BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 35487

Case No. 08-JA-33-O (Circuit Court of Logan County)

IN RE: JESSICA G., Infant,

MORRIS G.,

APPELLANT,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

APPELLEE.

RESPONSE BRIEF ON BEHALF OF JESSICA G.

FILED
MAR 25 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Submitted by:

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Guardian *ad litem* for Jessica G.

TABLE OF AUTHORITIES

CASES

In re Tiffany P., 215 W.Va. 622, 600 S.E.2d 334 (2004)

STATUTES

West Virginia Code § 49-6-5

I.

PROCEEDINGS AND RULINGS BELOW

Case No. 08-JA-33-O is an action filed by the Department of Health and Human Resources (hereinafter referred to as the WVDHHR) on July 2, 2008 against Appellant and his wife, Kelly G, to obtain custody of Jessica G., the daughter of the Appellant and Kelly G., on the grounds that Appellant and his wife had a history of court involvement which revolved around substance abuse and that Appellant had overdosed. The Court entered an Order on June 9, 2009 terminating Appellant, Morris G.'s and his wife, Kelly G.'s, parental rights to Jessica G.

II.

FACTS

A preliminary hearing was held on the Petition to Institute Proceedings for the Transfer of Custody of Minor Children on July 11, 2008. The Appellant, Morris G., waived his right to a preliminary hearing and orally requested a post-adjudicatory improvement period. After the waiver of the preliminary hearing, the Court ordered visitation with Morris G. A post-adjudicatory improvement period was granted for Morris G. on August 6, 2008, but the terms were to be developed at a scheduled Multidisciplinary Team Meeting. On August 27, 2008, visits were stopped due to the

Appellant, Morris G., producing positive drug screens and being unable to produce correct pill counts.

Even though Morris G. had not been able to remain drug free and keep correct pill counts to continue his unsupervised visits with his daughter, neither the WVDHHR nor the Guardian *ad litem* objected to Morris G. starting an improvement period to address the substance abuse issues outlined in the Petition filed by the WVDHHR. Accordingly, on September 17, 2008, Morris G. began his post-adjudicatory improvement period. Morris G. was ordered to attend the Logan Regional Day Report Center if he was not at a medical appointment. At the Day Report Center, Morris G. would benefit from parenting classes, substance abuse counseling, NA/AA groups, and adult life skills classes. He was ordered to maintain weekly contact with the WVDHHR and his attorney. He was to submit to two random drug screens per week and be subject to pill counts.

At the hearing on December 10, 2008 the WVDHHR advised the Court of its intention to file a motion to revoke the improvement period of Morris G. due to his lack of cooperation. The status report filed with the court indicated "[Morris G.] is not being compliant with improvement period terms, only sporadically attending day report, failing the majority of pill counts, [and] failing to take drug screens as ordered by the court." On April 8, 2009, the Appellant orally moved the court for a dispositional improvement period. The WVDHHR and the Guardian *ad litem* did not object to the Appellant's motion so long as the Appellant entered in-patient drug treatment to deal with his addiction to prescription medication. The Guardian *ad litem* reported to the court the Infant Respondent, Jessica G., did not want her father's parental rights terminated. On May 6, 2009, the West Virginia Department of Health and Human Resources filed a

motion to revoke Morris G.'s improvement period and terminate Morris G's parental rights. A termination hearing was held on June 5, 2009. During the termination hearing, Paula Adams, the child protective social worker, testified the WVDHHR had tried every service available to it, but Morris G. had not benefited from such services. When asked by counsel what the WVDHHR wanted the court to do with regard to Morris G., she responded, "We have no choice but to ask for termination of parental and custodial rights. However, I would note the child is thirteen and does not wish her father's parental rights to be terminated." Further, Ms. Adams testified, "There is a very strong bond between Jessica and her father." On June 29, 2005 the Circuit Court entered its Order terminating the parental rights of the Appellant to his daughter, Jessica G.

III.

ASSIGNMENT OF ERRORS AND MANNER DECIDED BELOW

The Court erred in its Dispositional Order of June 8, 2009 when it failed to make findings of fact as to whether it considered the wishes of Jessica G., age thirteen, regarding the permanent termination of the parental rights of the Appellant as required by West Virginia Code § 49-6-5(a)(6) and if so, why such wishes were ignored.

IV.

POINTS AND AUTHORITIES RELIED UPON DISCUSSION OF LAW AND REQUEST FOR RELIEF

"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." Syllabus point 1, In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

The Court erred in its Dispositional Order of June 8, 2009 when it failed to make findings of fact as to whether the Court considered the wishes of Jessica G., age thirteen, regarding the permanent termination of the parental rights of the Appellant as required by West Virginia Code § 49-6-5(a)(6) and if so, why such wishes were ignored. Under West Virginia Code § 49-6-5(a)(6), upon the Court "finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent . . ." However, further reading of the statute reveals, "Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." Id.

The record reflects the WVDHHR provided every opportunity and service available to it to assist Morris G. to rectify his addiction to prescription pain medication so that he could properly parent his teenage daughter. However, Morris G. was unwilling to help himself. The WVDHHR provided access to substance abuse counseling;

transportation, so long as notice was given for the transportation; parenting classes; and in-patient substance abuse counseling to help Morris G. correct his substance abuse problems. The WVDHHR did prove by clear and convincing evidence that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. Morris G. sporadically attended the Day Report Center which could have assisted him with substance abuse counseling and parenting. Even after the State had already decided to file a motion to terminate Morris G.'s parental rights, the State and the Guardian *ad litem* agreed to give Morris G. another chance to become drug free and attend in-patient drug treatment. Morris G. chose not to enter long term substance abuse treatment and has continued to abuse his prescription medication.

Considering the forgoing, Jessica G. could not safely be returned to her father's custody so long as he continued to abuse prescription medication. Due to Morris G. being unwilling to correct his substance abuse problem in almost one year, the WVDHHR filed its Motion to Terminate Morris G's parental rights. As noted in the Termination Hearing held on June 5, 2009, the WVDHHR believed it "had no choice but to ask for termination of parental and custodial rights." However, the West Virginia Department of Health and Human Resources was wrong when it believed it had no choice but to ask for termination of the Appellant's parental rights. Under West Virginia Code § 49-6-5(a)(5), Jessica G. could have been placed in foster care until she reached the age of eighteen. Such disposition could have allowed Morris G. to petition the court at a later date and show he was willing to provide for Jessica G.'s needs.

Another alternative disposition the court could have granted would be to bifurcate the parental rights of the Appellant, Morris G., and terminate his custodial rights only.

This would have allowed Morris G. to retain his parental rights to Jessica G. and to honor the wishes of Jessica G. Therefore, so long as Morris G. continued to abuse prescription medication and refuse treatment, Jessica G. could remain safe in a foster home, but remain a child of Morris G.

Jessica G. did not want her father's parental rights terminated and wanted to return home, but Jessica G. knew she was not going to be able to return home because her father continued to have a substance abuse problem. Although Jessica G. was not fourteen years of age when her father's parental rights were terminated, she was a thirteen year old girl who was able to understand the court process and the extent of her father's substance abuse problems.

CONCLUSION

In summary, the Appellant, Morris G., was unwilling to provide adequately for Jessica G.'s needs due to his prescription drug abuse. Further, the Court was proper to find that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future when the WVDHHR wanted the Appellant to correct his prescription drug abuse problem and offered him every service known by the WVDHHR. However, the Appellant was unwilling to stop his prescription drug abuse. Jessica G. did not want her father's parental rights terminated. However, the WVDHHR believed it had no choice but to ask for termination of the parental rights of Morris G. due to his unwillingness to treat his prescription drug abuse. The Circuit Court should have explained whether it considered the wishes of Jessica G. who did not want her father's parental rights terminated and if it did consider her wishes, why her wishes were ignored.

Accordingly, this Honorable Court should remand the case to the Circuit Court for proper disposition and consider the wishes of Jessica G. that her father's parental rights not be terminated.

JESSICA G.,
By her Guardian *ad litem*

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CERTIFICATE OF SERVICE

I, Erica Barker Cook, Guardian *ad litem* for Jessica G. do hereby certify that on the 25th day of March, 2010, I served a true and accurate copy of the foregoing Response Brief on Behalf of Jessica G. by Untied States Mail, postage prepaid, to the following:

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And the original and nine copies of said Response Brief was hand delivered on March 25, 2010 to the following:

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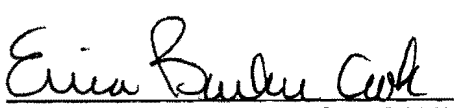

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