STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: **A.H., T.H. & I.H.**

No. 12-0462 (Wood County 10-JA-92, 10-JA-93 & 10-JA-94)

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

MEMORANDUM DECISION

Petitioner Father, by counsel Wells H. Dillon, appeals the Circuit Court of Wood County's order entered on March 13, 2012, denying his motion to modify the dispositional order, which terminated his parental rights to A.H., T.H., and I.H. The guardian ad litem, Reggie R. Bailey, has filed his 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 was filed after A.H. was hit in the face by Petitioner Father, and neither parent sought medical treatment for her. Petitioner Father claimed that he was asleep when he hit A.H., and that "repressed memories of childhood abuse" caused him to hit her. He states that when he awoke, he had no memory of hitting the child. Respondent Mother indicated that she believes Petitioner Father's explanation of the abuse. Both parents indicate that they did not report the abuse, even though they were already under a DHHR safety plan, until at least two days later, because they had not had time. They reported the abuse a day before a service provider was scheduled to be in the home. Interviews with extended family members show a pattern of abuse in the home, including excessive spanking of A.H., and domestic violence against Respondent Mother. In fact, Respondent Mother had filed a domestic violence protective order against Petitioner Father four months prior, but within weeks dismissed the same.

Petitioner Father attempted to stipulate to the allegations in the petition, but the circuit court refused this stipulation as it did not feel that Petitioner Father was taking responsibility for his actions. Petitioner Father was adjudicated as abusive and neglectful for the physical abuse of A.H. and his failure to seek medical treatment. Respondent Mother was adjudicated neglectful for failing to seek medical treatment for A.H. and for failing to protect the children. Both parents requested an improvement period, but the circuit court denied these requests, finding that Respondent Mother has failed to contact the DHHR to obtain services or more visitation, although she claims she wanted her children back and wanted to see them more. Respondent Mother only recently left Petitioner Father, but she moved in with his mother, who is the same person who did

not obtain medical care for the child after her injuries. Moreover, there is nothing other than Petitioner Father's testimony to support his claims of rage based on repressed memories. The court did not feel that the parents would fully participate in improvement periods. The circuit court then terminated Petitioner Father and Respondent Mother's parental rights. Petitioner Father's motion for a post-dispositional improvement period was denied, as was Respondent Mother's request for reconsideration of the denial of an improvement period. Petitioner Father was denied post-termination visitation, but Respondent Mother was granted supervised post-termination visitation.

Both parents then filed motions to modify the dispositional order, promising that they would live separately. Petitioner Father supplemented his motion with a transcript of an interview between a police officer and A.H., in which she states that Petitioner Father was asleep when he hit her and remained asleep thereafter. The circuit court denied both motions. The circuit court relied on *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007), which holds that parents do not have standing to move for modification of disposition of a child after their rights have been voluntarily or involuntarily terminated. The circuit court also finds no merit in Petitioner Father's argument that he has presented new evidence, as the interview of the child was available to Petitioner Father prior to termination, had he interviewed the detective, who was always listed as a witness. Moreover, the child was only three years old during the interview, and her interview that her father was asleep while hitting her was vague at best. Further, Petitioner Father testified himself that he woke up after hitting her, while she stated that he remained asleep. Additionally, Petitioner Father pled guilty to domestic battery after termination.

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 Father first argues that the circuit court erred in denying his motion to modify based upon a change of circumstances. Petitioner Father argues only that this case is distinguishable from *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007), in that Petitioner Father's rights were involuntarily terminated, and he brought his motion before his appeal rights had expired.

The DHHR responds in support of the denial of the motion for modification, arguing that the Court makes no distinction in the type of termination of parental rights. Further, petitioner offers no argument as to why this would matter under the *Cesar* case. The guardian concurs, arguing that *Cesar* is applicable here and that the circuit court was correct to deny the motion.

> A person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a "parent," pursuant to W. Va.Code § 49–6–6 (1977) (Repl.Vol.2004), to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated.

Syl. Pt. 6, *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007). The circuit court found that this provision prevents petitioner from moving for a modification in this matter. This Court agrees, finding no error in the circuit court's denial of petitioner's motion for modification of disposition.

Petitioner Father also argues that the circuit court erred in denying the motion to modify the dispositional order because there was newly discovered evidence introduced; namely, the transcript of the interview with A.H. The circuit court properly noted that the interview was not disclosed to either parent during the abuse and neglect proceeding, but still denied the motion. Petitioner argues that this evidence is new and material, as it corroborates the testimony of Petitioner Father. Moreover, petitioner argues that the new evidence would have produced a different result.

The DHHR argues that the police detective who interviewed the child was always listed as a witness, and the circuit court made note of the same in its order. Thus, the DHHR argues that the information was readily available to petitioner, and as such, is not newly discovered evidence. The DHHR also notes that the statements of the child contradict petitioner's testimony in some aspects, and notes that most of the interview consists of the child coloring pictures and not giving responses to the detective's questions. The DHHR feels that termination was proper in this matter. The guardian makes substantially the same arguments as the DHHR, noting that the statement in question was easily obtainable by petitioner in the proceedings below.

> "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus, *State v. Frazier*, 162 W.Va. 935, 253

S.E.2d 534 (1979).

Syl. Pt. 1, *State v. William M.,* 225 W.Va. 256, 692 S.E.2d 299 (2010). In the present case, the circuit court found that the interview was obtainable by petitioner in the proceedings below, as the detective was always listed by the State as a witness; however, petitioner never interviewed the detective. Additionally, the circuit court found that the interview would not have changed the outcome in this matter. This Court finds no error in the circuit court's refusal to grant a modification based on new evidence.

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 denial of the motion for modification, as well as the the termination of parental rights, are 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