STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re*: J.C.**

No. 16-0548 (Berkeley County 12-JA-120)

FILED
May 22, 2017
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father M.C., by counsel James P. Riley, IV, appeals the Circuit Court of Berkeley County's May 3, 2016, order terminating his parental rights to fifteen-year-old J.C.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee Niezgoda, filed its response in support of the circuit court's order. The guardian ad litem, R. Steven Redding ("guardian"), filed a response on behalf of the child also in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying his motion to continue the dispositional hearing.[2]

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.

In December of 2012, the DHHR filed an abuse and neglect petition against the parents alleging that they failed to provide their handicapped child, J.C., with proper medical care or education. The petition contained additional allegations that the parents claimed that the child was autistic but failed to obtain a diagnosis, assistance for the child, or seek treatment. The petition further alleged that, as a result of the parents' neglect, the child was non-verbal, not toilet-trained, did not wear clothing, rarely left the home, did not attend school, and was not home-schooled by the parents. The petition further alleged that petitioner allowed the child to sit in the same dirty diaper all day and that the child had not been seen by a doctor for

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W.Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W.Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W.Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

[2]We note that West Virginia Code §§ 49-1-1 through 49-11-10 were repealed and recodified during the 2015 Regular Session of the West Virginia Legislature. The new enactment, West Virginia Code §§ 49-1-101 through 49-7-304, has minor stylistic changes and became effective ninety days after the February 19, 2015, approval date. In this memorandum decision, we apply the statutes as they existed during the pendency of the proceedings below.

approximately eight years. Subsequently, the circuit court removed the child from petitioner's home and placed him at the Grafton School in Winchester, Virginia.[3]

In March of 2014, petitioner appeared before the circuit court and offered to relinquish his custodial and guardianship rights to the child. The circuit court accepted petitioner's relinquishment and terminated his custodial and guardianship rights to the child.

The parties were subsequently granted visitation with the child at the Grafton School. Between 2014 and 2015, the parents visited the child only sporadically, caused disruptions while visiting the child, and failed to participate in applied behavioral therapy training offered free of charge by the Grafton School. While the child was in petitioner's care he was non-verbal, not toilet-trained, did not wear clothing, did not attend school, and would not interact with people. Once the child was placed at the Grafton School he acquired a vast communication system through the use of an iPad and a developmental communication program. As a result of the school's efforts, the child was able to communicate with people, use the toilet on his own, dress himself, attend school, and function at a fourth-grade level. Following the child's placement at the Grafton School petitioner failed to make any progress to support the child's return to his care. Petitioner visited the child only four times; failed to attend a number of scheduled visits with the child; and cancelled several other visits. When petitioner did visit the child those visits consisted of petitioner and the child watching children's television shows on a cellular telephone. The child's behavioral therapist raised concerns that petitioner was over-stimulating the child and derailing his behavioral progress. According to the record on appeal, the behavioral therapist explained the child's treatment plan to petitioner, asked him to correct the overstimulation issue by providing alternative activities, invited him to participate in the child's behavioral therapy, and invited him to participate in classes to learn how to better interact with and care for the child. Petitioner refused to avail himself of these opportunities and failed to visit the child.

During the same period, an applied behavioral analysis therapist worked with the child for nine months and developed a good rapport with him. The therapist inquired of the guardian ad litem about the child's placement, completed foster parent training, and later informed the guardian ad litem that she wished to adopt the child. Based on these circumstances, the guardian ad litem filed a motion to modify the disposition and allow for the child's placement with the therapist. According to the guardian ad litem's motion, the therapist was an appropriate permanent placement option for the child. The matter was scheduled for a hearing on the guardian ad litem's motion.

The first motion hearing was rescheduled due to adverse weather conditions. Thereafter, the parents jointly moved the circuit court to continue the hearing again because they reported having car trouble. The circuit court granted that motion and rescheduled the hearing for a later date.

[3]The Grafton School provides specialized care and education for children and adults with autism and other complex physical and mental disabilities.

In April of 2016, the circuit court held a hearing on the guardian ad litem's motion to modify. Petitioner did not appear but was represented by counsel. Petitioner's counsel moved the circuit court to continue the hearing because the parents reported having car trouble again on the day of the hearing. The circuit court refused petitioner's motion to continue or to appear telephonically and proceeded with the hearing on the guardian ad litem's motion. The child's case manager from the Grafton School and the child's foster mother testified in support of the guardian ad litem's motion. At the close of the evidence, the circuit court terminated petitioner's parental rights by order dated May 3, 2016, and found that "[t]o not modify disposition to permit [the child] this opportunity at a normal and productive a[s] life as possible would be doing the cruelest disservice imaginable to this young man."[4] The circuit court further ordered post-termination visitation between petitioner and the child, with visits left to the discretion of the caregivers at the Grafton School. It is from this order that petitioner now 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). On appeal, petitioner first argues that the circuit court erred in denying his motion to continue the dispositional hearing.[5] We find no error.

According to petitioner, the circuit court's refusal to continue the hearing on the guardian ad litem's motion to modify disposition denied him sufficient notice that the hearing on the guardian ad litem's motion could jeopardize his parental rights. We disagree. We have previously held that the decision to grant a motion for a continuance in an abuse and neglect proceeding "is a matter left to the discretion of the circuit court." *In re Tiffany Marie S.*, 196

[4]All parental rights of all parents to J.C. have been terminated. J.C. was placed in the foster care of W.P., an applied behavioral analysis worker. The permanency plan is for the child to be adopted by W.P.

[5]On appeal to this Court, petitioner's assignment of error only concerns the circuit court's denial of his motion to continue. Petitioner does not assign error to the circuit court's termination of his parental rights. Accordingly, this memorandum decision does not address the circuit court's ruling in this regard.

W.Va. 223, 235, 470 S.E.2d 177, 189 (1996). As previously mentioned, the record on appeal indicates that petitioner was represented by counsel at the dispositional hearing. Contrary to petitioner's argument, he provides no evidence that his presence would have had an impact on the hearing. The record on appeal indicates that petitioner failed to make any progress during the pendency of this case. The circuit court indicated as much by noting that there was no information on the record to support the child's return to his parents. As such, we find that the circuit court did not err in denying petitioner's motion to continue.

Petitioner also claims that the denial of his motion to continue deprived him of proper notice that the modification proceeding could result in the termination of his parental rights. We disagree. Pursuant to West Virginia Code § 49-4-604(a),

> [u]pon motion . . . alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section six hundred four of this article and may modify a dispositional order if the court finds by clear and convincing evidence a material change of circumstances and that the modification is in the child's best interests.

It is clear from a plain reading of the statute that a modification proceeding could result in a different disposition. The guardian ad litem's motion provided petitioner with sufficient notice that his parental rights could be terminated as a result of the proceeding. *See* W.Va. Code § 49-4-604(a). Furthermore, the guardian ad litem's motion to modify disposition clearly stated that the purpose of the motion was to modify disposition because "an appropriate *permanent* placement option for the child had been identified." (Emphasis added). We note that petitioner was represented by counsel at all times relevant to the motion to modify disposition. Consequently, under the facts presented here, we find no error in the circuit court's order.

For the foregoing reasons, we hereby affirm the circuit court's May 3, 2016, order.

Affirmed.

ISSUED: May 22, 2017

CONCURRED IN BY:

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