

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: B.H., A.H., A.H. and J.H.

No. 12-0313 (Putnam County 11-JA-15 through -18)

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Herbert Hively II, arises from the Circuit Court of Putnam County, wherein Petitioner Father's parental rights were terminated by order entered on February 8, 2012. The children's guardian ad litem, Jeff Woods, 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 William Bands, also filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the 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 record 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 May of 2011, based on allegations of the parents' extensive history of domestic violence, and their exposure of their children to this violence; the parents' physical and verbal abuse against the children; the mother's failure to protect her children, as evidenced, for example, by her numerous petitions for domestic violence protective orders against Petitioner Father followed by subsequent motions to dismiss these petitions; the family's extensive history with Child Protective Services ("CPS") dating back to 2005; and the numerous times the parents were evicted from their homes due to unpaid rent. The most recent domestic violence incident that preceded the filing of the petition of the instant case resulted in an ambulance transporting the mother to the hospital. Petitioner Father had reportedly beaten and dragged the mother to the floor and had beaten her until she was unconscious. One of the children witnessed this incident and threw a flower pot at Petitioner Father and attempted to pull Petitioner Father off of his mother out of fear that Petitioner Father would severely hurt her or kill her. An on-site investigation revealed blood on the kitchen floor and blood splatters on the grass in the front yard. At the time DHHR filed this petition, Petitioner Father's whereabouts were unknown; he had fled the scene of this incident before law enforcement completed the investigation. The petition further discussed the parents' failure to comply with services offered by CPS throughout the years. Following this petition, the circuit court found probable cause for abuse and neglect at the June of 2011 preliminary hearing and subsequently placed the children in temporary custody with their maternal grandmother. The adjudicatory hearing was held in August of 2011 and neither parent contested the adjudication that their children were abused and neglected. In September of 2011, the circuit court granted each parent a post-adjudicatory improvement period, but revoked their improvement periods in December of 2011 after finding that they both failed to submit to any drug screens. At the

dispositional hearing in January of 2012, the parents filed renewed motions for post-adjudicatory improvement periods. The circuit court denied these motions and in its February 8, 2012, termination order, it terminated both parents' parental rights after finding that they continued to use drugs and engage in domestic violence, failed to participate in any sort of substance abuse treatment, and that their substance abuse seriously impaired their parenting. Petitioner Father appeals this decision, arguing two 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.” Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

On appeal, Petitioner Father argues that the circuit court erred by denying his renewed motion for a post-adjudicatory improvement period because he made substantial changes in his circumstances after his initial improvement period was revoked. In support, Petitioner Father cites to West Virginia Code §§ 49-6-12(b)(4) and (c)(4) and argues that he made substantial changes that warranted another improvement period. Petitioner Father asserts that he gained new employment; became willing to be drug screened, as demonstrated by appearing for his January 11, 2012, drug screen; was able to quit using heavy drugs on his own; became willing to participate in out-patient and in-patient drug treatment; and made the decision to improve for the sake of his children and fully participate in the improvement plan. Petitioner Father argues that due to these changes, the circuit court clearly erred when it denied his renewed motion for post-adjudicatory improvement period. He asserts that these substantial changes demonstrate that he would likely fully participate in a further improvement period.

Petitioner Father also argues that the circuit court clearly erred in terminating his parental rights when he was presently willing to fully participate in a further improvement period. In support, he cites to West Virginia Code §§ 49-6-5(a)(6), (b), and (c), arguing that there was a reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. He reiterates that at disposition, he was starting a new job and willing to receive drug treatments and screens. Petitioner Father further asserts that there were no new allegations of domestic violence since the instant case began. Petitioner Father argues that accordingly, his

parental rights to his children should be reinstated and that his renewed motion for post-adjudicatory improvement period should be granted.

The guardian ad litem and DHHR respond, contending that the circuit court did not abuse its discretion in denying Petitioner Father's renewed motion for post-adjudicatory improvement period or in terminating his parental rights to the subject children. The guardian argues that the circuit court properly terminated Petitioner Father's parental rights pursuant to West Virginia Code § 49-6-5(a)(6), which directs that a circuit court may terminate the parental rights of an abusing parent when it finds that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future. The guardian argues that here, Petitioner Father made multiple promises that were never fulfilled and his overall level of cooperation gave rise to grave concerns with regard to his improvement. DHHR adds that Petitioner father missed numerous visits with the children, failed drug tests, and failed to participate in the Batterer's Intervention Program. Moreover, Petitioner Father did not attend his psychological evaluation and was incarcerated, at times, during the improvement period of this case. The guardian and DHHR argue that due to Petitioner Father's behavior, the circuit court did not err in its decision and its order should be affirmed.

The Court finds that the circuit court did not err in denying Petitioner Father's renewed motion for post-adjudicatory improvement period or in terminating Petitioner Father's parental rights to B.H., A.H.-1, A.H.-2, and J.H. West Virginia Code §§ 49-6-12(f) and (h) provides that a circuit court is mandated to terminate a parent's improvement period if it finds that the parent has failed to comply with the terms of the improvement period and under the scope of West Virginia Code § 49-6-12, the circuit court has the discretion to grant or deny a parent's written motion for improvement period. The parent must demonstrate by clear and convincing evidence that he or she will likely fully participate in the improvement period. Moreover, the Court has held as follows: "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened" Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Further, the Court has also held that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). A review of the circuit court disposition order provides the circuit court's findings and conclusions which support its decision to deny Petitioner Father's motion for improvement period and to terminate Petitioner Father's parental rights. Petitioner Father's original motion for post-adjudicatory improvement period simply asserted that he would fully participate in any case plan adopted by DHHR. Petitioner Father presents no further evidence to support his argument that the circuit court erred in denying his renewed motion for post-adjudicatory improvement period or evidence that refutes the circuit court's findings and conclusions in its disposition order. Based upon a review of the record, the Court finds no error by the circuit court in its denial of further improvement period or in the termination of Petitioner Father's 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: September 7, 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