

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

In Re: G.H., P.H. Jr., K.H., & H.H.

No. 14-0302 (Roane County 13-JA-11 through 13-JA-14)

FILED

August 29, 2014

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

MEMORANDUM DECISION

Petitioner Father, by counsel Teresa C. Monk, appeals the Circuit Court of Roane County's February 26, 2014, order terminating his parental rights to G.H., K.H., and H.H., and his custodial rights to P.H. Jr. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed its response in support of the circuit court's order. The guardian ad litem, Erica Brannon Gunn, filed a response on behalf of the children supporting the circuit court's order. The children's maternal grandmother, U.L., by counsel Jason G. Heinrich, filed a response in support of the circuit court's order. On appeal, petitioner alleges that the circuit court violated his due process rights by failing to appoint him counsel in a prior guardianship proceeding, erred in allowing the guardian ad litem from the guardianship proceeding to serve as the children's guardian ad litem in the abuse and neglect proceeding, erred in not proceeding on the abuse and neglect petition de novo, and erred in admitting unreliable evidence.

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 order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Prior to the initiation of the instant abuse and neglect proceeding, Respondent U.L., the children's maternal grandmother, filed a guardianship action pursuant to West Virginia Code § 44-10-3 seeking custody of G.H., as well as domestic violence petitions. In June of 2013, the circuit court held a hearing in the guardianship matter. At the time, G.H. was already residing in her grandmother's care, and the guardian ad litem for the children took the position that it was in G.H.'s best interest to remain in that home and for the guardianship to be granted. Previously, the DHHR had investigated claims of abuse and neglect in petitioner's home but found them to be unsubstantiated. The circuit court took testimony from multiple witnesses during this hearing, including testimony from then sixteen-year-old G.H., who testified that petitioner touched her inappropriately several times beginning when she was in the sixth grade. During this hearing, petitioner did not have counsel. Later that month, the circuit court held a second evidentiary hearing in the guardianship matter. After taking additional testimony, the circuit court found the children had been abused and neglected due to petitioner's sexual abuse of G.H., as well as additional emotional abuse and educational neglect. The circuit court granted guardianship of G.H. to the maternal grandmother, U.L.

That same day, the children's guardian ad litem and the maternal grandmother filed a joint abuse and neglect petition in the circuit court. That petition alleged that the children were abused in the following ways: G.H.'s sexual abuse; physical abuse of G.H. and P.H. Jr.; petitioner's alcohol abuse; petitioner's emotional abuse of the children; educational neglect of G.H. and P.H. Jr.; and failure to provide necessary food and shelter, among other allegations. The circuit court granted the DHHR temporary legal and physical custody of the children and appointed the guardian ad litem from the guardianship proceeding, now co-petitioner in the abuse and neglect proceeding, to again represent the children in the abuse and neglect matter.

An amended petition was filed on July 25, 2013, to reflect unsanitary conditions in the home, including large amounts of dog urine and feces, as discovered by law enforcement when assisting the DHHR in obtaining custody of the children. The circuit court then held an adjudicatory hearing in August of 2013, during which the DHHR moved the circuit court to take judicial notice of the guardianship case as it had at the preliminary hearing. The circuit court agreed to take judicial notice of the testimony and orders from the prior proceeding and also directed counsel to obtain transcripts of those evidentiary hearings. The mother stipulated to adjudication, but the circuit court continued the hearing in regard to petitioner. The circuit court then took evidence on the maternal grandmother's motion to suspend visitation with petitioner after an incident in which petitioner engaged in "bad and obscene behavior in the presence of [the children]." As a result of witnessing petitioner's actions, four-year-old H.H. reportedly had nightmares and again began wetting the bed. The circuit court granted the motion and prohibited petitioner from having any contact with the children.

In October of 2013, the maternal grandmother moved the circuit court to hold petitioner in contempt due to an incident three days prior in which petitioner contacted P.H. Jr. Thereafter, following multiple continuances of the adjudicatory hearing, including at least two continuances predicated upon petitioner's counsel requiring additional time to obtain and review transcripts from the prior guardianship proceeding, the circuit court held an adjudicatory hearing in regard to petitioner on November 13, 2013. Ultimately, the circuit court found petitioner to be an abusing parent.

On January 24, 2014, the circuit court held a dispositional hearing and also addressed petitioner's motion for a post-adjudicatory improvement period. Ultimately, the circuit court denied petitioner's motion and terminated petitioner's parental rights to all the children except fifteen-year-old P.H. Jr, who objected to termination. The circuit court did, however, terminate petitioner's custodial rights to P.H. Jr. It is from the dispositional order that petitioner appeals.

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). Upon our review, the Court finds no error in the circuit court terminating petitioner's parental rights to G.H., K.H., and H.H., or his custodial rights to P.H. Jr.

To begin, the Court declines to address petitioner's allegation that his due process rights were violated when he was not afforded counsel in the related guardianship proceeding because petitioner failed to timely appeal any order from that proceeding. Petitioner has appealed the circuit court's dispositional order from the abuse and neglect proceeding and, as such, our review is limited to that proceeding only. However, the Court notes that there is no authority indicating that indigent parents are entitled to appointed counsel in any guardianship proceedings initiated pursuant to West Virginia Code § 44-10-3. Similarly, there is no authority to support petitioner's assertion that a circuit court may, sua sponte, "convert" a guardianship action into an abuse and neglect action simply because allegations of abuse and neglect are present. To the contrary, Rule 13(a) of the Rules for Minor Guardianship Proceedings directs that allegations of abuse and neglect in the context of a guardianship proceeding simply require the matter to be transferred from the family court to the circuit court and that a clear and convincing burden of proof be applied, both of which occurred in the guardianship proceeding below.

As to petitioner's allegation that the circuit court erred in allowing the guardian ad litem from the guardianship proceeding to serve as the children's guardian ad litem in the abuse and neglect proceeding, the Court finds no merit to this argument. Petitioner relies upon West Virginia Code § 49-6-2(a) to support this argument, pointing out that this code section explicitly states, in pertinent part, that "[u]nder no circumstances may the same attorney represent both the child and the other party or parties . . ." in an abuse and neglect proceeding. However, petitioner appears confused concerning the distinction between the guardian ad litem's representation of the children and her status as a co-petitioner to the abuse and neglect proceeding. The record is clear that the guardian ad litem represented only the children in the abuse and neglect proceeding in compliance with West Virginia Code § 49-6-2(a).

The fact that the guardian ad litem joined the maternal grandmother, who was represented by different counsel, in filing the petition has no bearing on her representation of the children. Pursuant to West Virginia Code § 49-6-1(a), "[i]f the [DHHR] or a reputable person believes that a child is neglected or abused, the [DHHR] or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides . . ." As such, the guardian ad litem was entitled to file an abuse and neglect petition as a "reputable person," especially in light of the DHHR's inaction in filing such a petition following the guardianship proceeding. The mere fact that the maternal grandmother served as co-petitioner does not impart an attorney-client relationship upon the guardian ad litem and the grandmother, and the circuit court did not

err in appointing the guardian ad litem to represent the children again in the abuse and neglect proceeding.

Next, the Court finds no error in the abuse and neglect court taking judicial notice of the evidence and orders from the prior guardianship proceeding. Petitioner specifically alleges that the circuit court erred in not reviewing the abuse and neglect case de novo, but the Court notes that petitioner's allegation in this regard is misguided. The circuit court did proceed on the abuse and neglect petition de novo, the judicial notice of the prior guardianship proceedings notwithstanding. Petitioner was appointed counsel for the abuse and neglect proceeding, and counsel obtained transcripts of the pertinent evidentiary hearings from the guardianship matter. While petitioner argues that he was prejudiced because the evidence from the prior proceeding is "one-sided," the record is clear that the circuit court "afforded [petitioner] the right to recall any of the witnesses [from the prior guardianship proceeding] to cross[-]examine them," and that, during the abuse and neglect matter, he was additionally granted "leave to cross-examine [witnesses] on matters outside the scope of the direct examination."

Further, the record is similarly clear that the guardian ad litem, the maternal grandmother, and petitioner all presented evidence in the abuse and neglect proceeding, with the guardian ad litem and petitioner additionally calling their own witnesses. Additionally, the record shows that ample additional evidence was submitted during the abuse and neglect proceeding that was not available during the guardianship proceeding, contrary to petitioner's allegation that the circuit court "based the entire [abuse and neglect case] on testimony from the guardianship case" This included substantial evidence of petitioner's ongoing problems with alcohol abuse, his continued emotional abuse of the children, and his failure to acknowledge the underlying conditions of abuse and neglect in the home.

We have previously held that

[i]n the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

In re Timber M., 231 W.Va. 44, 53, 743 S.E.2d 352, 361 (2013) (quoting Syl. Pt. 2, *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003)). Upon our review, it is clear that petitioner's due process rights were not violated by the circuit court taking judicial notice of the prior guardianship proceeding. This is especially true in light of the fact that petitioner was afforded all the rights provided to parents in abuse and neglect proceedings consistent with the Rules of Procedure for Child Abuse and Neglect Proceedings and West Virginia Code § 49-6-1 through § 49-6-12.

Finally, the Court finds no error in the circuit court taking judicial notice of G.H.'s testimony from the guardianship proceeding. Petitioner argues that the circuit court erred in admitting this evidence in the abuse and neglect proceeding because the testimony "was conflicting within itself." However, we note 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). It is important to note that the same judge that presided over the abuse and neglect proceeding at issue also presided over the related guardianship proceeding. As such, the Court finds that the circuit court was in the best position to gauge G.H.’s credibility and ultimately held that “[G.H.’s] testimony about the sexual touching by her father[] is credible.” Therefore, the circuit court did not err in taking judicial notice of this prior testimony.

For the foregoing reasons, we find no error in the decision of the circuit court and its February 26, 2014, order is hereby affirmed.

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