

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

In Re: R.B. and F.B. Jr.

No. 12-0387 (Barbour County 11-JA-16 and 17)

FILED

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

MEMORANDUM DECISION

Petitioner Stepfather, by counsel Justina Helmick, appeals the Circuit Court of Barbour County's order entered on February 27, 2012, terminating his custodial rights to R.B. and F.B. Jr. The guardian ad litem, Karen Hill Johnson, 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.

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.

The petition in this matter arose after a neighbor called police in May of 2011, indicating that R.B., then four years old, had left her home and crossed the highway in only her underwear, and that she had a black eye. When police arrived asking R.B.'s whereabouts, mother and Petitioner Stepfather indicated that she was in her room, and they were asleep at the time. The home was in disarray with animals, animal feces, food, garbage and blood in the home. R.B. indicated that Petitioner Stepfather had given her the black eye by hitting her in the face. R.B. also had bruises on her back. F.B. was 7 at the time, and had been living with his maternal grandparents since he was 3 years old. Mother has a third child who is in a legal guardianship with the child's paternal grandparents and was not named in this matter. There have been three prior referrals for this family, including for lack of supervision, dangerous shelter, inadequate nutrition, abuse, and inadequate physical care. In photographs from a prior January 2011 referral, R.B. again had a black eye.

Petitioner Stepfather and mother stipulated to the allegations in the petition; however, neither admitted that R.B. had been physically abused. Instead, Petitioner Stepfather and mother gave several explanations for R.B.'s two black eyes within five months of one another, including horseplay and lack of sleep. They also indicated that the back bruising was from a fall from bed, but then indicated that it could be from a spanking mother gave to R.B. As to the conditions of the home, Petitioner Stepfather indicated that this was due solely to a missed garbage pickup that week. Both Petitioner Stepfather and mother requested improvement periods, but those motions

were denied based on their failure to provide “acceptable, reasonable, logical explanation” for R.B.’s injuries. Mother’s parental rights were later terminated, as were Petitioner Stepfather’s custodial rights, based on the circuit court’s finding that neither mother nor Petitioner Stepfather have identified R.B.’s abuser. The circuit court ordered that the guardian ad litem and the DHHR are given discretion regarding future contact between the children and their mother.

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).

Petitioner Stepfather argues on appeal that the circuit court erred in denying his motion for a post-adjudicatory improvement period, because he admitted to the conditions of the home and the lack of supervision. Further, he argues that he provided an explanation of R.B.’s injuries which was corroborated by the mother. Petitioner notes that no medical evidence regarding the eye injury was presented. Petitioner argues that he would have participated fully in an improvement period, and that the circuit court erred in denying the same.

The guardian argues that although petitioner acknowledged the allegations in the petition, he alleged that the physical injuries to the child were accidental. Therefore, the guardian argues that petitioner has failed to admit the most serious abuse in this matter. The guardian argues that petitioner’s failure to admit the physical abuse shows that an improvement period would be futile. The DHHR agrees, arguing that the circuit court did not abuse its discretion in denying an improvement period, as petitioner’s failure to acknowledge the physical abuse shows that petitioner would not benefit from an improvement period.

West Virginia Code § 49-6-12 does not provide a parent with a guaranteed right to an improvement period because the language therein allows a circuit court discretion in granting improvement periods. Further, that code section states that a parent must establish “by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period.” W. Va. Code § 49-6-12(a)(2). Simply put, the only evidence petitioner presented to meet his

burden were his own assertions that he would avail himself of any opportunity for appropriate programs. Petitioner argues that he admitted the deficiencies in his parenting, but a review of the record shows that for every admission, petitioner had an excuse for his deficiencies. Further, he failed to admit to or identify the perpetrator of the most egregious behavior, which was the physical abuse of R.B. The circuit court's decision to deny petitioner a post-adjudicatory improvement period was not clearly erroneous.

Petitioner Stepfather also argues that the circuit court erred in terminating his custodial rights rather than a less restrictive disposition. He argues that the welfare of the children would not have been endangered if there was a less restrictive alternative ordered. He also argues that he was the only father figure in R.B.'s life, and that termination was not in her best interest.

The guardian argues in favor of the termination of custodial rights, stating that Petitioner Stepfather's failure to acknowledge the physical abuse left the circuit court no option other than termination. The DHHR also argues in favor of termination due to petitioner's failure to be truthful about the child's injuries.

With regard to the termination of Petitioner Stepfather's custodial rights, this Court notes that the least restrictive alternative is generally employed as per West Virginia Code § 49-6-5. However, this 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). Furthermore, this Court has found that:

“Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.” Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 4, *In re Harley C.*, 203 W.Va. 594, 509 S.E.2d 875 (1998). R.B. had at least two black eyes in a five month period, along with bruising on her back. Although Petitioner Stepfather admitted that the child suffered injuries, his explanations for the injuries were illogical to the

circuit court. We find no error in the circuit court's findings and decline to disturb the termination of custodial 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 child 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 custodial 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