

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

In Re: D.M., P.M., and L.M.

No. 12-0386 (Mercer County 11-JA-82, 11-JA-83, and 11-JA-99)

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 Thomas Evans III, arises from the Circuit Court of Mercer County, wherein Petitioner Father's parental rights were terminated by order entered on February 24, 2012. The children's guardian ad litem, Julie Lynch, 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, filed a response joining in and concurring with the guardian ad litem's response.

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 in June of 2011, alleging that the children's parents had track marks on their arms and drug paraphernalia, such as needles, spoons, and pill residue, in their home. DHHR filed an amended petition later in the case to incorporate the youngest child, L.M. The parents waived their rights to a preliminary hearing in late June of 2011 and at the adjudicatory hearing in August of 2011, they stipulated to neglecting their children through drug use. The circuit court placed both parents on post-adjudicatory improvement periods. One of the terms of Petitioner Father's improvement period was to complete substance abuse treatment. At a review hearing in October of 2011, the circuit court was informed of the parents' continued positive drug screens, but allowed them to continue their improvement periods. At a review hearing in January of 2012, the circuit court was informed that Petitioner Father entered detoxification treatment at Amity Detox and Treatment Center. On January 31, 2012, the circuit court noted that Petitioner Father was currently in treatment, granted him an extension to his post-adjudicatory improvement period, and scheduled February 21, 2012, as the next hearing for review and disposition. Although neither Petitioner Father nor his counsel were present at the January 31, 2012, hearing, on February 15, 2012, DHHR faxed a Notice of Hearing for the February 21, 2012, hearing to all parties, including to Petitioner Father by his counsel. At disposition, Petitioner Father moved for another extension to his improvement period. The circuit court did not grant this extension and instead, found that the parents' proper parenting skills were seriously impaired by their habitual abuse of alcohol, controlled substances, and drugs, and that the parents did not follow through with their treatment plans. By order entered on February 24, 2012, the circuit court terminated Petitioner Father's parental rights to the subject children, D.M., born on August 15, 2010; P.M., born on November 27, 2006; and

L.M., born on October 17, 2011. Petitioner Father appeals this circuit court 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 terminating his parental rights without giving him proper notice and an opportunity to be heard. He argues that under Rule 6(d)(A) of the West Virginia Rules of Civil Procedure, written motions must be served at least nine days before the time set for hearing. Petitioner Father argues that accordingly, DHHR’s February 15, 2012, service of its Notice of Hearing for the February 21, 2012, hearing violated Rule 6(d) of the West Virginia Rules of Civil Procedure. Moreover, Petitioner Father argues that the January 31, 2012, order set the February 21, 2012, hearing for review, not disposition, and that Petitioner Father was unable to receive notice at the January 31, 2012, hearing because he was in drug treatment.

The guardian responds, contending that the circuit court did not commit error with regard to Petitioner Father receiving notice of the dispositional hearing. The guardian argues that Rule 31 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings directs that “[n]otice of the date, time, and place of the disposition hearing shall be given to all parties, their counsel, and persons entitled to notice and the opportunity to be heard.” The guardian further argues that Rule 6(d)(1) of the West Virginia Rules of Civil Procedure directs that unless a different time period is set by the rules or the circuit court, notice of hearing on a motion shall be served at least nine days before the hearing if served by mail (subsection (A)), or served at least seven days before the hearing if served by hand delivery or by facsimile (subsection (B)). The guardian argues that here, DHHR’s February 15, 2012, Notice of Hearing for the February 21, 2012, hearing complied with the seven-day notice rule outlined in Rule 6(d)(1)(B) with regard to notices served by facsimile. Moreover, the guardian argues that the family’s social worker testified that she had spoken with Petitioner Father the morning of the dispositional hearing and that he was aware of the hearing’s time and location that day. The guardian argues that despite this knowledge, Petitioner Father chose not to attend the hearing and testify on his own behalf.

Further, Petitioner Father's counsel was present at the hearing and cross-examined witnesses and could have called witnesses on Petitioner Father's behalf. The guardian argues that Petitioner Father's choices at disposition were not errors by the circuit court and its order should be affirmed. DHHR joins in the guardian's response.

The Court finds no error in Petitioner Father's notice of the dispositional hearing. Rule 81(a)(7) of the West Virginia Rules of Civil Procedure directs that none of its rules, other than Rules 5(b), 5(e), and 80, apply to juvenile proceedings brought under the provisions of Chapter 49 of the West Virginia Code. Accordingly, West Virginia Rule of Civil Procedure 6, as argued by both Petitioner Father and guardian, has no bearing on determining whether proper notice of the disposition hearing was given to Petitioner Father in this case. Rather, the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings dictate proper procedure here. Rule 31 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, as raised by the guardian, mandates that notice of the disposition hearing shall be given to all parties. Rule 30 of West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings directs that at least five days prior to the disposition hearing, each party shall provide the other parties with a brief summary of anticipated testimony by possible witnesses. Petitioner Father's appendix includes a copy of the circuit court's January 31, 2012, order, which summarized that hearing as a review hearing and directed that the matter "be set for disposition/review on February 21, 2012" Contrary to Petitioner Father's argument that this order set the next hearing for review only, the circuit court clearly set forth in its order that the February 21, 2012, hearing would also cover disposition. Moreover, this January 31, 2012, order further directed the circuit court clerk to send a copy of the order to all parties of the case. Accordingly, even though Petitioner Father and his counsel were not present at the hearing, they were ordered to receive a copy of this order notifying them of the February 21, 2012, hearing scheduled for review and disposition. Petitioner Father provides no document or evidence in his petition for appeal that disputes he received a copy of this particular order.

Moreover, the circuit court's disposition order indicates that DHHR submitted a copy of its February 16, 2012, court summary to the circuit court. Petitioner Father provides no document or evidence in the record that disputes the circuit court's finding that DHHR properly submitted a court summary five days prior to disposition, pursuant to Rule 30 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Neither does Petitioner Father submit any documents in his appendix or a reply brief to dispute or argue against the guardian's assertion that his social worker testified as to Petitioner Father's knowledge of the time and location of the disposition hearing. Because the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings are applicable here, and not the West Virginia Rules of Civil Procedure, it is inconsequential that DHHR filed its Notice of Hearing six days prior to disposition. Rather, our review on appeal focuses on whether the circuit court found that a court summary was timely submitted and whether it provided notice of disposition to the parties, both of which we find occurred. Accordingly, Petitioner Father was given opportunities to be heard at disposition and we find no error by the circuit court in that regard.

Petitioner Father also argues that the circuit court erred in failing to make a plausible accounting of the evidence and thereby failed to make an appropriate ultimate ruling. He argues that pursuant to West Virginia Code § 49-6-5, before a circuit court terminates parental rights, it

must find that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected. Petitioner Father argues that here, the circuit court decided the case with limited testimony from DHHR and no testimony from Petitioner Father at the dispositional hearing. Moreover, Petitioner Father argues that he stipulated to neglect by drug abuse and attended a detoxification clinic through the pendency of this case, in accordance to the terms of his improvement period. Although Petitioner Father submits in his brief that he left the clinic against medical advice, he also argued that the circuit court erred because it did not hear evidence from the clinic or from Petitioner Father concerning Petitioner Father's reasons for leaving the clinic.

The guardian responds, arguing that the circuit court did not err in terminating Petitioner Father's parental rights to the subject children. The guardian argues that pursuant to West Virginia Code § 49-6-12, DHHR is responsible for monitoring a parent's progress in his or her improvement period and for informing the circuit court if the parent fails to participate in services. This Code outlines that upon such notification by DHHR to the circuit court, the circuit court is mandated to terminate the parent's improvement period. The guardian argues that here, Petitioner Father failed to fully participate in his improvement period. He stipulated to neglecting his children by his drug addiction and consequently, was required to complete detoxification and long-term substance abuse treatment. Testimony at disposition revealed that Petitioner Father entered treatment but left against medical advice. The guardian argues that accordingly, Petitioner Father failed to follow through with the most critical element of his improvement period and that the circuit court's findings and reasons provided a proper basis for terminating Petitioner Father's parental rights. DHHR joins in the guardian's response.

The Court finds no error in the circuit court's findings or in its decision to terminate Petitioner Father's parental rights. West Virginia Code § 49-6-12(g) directs that a circuit court has the discretion to extend a parent's improvement period if it finds that the parent has substantially complied with the improvement period, that extending the improvement period will not substantially impair DHHR's ability to place the children, and that such an extension is consistent with the best interests of the children. West Virginia Code § 49-6-5(a)(6) directs that the circuit court has the discretion to terminate parental rights after it finds that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future. 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, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.” Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *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). The January 31, 2012, review hearing order indicates that Petitioner Father was absent from the hearing and currently in treatment. The February 21, 2012, dispositional termination order, however, notes that Petitioner Father was absent from the hearing, but was not in communication with his lawyer and did not respond to or follow through with the recommended or appropriate treatment to improve his capacity for adequate parental functioning. This termination order also indicates that Petitioner Father's counsel was present and that the circuit court heard sworn testimony from two witnesses. Petitioner Father submitted in his petition for appeal, and the guardian also argued in her response, that he left treatment early against medical advice. Petitioner Father argues that the circuit court erred in not hearing evidence concerning Petitioner Father's reasons for leaving treatment, yet Petitioner Father does not provide any valid reasons or supporting documents for his departure from treatment to refute the circuit court's findings and conclusions in its termination order. Given the circumstances of this case, including the children's young ages, and a review of the appendix provided on appeal, we find no error by the circuit court in terminating Petitioner Father's parental rights to the subject children.

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