STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: K.W. and J.W.

No. 12-0114 (Cabell County 10-JA-29-32)

FILED
June 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by counsel Raymond A. Nolan, appeals the Circuit Court of Cabell County's December 21, 2011, order terminating his parental rights to K.W. and J.W.[1] The guardian ad litem, Jacquelyn Stout Biddle, has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

Having reviewed the appendix record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the appendix presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

A petition was filed against Petitioner Father and Respondent Mother first in 2009, alleging physical abuse by Petitioner Father, failure to support the children, and failure to protect by Respondent Mother. Both parents were offered extensive services after admitting to the allegations in the petition, and eventually reunification occurred, with two older children of Respondent Mother going to live with their father, upon their request. Approximately four months after the initial petition was dismissed, the DHHR received a new referral regarding this family after Petitioner Father physically abused Respondent Mother's child H.G. and was arrested for this incident in North Carolina. At the time, Petitioner Father's blood alcohol content was .18. Respondent Mother took the children back to West Virginia, but then returned to North Carolina to pick up Petitioner Father and moved him back into the home. Another petition was filed after this incident and the children were removed.

Petitioner Father and Respondent Mother again admitted to the allegations contained in the petition, and Petitioner Father was adjudicated as abusing, while Respondent Mother was adjudicated as neglectful. Both were granted post-adjudicatory improvement periods. Within two months, Petitioner Father's visitation with K.W. and J.W. was terminated upon their repeated requests and their refusal to attend. Although the circuit court noted that the parents had not substantially complied with their initial improvement period, an

[1]Four children were initially named in the petition; however, only K.W. and J.W. are Petitioner Father's biological children, and he only appeals the termination of his parental rights regarding these two children.

extension was granted to each. The parents were then each granted a dispositional improvement period. Throughout the improvement periods, the parents were only minimally complying with services. The circuit court then held three days' of dispositional hearings in which numerous service providers and the parents testified. Moreover, the circuit court extensively interviewed the children in camera in their therapist's office.

After taking all of this evidence, the circuit court terminated the rights of Petitioner Father and Respondent Mother. The circuit court found that neither parent had substantially complied with the terms and conditions of the case plan. Petitioner Father had failed to complete the following: anger management; marriage counseling; a batterer's intervention program; alcohol assessment; sex offender assessment; and, counseling. Respondent Mother had failed to complete the following: marriage counseling; individual counseling; family counseling; and, failed to pay child support. Petitioner Father has failed to admit to his many shortcomings such as alcohol abuse and physical abuse of others, while Respondent Mother has a lifelong history of placing her own relationship needs over the needs of her children. The circuit court also noted that each of the four children have separately indicated a strong desire not to return to their parents' care. Moreover, the circuit court noted that the children have been out of the home for over fifteen months. The circuit court concluded that here is no reasonable likelihood that the conditions of neglect and abuse can be substantially corrected in the near future. The circuit court also denied any post-termination visitation, based partially upon the testimony of the children, and on the testimony of the children's therapist and their older sibling. The possibility of future visitation is left open should the children change their minds regarding visitation.

The Court has previously established the following standard of review:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

On appeal, Petitioner Father first argues that the circuit court erred in terminating his parental rights because the State did not prove by clear and convincing evidence that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future.

He argues that his progress in the improvement period was such that he was granted an extension, and was then granted a dispositional improvement period. He notes that none of these improvement periods were terminated early. Petitioner Father admits that alcohol was a factor in the incident which precipitated the filing of the instant petition, but that there is no evidence that his parenting skills were permanently impaired. Further, he argues that he complied in the case plan, as shown by the extension and dispositional improvement period he was granted. He argues that he underwent a psychological examination as requested and that he attempted to comply with the therapy sessions, although his financial situation led to missed sessions. He also attempted to complete the batterer's intervention program, had all negative drug screens, participated in parenting classes, maintained a home, and maintained gainful employment. Petitioner Father admits that not all of the terms and conditions of the case plan were completed, but argues that he "substantially complied" with them and improved his parenting approach.

The guardian argues that Petitioner Father did not successfully complete his improvement period and failed to change his attitude and beliefs throughout these proceedings. The guardian reiterates that Petitioner Father failed to complete many aspects of the case plan, including the batterer's intervention program, anger management, and substance abuse treatment for his alcohol use. The guardian supports termination in this matter.

The DHHR argues that termination is proper in this matter due to petitioner's habitual abuse of alcohol, his failure to follow through with a reasonable case plan, and the physical abuse which has repeatedly occurred in this matter. The DHHR argues that even when petitioner participated in services, he failed to benefit from these services. The DHHR also argues that petitioner failed to acknowledge any responsibility for the two abuse and neglect petitions filed against him and that he "missed the point" of the improvement period.

Petitioner Father argues that the circuit court erred in terminating his parental rights, because he was compliant in all services. "As we explained in *West Virginia Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990), it is possible for an individual to show 'compliance with specific aspects of the case plan' while failing 'to improve . . . [the] overall attitude and approach to parenting.'" *In the Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991). Although Petitioner Father participated in some services, the record reflects that he did not substantially correct the conditions that led to the filing of the petition, including physical abuse and his drinking. In fact, after the first petition and reunification, he again physically abused the children.

With regard to the termination of Petitioner Father's parental rights, this Court has held as follows:

> "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will

> be seriously threatened . . . ." Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Kristin Y.*,in part, 227 W.Va. 558, 712 S.E.2d 55 (2011). Petitioner Father has refused to acknowledge his part in causing the petitions to be filed. Moreover, he failed to comply in many parts of the case plan, and failed to benefit from services. Therefore, this Court finds no error in the termination of parental rights.

Petitioner Father also argues that the circuit court erred in terminating visitation, and in failing to reinstate visitation with the children. Petitioner Father argues that he participated in the case plan requirements and made positive changes, but that he was never allowed to implement his improvements with his children. The guardian argues in response that she has never seen two children so adamant about not having contact with their father, and notes that there has been no contact for over a year. Further, the guardian notes that the children's therapist feels it is not in their best interest to see Petitioner Father. The DHHR argues that Petitioner Father's psychologist has opined that it would take at least a year of therapy before he could be reunited with the children in any manner, and by then the children would have been out of the home for over two years. The DHHR argues that it was clear that the children were very afraid of Petitioner Father and repeatedly asked not to see him.

In the present case, the circuit court extensively interviewed all four of the children involved in this petition. In the circuit court's well-reasoned disposition order, the court credits the children's individual testimony and notes that K.W. and J.W. have consistently asked not to be subjected to visitation due to their fear of petitioner. Further, the children's therapist opined that visitation was not in the children's best interest. This Court has held as follows:

> "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 5, *In re Austin G.*, 220 W.Va. 582, 648 S.E.2d 346 (2007). Based upon all of the foregoing, it is clear that the circuit court did not abuse its discretion in denying petitioner post-termination visitation, and the Court declines to disturb this decision on appeal.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within eighteen months of the date of the disposition order.[2] As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that "[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found." Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard* , 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: June 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

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[2] Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.