

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

In Re: L.M. & S.M.

No. 12-0646 (Raleigh County 11-JA-25 & 26)

FILED

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

MEMORANDUM DECISION

Petitioner Father, by counsel Thomas H. Evans III, appeals the Circuit Court of Raleigh County's order entered on April 23, 2012, terminating his parental rights to his children. The guardian ad litem, G. Todd Houck, has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, 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 abuse and neglect petition in this action was filed based on physical abuse of the children by their mother and lack of supervision. At the time the petition was filed, Petitioner Father was incarcerated for failing to register as a sex offender in Raleigh County. The petition also noted that Petitioner Father and the biological mother had two prior terminations of parental rights in Ohio. Petitioner Father stipulated to the allegations in the petition and was granted an improvement period, although he was incarcerated and could not participate. The DHHR filed a motion to terminate Petitioner Father's parental rights, and although a transport order was entered a month prior to the termination hearing, Petitioner Father was not transported to the hearing. However, he was represented by his attorney and his appointed guardian ad litem. The circuit court proceeded to disposition in petitioner's absence and terminated Petitioner Father's parental rights. The April of 2012 termination was based on his incarceration for failing to report as a registered sex offender, his failure to contact his children, his two prior terminations of parental rights in Ohio, and the fact that he cannot be paroled until at least September of 2012 and therefore, could not have participated in an improvement period.

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 terminating his parental rights without giving him proper notice and an opportunity to be heard pursuant to Rule 6(d) of the West Virginia Rules of Civil Procedure. He argues that disposition should not have continued in his absence. Petitioner also argues that the circuit court failed to make a plausible account of the evidence and therefore failed to make an appropriate ultimate ruling. Petitioner argues that the case was decided based on limited testimony, and that despite his limited participation, petitioner had a right to be present at all scheduled proceedings.

The DHHR responds in favor of the termination of parental rights, arguing that petitioner could have had his rights terminated based solely on his incarceration, noting also that Rule 43 of the West Virginia Rules of Procedure for Child Abuse and Neglect allows only eighteen months for permanency to be achieved.¹ The children’s guardian also responds in favor of the termination of parental rights, and agrees that petitioner’s lengthy incarceration could have been the sole basis of the termination. Further, the guardian notes that the other facts of the case, including petitioner’s failure to maintain any contact with the children and petitioner’s participation in domestic violence in the home, also warrant termination.

Regarding termination of parental rights, the Court has 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” Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Furthermore,

The eighteen-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

¹ This Court notes that the current Rule 43 allows for only twelve months; however, the petition below was filed prior to the rule change.

substantiated in the record.

Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). In the present case, the petition was filed in February of 2011, and at best, petitioner was going to be released on parole in September of 2012. Thus, it was not possible that the children could be in a permanent placement within the required eighteen months. Moreover, the circuit court had many other factors it properly relied upon to terminate petitioner's parental rights. Finally, this Court finds no merit in the argument that petitioner was entitled to appear in person at the hearing, as he was represented by both his appointed attorney and a guardian ad litem. Therefore, we find no error in the circuit court's ruling in this matter.

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. 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: 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