STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In Re: **M.M.**

No. 12-0491 (Marion County 11-JA-57)

MEMORANDUM DECISION

Petitioner Father, by counsel Heidi Georgi Sturm, appeals the Circuit Court of Marion County's order entered on March 23, 2012, terminating his parental rights to M.M. The guardian ad litem, Frances Whiteman, 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.

As the record produced by petitioner in this matter is scant at best, the DHHR history, including the reason for the filing of the petition in this matter, is not clear. It appears that this is at least the second petition filed regarding this child, and that there have been several DHHR referrals made regarding M.M. and another child, dating back to 2006. From the dispositional hearing transcript, it appears that Petitioner Father failed to participate in the prior abuse and neglect proceeding. He did not attend multidisciplinary team ("MDT") meetings, participated in no services, and cancelled all but two of his visits. Petitioner was incarcerated[1] throughout the proceedings in the current matter, and therefore again participated in no services or visitation. A DHHR employee testified that Petitioner Father has made no contact with the department since the filing of the present petition. Petitioner Father apparently stipulated to abandoning the child due to his incarceration, and stipulated that this abandonment constituted neglect of M.M. Petitioner Father's parental rights were eventually terminated, after the circuit court found that petitioner abandoned the child and therefore neglected him. The circuit court also found that petitioner has not contacted the DHHR regarding the child's wellbeing, and has not participated in any services due to his incarceration. Termination was recommended by the DHHR due to petitioner's limited involvement in the child's life; his pattern of violent behavior; the child's young age; his lack of

[1] Petitioner was incarcerated on multiple parole violations, most of which concerned violations of a protective order and domestic battery. Petitioner admitted to violating his parole and his original sentences in two separate cases were reinstated. These sentences were one to five years in the penitentiary for conspiracy, and one to five years in the penitentiary for cruelty toward animals.

participation in the case; and because it is in the child's best interests. Further, the circuit court found that the conditions of neglect could not be substantially corrected in the near future.

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 first argues that the guardian failed to fulfill her duties and made recommendations without taking the child's best interest into consideration. Petitioner notes that he paid child support, and was prevented by the child's mother from being an active caregiver to the child when he was not incarcerated. Petitioner notes that the child's mother failed to contact him, even though she repeatedly left the child with inappropriate caregivers.

The guardian and the DHHR respond, arguing in favor of the termination of parental rights. The guardian also argues that her alleged failure to "fulfill her duties" is not a valid assignment of error on appeal. She further argues that it was in the child's best interest to recommend termination considering that petitioner is incarcerated at this time, with a parole hearing date of May 1, 2013.

Upon a review of the scant record provided by Petitioner Father, there is no evidence that the guardian failed to fulfill her duties. Petitioner only argues that the guardian made a recommendation against him, but gives no evidence as to how this recommendation constituted a failure to fulfill her duties as a guardian for the child. This Court finds no merit in petitioner's allegations against the guardian.

Petitioner next argues that he should have been granted an improvement period because the only allegation against him was abandonment, which will be remedied upon his release from incarceration. Petitioner argues that he could not address the only allegation against him due to his incarceration. Petitioner could comply with all aspects of an improvement period after his release. Petitioner also argues that it is unfair for the child's mother to be granted an improvement period, when she has ongoing mental health issues, while he was not granted the same. The guardian argues that it is true that petitioner was not granted an improvement period, but states that his

incarceration was the reason, and that this was not improper. The DHHR's argument mirrors that of the guardian.

This Court has stated as follows:

> [W]hen the conduct forming the basis of the abuse and/or neglect allegations consists of abandonment, such parental recalcitrance is perceived as so egregious as to warrant the virtually automatic denial of an improvement period. "Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period." Syl. pt. 2, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

In re Emily, 208 W.Va. 325, 336, 540 S.E.2d 542, 553 (2000). In the present case, petitioner was incarcerated throughout all of the proceedings, and remains incarcerated at this time. Further, he failed to participate in prior services. Petitioner has shown no evidence that even if he were not incarcerated, that he would participate in services. This Court finds no error in the denial of an improvement period.

Finally, petitioner argues that his continuous payment of child support, up until his current incarceration, shows that he did not abandon the child. Petitioner again argues that he could comply with an improvement period upon his release. The guardian and the DHHR agree that petitioner previously paid his child support, but state that petitioner's assignment of error regarding the allegation of abandonment is not proper for appeal, as petitioner makes no allegations of error against the circuit court.

In the present matter, the circuit court found that petitioner abandoned his child, as he was incarcerated and unable to care for the child. Further, the circuit court noted that even when he was not incarcerated, he failed to be a caregiver for the child, and had little to no contact with the child. A DHHR employee testified that he had not contacted the department regarding the welfare of the child, and in the prior abuse and neglect proceedings, he had cancelled all but two visitations. Upon his incarceration, he was no longer even paying child support. This Court therefore finds no error in the circuit court's finding that petitioner abandoned his child, despite his previous child support payments.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 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