STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In Re: T.F.-1, S.F., and T.F.-2

No. 12-0171 (Barbour County 11-JA-10, 11-JA-11, and 11-JA-12)

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel Mary Nelson, arises from the Circuit Court of Barbour County, wherein Petitioner Father's parental rights were terminated by order entered on January 13, 2012. The children's guardian ad litem, Karen Hill Johnson, filed a response on behalf of the children in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

DHHR filed the petition in the instant case against the children's parents in March of 2011. Referrals had been made to DHHR on this family since 2000. The petition in the instant case was based on allegations that the parents failed to adequately provide for the children's needs at home and at school. Both parents were unemployed, were financially dependent on others, and dependent on drugs. At the preliminary hearing, the circuit court made findings that both parents had been involved with criminal truancy cases and that a juvenile petition for truancy was anticipated to be filed against the oldest child, T.F.-1.[1] The children's mother at one point had also taken the children to Virginia under the belief that she would prevent removal by DHHR from their home. At the adjudicatory hearing in July of 2011, both parents admitted and stipulated to substance abuse, addiction to narcotics, their past criminal truancy charges, and domestic violence in the home. In particular, the children's mother discussed instances where Petitioner Father shoved her down the stairs, threatened to set the house on fire with her and the children in it, and choked her. Petitioner Father submitted that he and the children's mother "grabbed" each other. The circuit court adjudicated both parents as abusive and neglectful and granted both parents a three-month post-adjudicatory improvement period with directions to participate in drug tests and services. At a review

[1]Because two children in this matter share the same initials, these children will be referred to throughout this decision as T.F.-1 and T.F.-2.

hearing in September of 2011, the circuit court found that the parents had not complied with their improvement periods. In particular, neither parent called in for their drug screens and both admitted to continuing to take hydrocodone without a prescription. The circuit court revoked the parents' improvement periods and set the matter for disposition. At the dispositional hearing in October of 2011, the circuit court made findings that the parents continued to use drugs, failed to participate in random drug testing, and failed to cooperate with the terms and goals of the Family Case Plan. After finding that the conditions of abuse and neglect could not be corrected in the foreseeable future, the circuit court terminated the parents' parental rights and terminated visitation. Petitioner Father appeals this order, arguing three assignments of error.

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 finding that imminent danger existed at the time of the filing of the petition, violating his due process rights. Petitioner Father asserts that DHHR could have filed its petition without requesting immediate transfer of custody of his children. He argues that the right of a natural parent to custody over his or her child is paramount to that of any other person and that it is a fundamental personal liberty protected and guaranteed by due process, pursuant to the West Virginia State Constitution and the United States Constitution. Syl. Pt. 1, *State ex rel. W.Va. Dept. of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987). Petitioner Father further argues that the children's mother removed the children to her parents' home in Virginia under the belief that this would meet requirements of DHHR to appropriately safeguard her children while the investigation proceeded. Petitioner Father asserts that the mother consulted DHHR before taking the minor children to Virginia and that she voluntarily returned them to West Virginia prior to the case's preliminary hearing.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in finding imminent danger at the time the petition was filed. The petition was filed after the parents appeared in court for criminal truancy cases filed against them. During those hearings, the parents

gave testimony that concerned the circuit court which led it to order DHHR to conduct an investigation on the family. The circuit court properly found imminent danger for the children's removal because the parents admitted to staying up late at night and sleeping late the next day, the parents did not cooperate with the investigation and were deceptive, and the children were taken out of the state to circumvent CPS intervention. The children's mother never notified DHHR about leaving the state with her children to go to Virginia.

The Court finds no error in the circuit court's finding of imminent danger at the time the petition was filed. West Virginia Code § 49-6-3 directs that a circuit court may order a child's removal from the home when there exists imminent danger and there are no reasonably available alternatives to removal. The petition states in great detail the number of days the children did not attend school, the parents' admission to staying up late at night and sleeping late the next day, the parents' failure to communicate with DHHR, and the domestic violence in the home. The circuit court did not abuse its discretion in finding imminent danger in the instant petition to warrant the children's removal.

Petitioner Father also argues that the circuit court erred in not granting him six months for his post-adjudicatory improvement period and then erred in revoking his three-month post-adjudicatory improvement period. The circuit court based this revocation on Petitioner Father's continued drug use, addiction to alcohol, and his lack of participation in services. Petitioner Father asserts, however, that he did not deny his addictions or attempt to hide his past or current use of substances. Petitioner Father argues that this Court has stated as follows:

> In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Syl. Pt. 4, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). Here, Petitioner Father argues that he was taking the first step to a valid recovery plan by being honest and asking for help, but that services provided by DHHR were limited and it did not help in finding Petitioner Father a much-needed long-term in-patient treatment program. He asserts that because services were inadequate to meet the addictions he suffered, he was left to proceed alone in seeking a higher level of care than was identified in the Family Case Plan. Petitioner Father argues that he repeatedly made the circuit court aware of his obstacles, but no effort was made to resolve these obstacles prior to the revocation of his improvement period. Petitioner Father argues that because he needed more time to successfully address these issues, the circuit court erred in prematurely revoking his improvement period.

The guardian and DHHR respond, contending that the circuit court did not err in giving Petitioner Father three months, rather than six months, for his improvement period and it also did not err in revoking Petitioner Father's improvement period after two months. West Virginia Code § 49-6-12(b) provides that a circuit court may grant an improvement period of up to six months. "[A] circuit court always has the authority to terminate an improvement period if there is evidence that the parent is not following the conditions prescribed or is failing to make improvement." *In the Matter of Brian D.*, 194 W.Va. 623, 636, 461 S.E.2d 129, 142 (1995). Accordingly, the guardian and DHHR argue that the circuit court did not abuse its authority in granting Petitioner Father only three months, rather than six months, for his improvement period, especially when he failed to demonstrate any improvement during this case. Moreover, the guardian argues that "entitlement to an improvement period is conditioned upon the ability of the parent/respondent to demonstrate 'by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period . . . .'" *In re: Charity H.*, 215 W.Va. 208, 215, 599 S.E.2d 631, 638 (2004) (citing W.Va. Code § 49-6-12(b)(2)). Here, the guardian and DHHR assert that Petitioner Father continued to use drugs, consume alcohol, failed to comply with drug testing, and failed to fully participate with services. Further, although Petitioner Father argues that he could not get proper treatment, he admitted to buying street drugs in Clarksburg to feed his habit. Petitioner Father never made any efforts to wean himself off drugs or try to achieve at least one negative drug screen. Rather, Petitioner Father chooses to blame others for his situation.

The Court finds no error in the circuit court's decision revoking Petitioner Father's post-adjudicatory improvement period. Pursuant to West Virginia Code § 49-6-12(h), "[u]pon the motion by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent [parent] has failed to fully participate in the terms of the improvement period." The appendix includes court summaries that discuss Petitioner Father's failure to call for his drug tests and his continuous addiction to drugs. The circuit court did not abuse its discretion in revoking Petitioner Father's improvement period.

Lastly, Petitioner Father argues that the circuit court erred in terminating his parental rights to T.F.-1, S.F., and T.F.-2 because there were less drastic alternatives available. Petitioner Father asserts that he was working toward resolving his issues, independently seeking in-patient drug/alcohol rehabilitation and expressing his desire to maintain sobriety, despite lack of substantial assistance from DHHR. Petitioner Father cites West Virginia Code § 49-6-5(a)(5), which concerns where children may be placed at disposition. Here, Petitioner Father argues, the circuit court could have placed his children with a fit relative without terminating his parental rights. Both grandmothers were options as placements in the instant case.

The guardian and DHHR respond, contending that the circuit court did not err in terminating Petitioner Father's parental rights to the subject children. They argue that the Court has held as follows:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code [§] 49-6-5 (1977) may

> be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code [§] 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Nelson B.*, 225 W.Va. 680, 695 S.E.2d 910 (2010). In the present case, the circuit court had revoked Petitioner Father's post-adjudicatory improvement period and at no point in the case did Petitioner Father successfully remediate any of the problems that gave rise to the filing of the petition, the stipulated conditions of abuse and neglect, or the circuit court's findings of abuse and neglect. At disposition, the circuit court found that the conditions of abuse and neglect could not be corrected in the near future. DHHR further argues that even though West Virginia Code § 49-6-5(a) provides an order of preference in least restrictive alternatives, it does not direct that the need to promote the best interests of the children should be overshadowed. Petitioner Father did not offer any evidence that proved how preserving his parental rights would promote the best interests of the children.

The Court finds that the circuit court did not abuse its discretion in terminating Petitioner Father's parental rights. "'[T]he welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008). "'[C]ourts 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 part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Here, the appendix reflects Petitioner Father's failure to cooperate with the terms of his improvement period. Given the circumstances of this case, the Court finds no error in the termination of parental rights.

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 twelve months of the date of the disposition order. As this Court has stated, "[t]he [twelve]-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