STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

***In Re:* J.K.**

No. 12-0629 (Webster County 11-JA-61)

MEMORANDUM DECISION

Petitioner, by counsel Dennis Willett, appeals the Circuit Court of Webster County's order entered on April 18, 2012, terminating his psychological parental rights to J.K. The guardian ad litem, Howard J. Blyler, has filed his response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response. Respondent Mother has also filed a response, by counsel Joyce Helmick Morton.

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 abuse and neglect petition in this matter alleges drug abuse by Respondent Mother after she was stopped by police in a traffic stop with J.K. in the vehicle and was found to have drugs and drug trafficking paraphernalia in the vehicle. Further, Respondent Mother does not have custody of her four older children, and does not have parental rights to any of them.[1] Upon the birth of J.K., Respondent Mother gave the child to petitioner and his wife, but refused to sign a temporary custody order. Respondent Mother asserts that petitioner and his wife were helping her, and in return, she put petitioner's name on the birth certificate as the father, although J.K.'s father is actually deceased.[2] Respondent Mother states that after approximately three months, she sought custody of J.K., but did not actually regain custody of him for almost a year, after extensive litigation in family court. During that year, J.K. lived with petitioner and his wife. Although the

[1] Respondent Mother indicates that she gave up custody of three of them and allowed those three to be adopted, and admits that her parental rights were terminated to the fourth child. However, there are allegations that her rights were involuntarily terminated to all four children, and allegations that she sold some or all of the children. These events occurred in Florida, and the WV DHHR did not fully investigate Respondent Mother's cases in Florida.

[2] Petitioner admits that he is not the biological father of the child, and apparently DNA testing in Florida confirmed the same. The records from the custody proceeding in Florida were not a part of petitioner's appendix on appeal.

record is scant, it appears that the child had been back in his mother's custody for approximately eight months before this petition was filed, and upon receiving custody, the mother moved to West Virginia, while petitioner and his wife remained in Florida. There is no evidence in the record that petitioner or his wife had any visitation with the child, or attempted to visit the child.

After the DHHR removed the child from the biological mother's custody, petitioner and his wife intervened in the action. Both were granted visitation. However, petitioner only attended a few visits and failed to appear for the dispositional hearing. Testimony showed that although petitioner and his wife had once acted as psychological parents to the child, the bond was broken between them. The circuit court therefore terminated petitioner and his wife's psychological parental rights after finding that neither had participated in the case in a meaningful way and finding that they have not shown that placement with them is in the best interests of J.K. Moreover, the circuit court found that petitioner and his wife did not present any evidence to refute the testimony that they had both used controlled substances and that the wife's mental health issues would not affect any potential placement.

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 argues that the circuit court erred in adjudicating him as abusive and neglectful[3], and erred in terminating his parental rights. Petitioner argues that he was a psychological parent to J.K., and that no allegations of abuse or neglect were made against him in the petition. Petitioner argues that he was not provided proper notice that his rights could be terminated to J.K. and that he was deprived of due process in this matter.

The guardian responds in favor of the termination of psychological parental rights, arguing that petitioner had no contact with the child for eight months after the biological mother regained custody in Florida and immediately moved to West Virginia. The guardian argues that during that

[3] Although petitioner makes this argument, there is no evidence in the record provided by petitioner that he was in fact adjudicated in this case.

time petitioner did nothing to regain custody of J.K. or maintain contact with J.K. The guardian notes that the burden was upon petitioner to prove that he was a psychological parent to J.K., and he failed to do so throughout the proceedings. Additionally, the guardian notes that petitioner had separated from his wife and that neither offered testimony regarding how they would care for the child or what the custody agreement would be, as both continued to seek custody.

The DHHR likewise responds that there is no longer a bond with the child based on the eight months the child spent with the mother without seeing petitioner at all. The biological mother has also responded in favor of terminating petitioner's psychological parental rights, noting that petitioner failed to attend some court hearings, has no bond with J.K. and did not have custody of J.K. in the eight months preceding the petition.

In the present case, petitioner makes a vague argument that he was J.K.'s psychological parent. This Court has held as follows:

> "A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syl. Pt. 3, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

Syl. Pt. 9, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011). There is no evidence that petitioner had any contact with J.K. in the eight months that the biological mother resided in West Virginia prior to the petition being filed, and therefore could not have been J.K.'s psychological parent. Therefore, even assuming arguendo that he formerly was the child's psychological parent, petitioner had no rights to the child at the time the petition in this matter was filed, as he had not continued in his purported role as a psychological parent. There is no evidence in the record that petitioner was ever granted any legal rights to J.K., and petitioner admits that he is not J.K.'s biological father. This Court finds that the circuit court's termination of "any psychological parent rights or other rights" of the petitioner was unnecessary, as petitioner had no rights to the child. Based on this fact, petitioner is not entitled to adjudication, as no allegations were made against him in the petition. Further, this Court finds that petitioner failed to establish that placement with him was in the best interests of J.K.

For the foregoing reasons, we find that petitioner had no rights to J.K. and that the circuit court did not err in failing to place the child with petitioner.

Affirmed.

ISSUED: November 19, 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