STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: F.T., M.T., C.T. III, A.K., L.K., & A.K.

No. 14-0255 (Nicholas County 13-JA-67 through 13-JA-72)

FILED
August 29, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by counsel John Anderson II, appeals the Circuit Court of Nicholas County's February 19, 2014, order terminating his parental and custodial rights to F.T., M.T., and C.T. III.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William Jones, filed its response in support of the circuit court's order. The guardian ad litem ("GAL"), Linda Garrett, filed a response on behalf of the children that also supports the circuit court's order. On appeal, Petitioner Father alleges that the circuit court erred in adjudicating him as an abusive and neglectful parent.

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 affirming the circuit court's decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

On September 17, 2013, the DHHR received a referral that Petitioner Father touched A.K.-2's breast and buttock, and that Petitioner Father allowed a house guest to remain in the home after A.K.-2, L.K., and M.T. informed Petitioner Father that the guest touched their breast.[2] During the investigation, Petitioner Father admitted to Trooper Doug Gordon of the West Virginia State Police that on numerous occasions he accidentally touched A.K.-2's breast, buttock, and vagina while tickling her. Based upon these allegations, the DHHR filed a petition for abuse and neglect against Petitioner Father.

In November of 2013, the circuit court held an adjudicatory hearing during which Petitioner Father refused to testify. However, the State introduced a recording of Petitioner Father's interview following his arrest for sexual abuse wherein he admitted to inappropriately touching A.K.-2. Further, April Clendenin, a supervised psychologist, testified that A.K.-2 told

[1]The circuit court did not terminate Petitioner Father's parental, custodial, or guardianship rights to A.K.-1., L.K., and A.K.-2. Because two of the children in this case have the same initials, we have distinguished each of them using numbers 1 and 2 after their initials.

[2]A.K.-2 was approximately fourteen years old when Petitioner Father allegedly sexually abused her. L.K. was thirteen years old when the petition was filed and M.T. was approximately six years old.

her that Petitioner Father put his hands down her pants and that he touched her breast Based on the evidence, the circuit court adjudicated Petitioner Father as an abusive and neglectful parent.

In December of 2013, the circuit court held a dispositional hearing and found that aggravated circumstances existed because Petitioner Father "molested" A.K.-2. As a result, the circuit court terminated Petitioner Father's parental and custodial rights to only C.T. III, M.T., and F.T.[3] It is from this order that Petitioner Father now appeals.

The Court has previously established the following standard of review in such cases:

> "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). Upon our review, the Court finds no error in the circuit court's order adjudicating Petitioner Father as an abusive and neglectful parent. Contrary to Petitioner Father's argument that he accidentally touched A.K.-2's breasts, buttock, and vagina, the record is replete with evidence supporting the circuit court's decision. During the adjudicatory hearing, the circuit court listened to a video recording of an interview wherein Petitioner Father admitted to inappropriately touching A.K.-2, but that it was accidental. The circuit court also heard testimony from Ms. Clendenin that A.K.-2 admitted to her that Petitioner Father touched her breast Further, Petitioner Father refused to testify in response to these allegations.

We have previously held that

> "[b]ecause the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability." Syl. pt. 2, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

[3]Petitioner Father and the children's biological mother were granted a final divorced by order entered on December 16, 2013. Therefore, Petitioner Father only had parental, custodial, and guardianship rights to his children, C.T. III, M.T., and F.T.

Syl. Pt. 3, *In re Marley M.*, 231 W.Va. 534, 745 S.E.2d 572 (2013). Based upon this holding, it is clear that the circuit court properly considered Petitioner Father's silence as evidence of his culpability. Therefore, not only was the circuit court presented with sufficient evidence that Petitioner Father inappropriately touched A.K.-2, but Petitioner Father failed to refute the same. In doing so, Petitioner Father allowed the circuit court to consider his silence as affirmative evidence of his culpability. Additionally, we have previously held that "[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997). As such, we note that the circuit court was in the best position to assess witness credibility, and we find no error in the findings of abuse and neglect.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: August 29, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II