STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: **C.H. G.M., L.H., and S.M.**

No. 12-0465 (Taylor County 11-JA-22, 23, 24 and 25)

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel, Roger D. Curry on behalf of Petitioner Father, arises from the Circuit Court of Taylor County, wherein Petitioner Father's parental rights were terminated by order entered by the circuit court on March 16, 2012. The circuit court later entered an amended dispositional hearing order on June 27, 2012. The children's guardian ad litem, Mary Nelson, filed a response on behalf of the children in support of the circuit court's order, along with a supplemental record. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response supporting the circuit court's termination 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 in July of 2011. The petition discussed domestic violence incidents that occurred between Petitioner Father and his ex-wife in early December of 2010. Petitioner Father's biological children, C.H. and L.H., and his former stepchildren, G.M. and S.M.,[1] witnessed Petitioner Father hit their mother in the face after their mother bit Petitioner Father on the nose. The petition also described that Petitioner Father has a history of domestic battery, dating back to 1998, when he was charged with domestic assault, and to 2005 and early 2010, when he was arrested for domestic battery. The petition also included that in late December of 2010, Petitioner Father was arrested for multiple counts of armed robbery and conspiracy to commit armed robbery, which arose out of incidents that occurred in Harrison and Marion Counties. Upon Petitioner Father's guilty pleas to first degree robbery and grand larceny in Marion County, he was sentenced to concurrent sentences of ten years and one to ten years, respectively. This sentence was ordered to run concurrently with his sentence for one to five years from his plea to conspiracy to commit first degree robbery in Harrison County. Throughout a series of adjudicatory and review hearings in the fall of 2011, the circuit court found that Petitioner Father admitted that he and the children's mother used drugs; that there was domestic violence between himself and the children's mother; and that he

[1] The circuit court terminated Petitioner Father's parental rights to his two biological children, C.H. and L.H., and terminated his custodial rights to his two former stepchildren, G.M. and S.M. Petitioner Father only appeals the termination of his parental rights.

was convicted of armed robberies. At the conclusion of adjudication, the circuit court found that Petitioner Father's history with drug addiction and domestic violence constituted aggravated circumstances and subsequently found that Petitioner Father was an abusive and neglectful parent to the subject children. The dispositional hearing was held in January of 2012, at which Petitioner Father requested that the circuit court "leave the door open" so that he may come back later on and prove that "he should have some sort of contact with the children." Petitioner Father did not request or file a motion for an improvement period. The circuit court found that the abuse and neglect could not be corrected in the foreseeable future and accordingly, terminated Petitioner Father's parental rights to C.H. and L.H. and terminated his custodial rights to stepchildren G.M. and S.M. At the time of the dispositional hearing, C.H. was almost four years old and L.M. had just turned three years old. The circuit court ordered that the physical and legal custody of all four children remain with their mother. Petitioner Father appeals this termination order, arguing one assignment 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).

Petitioner Father argues that the circuit court abused its discretion in terminating his parental rights when (1) he freely admitted the allegations of domestic violence, criminal activity, and drug addiction; (2) the children have been placed in their customary home with their mother; and (3) Petitioner Father will be subject to a long period of sobriety and rehabilitation due to his incarceration. Petitioner Father's main point of contention arises from the fact that throughout this case, he asserts he has told the truth without any prompting. He asserts that had he chosen not to testify, his silence could have been used against him, according to *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). Petitioner Father also raises that according to *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980), neither the circuit court nor DHHR are required to exhaust every speculative alternative, but Petitioner Father argues that because the children are with their mother, granting Petitioner Father's request would make little difference to them. Petitioner Father asserts that he would then at least have a chance to be a part of his children's lives whenever he is again in society on parole.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Father's parental rights. The guardian argues that a circuit court considers whether a strong emotional bond exists between a parent and his or her children in determining whether there should be continued contact. *See In re Jonathan G.*, 198 W.Va. 716, 735, 482 S.E.2d 893, 912 (1996). Here, both children were less than three years old when Petitioner Father was first incarcerated at the end of 2010. Petitioner Father is projected to remain incarcerated for at least another four years before he is eligible for parole. Effectively, whatever little bond there is will become even more remote for the children as the years pass while Petitioner Father is incarcerated. Moreover, the guardian argues that, concerning an incarcerated parent, the Court has held as follows:

> When no factors and circumstances other than incarceration are raised at a disposition hearing . . . [concerning] a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include . . . the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

Syl. Pt. 3, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). The guardian argues that here, the circuit court considered all of the factors set forth in *In re Cecil T.*, along with Petitioner Father's history of substance abuse and domestic violence and the children's young ages. Additionally, the circuit court considered Petitioner Father's past requirement of completing the Batterer's Intervention Program, yet continued to engage in domestic battery incidents. Further, the guardian argues that it is only speculation that Petitioner Father will make substantial improvements while he is incarcerated, given that his past violations of restraining orders exhibit his lack of intention to remedy his behaviors. DHHR adds that Petitioner Father did not request an improvement period nor did he make any efforts to demonstrate that he should be granted an improvement period. Rather, Petitioner Father is essentially requesting a delayed improvement period, which this Court disfavored in *In re Emily*, 208 W.Va. 325, 340, 540 S.E.2d 542, 557 (2000). DHHR further contends that Petitioner Father has failed to demonstrate how an alternative disposition other than termination would serve the children's best interests. Even if Petitioner Father rehabilitates himself of his drug addiction while incarcerated, Petitioner Father still has not demonstrated how he would remedy his domestic violence issues. The circuit court's termination order should be upheld because it serves the children's best interests and establishes the permanency they need.

The Court finds no error in the circuit court's order terminating Petitioner Father's parental rights. We have 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). We have also 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). Moreover, we keep in mind the following:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va.* [§] 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.

Syl. Pt. 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). Here, a review of the record on appeal supports the circuit court's findings in its termination order. Petitioner Father's incarceration was not the only factor the circuit court considered in terminating Petitioner Father's rights. Given the circumstances of this case, including the children's young ages, we find no error.

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 24, 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