STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re:* J.B.**

No. 12-0828 (Preston County 12-JA-04)

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

MEMORANDUM DECISION

Petitioner Father, by counsel W. Chad Noel, appeals the Circuit Court of Preston County's order entered on June 13, 2012, terminating the parental rights to his child. The guardian ad litem, Virginia Jackson Hopkins, has filed a response on behalf of the child. The guardian ad litem, William L. Pennington, has filed a response on behalf of the biological mother, who is a minor. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response. The great-grandparents, by counsel Anne Marie Armstrong, have filed a 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 matter was filed by the great-grandparents after the J.B.'s biological mother absconded from J.B.'s great-grandparents' home, leaving then one-year-old J.B. The biological mother in this matter was approximately thirteen years old when she was impregnated by Petitioner Father, who was over eighteen years old at the time. Petitioner Father was convicted of third degree sexual assault for the conduct that resulted in the pregnancy. Petitioner Father admits that he has never met his child, and he was incarcerated at the time the petition was filed. He was adjudicated as an abusing parent after admitting to the allegations in the petition, but notes that he did not intentionally abandon the child. Upon his release on parole, Petitioner Father filed for an improvement period. After a lengthy hearing, the circuit court denied Petitioner Father's motion for an improvement period based upon West Virginia Code § 62-12-17(a), which states that a parolee convicted of a sexual offense may not have contact with a minor or the parolee's victim.[1] The circuit court then found that petitioner's psychological examination noted a "profound" need for alcohol and substance abuse treatment, and that he has anger control issues, exhibits risky behavior, and is likely to commit further crime. The circuit court also notes that petitioner has never met J.B., and that an attempt at reunification with petitioner is not in the child's best interests.

[1] Although the judge in petitioner's criminal action allowed for contact with only petitioner's minor child, petitioner failed to inform the judge that the child in question was the product of petitioner's crime.

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. He argues that the circuit court's termination of his parental rights under these circumstances is tantamount to an automatic termination of the rights of an incarcerated parent. Petitioner also argues that he should have been given an improvement period, noting that he is already subject to parole restrictions which require many of the same conditions as an improvement period. Petitioner further argues that he did not have a chance to demonstrate that he had an inadequate capacity to solve the problems of abuse or neglect. In the alternative, petitioner argues that an alternate disposition would be appropriate as opposed to the termination of parental rights.

The great-grandparents, who were the petitioners in the underlying matter, respond in favor of the termination of parental rights, arguing that due to the conviction of petitioner for sexual assault of a minor, it is impossible or impractical for petitioner to successfully complete an improvement period due to the prohibition on contact with the child during his parole. The grandparents also note that petitioner has never met the child, who is now twenty months old, and thus it is not in the child's best interests to prolong the quest for permanency. The mother's guardian also responds in favor of the termination of Petitioner Father's parental rights, arguing that an improvement period was impossible in this matter and therefore there is no likelihood that the conditions of neglect or abuse can be substantially corrected in the near future. The DHHR also responded in favor of the termination of parental rights, noting that because an improvement period was impossible, it was in the child's best interests to terminate petitioner's parental rights. The child's guardian concurs with the other respondents in this action.

With regard to parolees, West Virginia Code § 62-12-17(a)(4) states:

> That in every case in which the parolee for a conviction is seeking parole from an offense against a child, defined in section twelve [§ 61-8-12], article eight, chapter sixty-one of this code; or article eight-b [§§ 61-8B-1 et seq.] or eight-d [§§ 61-8D-1 et seq.] of said chapter, or similar convictions from other jurisdictions where the parolee is returning or attempting to return to this state pursuant to the provisions of article six [§§ 28-6-1 et seq.], chapter twenty-eight of this code, the parolee may not

> live in the same residence as any minor child nor exercise visitation with any minor child nor may he or she have any contact with the victim of the offense[.]

In the present case, petitioner was convicted of a crime against a child, and the result of that crime was J.B. Thus, this Court finds that the circuit court did not err in finding that under the current law, petitioner is not allowed to have contact with a minor child while on parole. Therefore, an improvement period is not a possibility. Further, this Court finds no error in the termination of petitioner's parental rights based on the child's best interests.

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