

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

In Re: Z.C.

No. 12-0581 (Webster County 11-JA-65)

FILED

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

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Daniel R. Grindo on behalf of Petitioner Father, arises from the Circuit Court of Webster County, wherein Petitioner Father's custodial rights were terminated by order entered by the circuit court on April 19, 2012. The child's guardian ad litem, Joyce Helmick Morton, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, 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 December of 2011 after Z.C.'s half-sister was born with drugs in her system. The petition alleged that the mother had been abusing unprescribed hydrocodone during her pregnancy. This was not DHHR's first involvement with Petitioner Father and his family. In 2009, DHHR initiated an investigation after the mother was hospitalized from her drug use. The investigation did not proceed further, however, because the mother signed a safety plan that assigned her parents temporary rights over Z.C., born on July 18, 2006, and three years old at the time. Z.C. has thereafter been in his maternal grandparents' custody the majority of his life, but has also been in others' care, such as with his half-sister's paternal grandparents and a foster family. When DHHR filed the abuse and neglect petition, Petitioner Father had been incarcerated for three months for his felony conviction for transferring and receiving stolen property. Prior to this sentence, he had been on home confinement but had it revoked after he was found to be in possession of morphine and under the influence of alcohol and/or drugs. The petition alleged that due to his incarceration, Petitioner Father was unable to provide a fit and suitable home. Petitioner Father waived his rights to a preliminary hearing and an adjudicatory hearing was held in January of 2012. At adjudication, Petitioner Father admitted to the petition's allegations against him concerning his current incarceration. The circuit court found that Petitioner Father is an abusive and/or neglectful parent to Z.C. and found that Z.C. is an abused and/or neglected child. During this time, Z.C. was living with his maternal grandparents.

At the dispositional hearing in March of 2012, the circuit court granted a motion by Z.C.'s maternal grandparents to intervene. Petitioner Father testified and admitted to the criminal history alleged in the petition and testified that he has been incarcerated a total of six years so far, which included the first eighteen months of Z.C.'s life. He has no home now, and he had no home before incarceration. In addition to the criminal history outlined in the petition, Petitioner Father testified that in 2000 he was convicted and incarcerated for malicious wounding, and in 2001 he was convicted and incarcerated for distributing cocaine. Petitioner Father discussed his history with substance abuse, testifying that for two years prior to his most recent incarceration, he had a "hit and miss" substance abuse problem, but further expressed his desire to take daily drug tests and explained that he was on the waiting list at the jail to take parenting, drug, and life skills classes.

Z.C.'s maternal grandfather testified that Petitioner Father's visits and communication with the child were "hit and miss." Upon the close of the evidence and testimony, the circuit court granted Z.C.'s mother a one-year rehabilitation period. In turning to its findings concerning Petitioner Father, the circuit court found that Petitioner Father had a history with criminal convictions and substance abuse. It further found that it was unlikely that Petitioner Father would meet parole in August of 2012. The circuit court found that the bond between Petitioner Father and Z.C. was not a significant one but rather, that Z.C.'s most significant caretaker was his maternal grandfather. That being found, the circuit court further stated that it would be unfair to terminate Petitioner Father's *parental* rights when it was granting the mother a rehabilitation period, and not terminating her rights, when her actions were more egregious. The circuit court found that based on a consideration of all the factors, termination of Petitioner Father's *custodial* rights to Z.C. would be in Z.C.'s best interest to timely achieve permanency. However, the circuit court left Petitioner Father the opportunity to later move for post-termination visitation upon his release from incarceration. Petitioner Father appeals the circuit court's order terminating his custodial rights.

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 terminating his custodial rights because he had no part in the circumstances that gave rise to the petition. Petitioner Father relies on *In re Cecil T.* as follows:

Because incarceration does not *automatically* result in termination of a person's parental rights does not mean it may not affect the decision regarding permanent placement of a child. The reasons underlying the incarceration as well as the terms and conditions of incarceration can vary greatly. In some cases, a parent who is incarcerated may . . . still be able to correct conditions of abuse and neglect “in the near future” through participation in an improvement period or otherwise. In other cases, incarceration may unreasonably delay the permanent placement of the child . . . and the best interests of the child would be served by terminating the incarcerated person's parental rights.

In re Cecil T., 228 W.Va. 89, 717 S.E.2d 873, 881 (2011). Petitioner Father argues that it was only due to his incarceration that he was unable to provide a suitable home for Z.C. and was unable to monitor or prevent the behaviors of Z.C.’s mother. Moreover, Petitioner Father argues that his parole date in August of 2012 falls within the time frame allowed to achieve permanency. Petitioner Father asserts that the circuit court and DHHR did not consider Petitioner Father’s relationship with Z.C. before his incarceration. Petitioner Father argues that the circuit court should have delayed disposition until after Petitioner Father’s parole board hearing because if he is denied parole, the circuit court would know for certain that he could not provide a suitable home within the time limit for achieving permanency.

Petitioner Father next argues that termination of his custodial rights was contrary to Z.C.’s best interests, asserting that *In re Cecil T.* directs 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 reason for the incarceration, 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, 881 (2011). Petitioner Father argues that the evidence provides that even though he is incarcerated, he and his son share a significant bond through their time on the telephone together, as well as time together through the parenting plan. Petitioner Father argues that terminating his custodial rights prevents him from having the opportunity to establish a home for them after his release from prison. In contrast, the circuit court granted Z.C.’s mother an improvement period, even though her acts were more egregious, and did not terminate her rights like it did to Petitioner Father. Petitioner Father argues that the circuit court erred in placing more weight on Petitioner Father’s incarceration, rather than on his significant bond with Z.C. In response, the guardian ad litem and

DHHR contend that the circuit court correctly terminated Petitioner Father's custodial rights even though he was not present with the child when DHHR filed the petition and they further dispute Petitioner Father's argument that termination was contrary to Z.C.'s best interests. The guardian highlights that *In re Cecil T.* directed that circumstances of incarceration should be considered in light of the child's best interests and need for permanency.

The Court finds no error in the circuit court's decision to terminate Petitioner Father's custodial rights. As discussed in *In re Cecil T.*, incarceration is only one factor considered in determining whether termination of parental rights is appropriate. Moreover, we have discussed the termination of custodial rights as follows:

“A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.” Syllabus, *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960).

Syl. Pt. 7, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011). We also previously applied this holding in the case of *In re Nelson B.*, 225 W.Va. 680, 695 S.E.2d 910 (2010), where we affirmed the circuit court's termination of the petitioner father's custodial rights. Here, a review of the record supports the circuit court's findings of fact and conclusions of law. Further, similar to the case of *In re Nelson B.*, the circuit court's termination of Petitioner Father's custodial rights allows him room to modify his role in the child's life if he is able to show significant improvement. See *In re Nelson B.*, 225 W.Va. at 687, 695 S.E.2d at 917. The circuit court has allowed Petitioner Father to file a motion for post-termination visitation upon his release from incarceration. We find no error in the circuit court's order terminating Petitioner Father's custodial rights and accordingly, we affirm.

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 custodial 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