

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

In Re: D.C. and C.C.

No. 12-0474 (Randolph County 10-JA-31, 32)

FILED

September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Heather M. Weese, arises from the Circuit Court of Randolph County, wherein her parental rights to the children, D.K. and C.K., were terminated by order entered on March 19, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel, Lee A. Niezgodka, has filed its response. The guardian ad litem, James E. Hawkins Jr., has filed a response on behalf of the children.

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 proceedings below were initiated upon a referral that the petitioner allowed the children to live in unsafe and unsanitary conditions in the home of their father, J.C. According to the initial abuse and neglect petition, there was insufficient food in the home, which had deplorable living conditions, including feces, trash, and an unsafe heating source with improper ventilation. The initial petition also referenced prior abuse and neglect proceedings involving the parents, and noted that aggravated circumstances were present because J.C. previously had his parental rights to an older child involuntarily terminated due to severe physical abuse of the child. Further, the petition noted that a prior abuse and neglect petition against the parents was dismissed when petitioner agreed to not allow the children to reside with their father only to leave them in his care for approximately two weeks.

Following the dismissal of that prior proceeding, petitioner stipulated to the allegations in the petition at adjudication and was granted a six-month post-adjudicatory improvement period during which she was provided parenting education, adult life skills education, a psychological evaluation, counseling, family therapy, and transportation services. Petitioner initially complied with the terms of her post-adjudicatory improvement period, but stopped complying after being granted an extension. The circuit court set the matter for disposition, and petitioner moved for a dispositional improvement period. The circuit court denied that motion and terminated petitioner's parental rights. On appeal, petitioner alleges three assignments of error which are addressed below.

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.” Syllabus Point 1, *In the 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).

First, petitioner alleges that the circuit court erred in denying her motion for a dispositional improvement period because she demonstrated that she had resolved the issues that prevented her from successfully completing her post-adjudicatory improvement period. Petitioner cites to her full compliance with the post-adjudicatory improvement period which earned her an extension to that improvement period. Petitioner argues that she obtained appropriate housing, but was overcome with chronic transportation problems and gaps in transportation assistance from her service provider, which caused her to be unable to maintain strict compliance in her contact with her children, including medical appointments. At disposition, petitioner testified that these transportation problems had been resolved and that she was fully able to participate in a dispositional improvement period.

The DHHR responds in support of the circuit court’s denial of a dispositional improvement period and the termination of petitioner’s parental rights. Specifically, the DHHR argues that testimony established that petitioner was responsible for her non-compliance, not her service provider. The DHHR also argues that testimony established that there was only a one-month gap in petitioner’s transportation services, whereas petitioner failed to comply for a period longer than the one month and attended only fourteen out of thirty-nine scheduled family therapy appointments. Further, the DHHR argues, inter alia, that petitioner missed many scheduled visits with her children, and that she also failed to assure that he child, D.K., who has special needs, attended important medical, speech, and occupational therapy appointments, as was her responsibility under the post-adjudicatory improvement period. The DHHR argues that petitioner failed to establish by clear and convincing evidence that she was likely to fully participate in a dispositional improvement period.

The guardian responds in support of the circuit court’s termination of petitioner’s parental rights, arguing that because petitioner did not successfully complete her post-adjudicatory improvement period, she was not entitled to a dispositional improvement period. Further, the

guardian argues that petitioner failed to demonstrate by clear and convincing evidence that she has experienced a significant change in circumstances, as required by West Virginia Code § 49-6-12(c)(4) and as evidenced by petitioner continuing to miss visitations, and therapy and bonding appointments, and failing to demonstrate she could care for D.K.'s special needs. For these reasons, the guardian argues that petitioner failed to demonstrate that she was likely to successfully complete any further improvement period.

Based upon our review of the record, the Court finds no error in the circuit court's denial of petitioner's motion for a dispositional improvement period. According to West Virginia Code § 49-6-12(c), dispositional improvement periods are left to a circuit court's discretion. In order to obtain a dispositional improvement period, the moving parent must establish, by clear and convincing evidence, that they are likely to fully participate in the improvement period. As noted above, the evidence at disposition established that petitioner's non-compliance with the terms of her post-adjudicatory improvement period occurred outside the one-month period when she was experiencing issues with transportation services, thus she failed to satisfy the requisite burden in requesting her dispositional improvement period. Further, it is clear that petitioner's non-compliance was not based, entirely, on issues of transportation, and after being granted a three-month extension to her post-adjudicatory improvement period, she "consistently failed to attend visitations with the children or take the children to scheduled appointments, and furthermore, she has been noncompliant throughout the matter." For these reasons, the circuit court did not err in denying petitioner a dispositional improvement period.

Petitioner next alleges that the circuit court erred in terminating her parental rights because she demonstrated that there was a reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. Petitioner reiterates that she had resolved the issues that prevented her from successfully completing the post-adjudicatory improvement period, and that she had secured safe, clean, and appropriate housing for her children. Petitioner argues that she could have obtained reliable transportation during a dispositional improvement period, thus it was error to terminate her parental rights.

In response, the DHHR argues that petitioner had a full year to obtain reliable transportation in order to visit her children, attend therapy, and prepare to meet her children's needs. There is no record of petitioner seeking assistance in remedying the alleged issue with transportation services until disposition, which was approximately seven months after the issue arose. According to the DHHR, petitioner relied solely on her own uncorroborated testimony that her car was now more reliable and would be available the day after disposition. For these reasons, the DHHR argues that the circuit court did not err in exercising its reasonable discretion by denying petitioner an additional improvement period and terminating her parental rights.

The guardian argues that the circuit court properly terminated petitioner's parental rights because she had sufficient time and opportunity to remedy the circumstances that existed at the time of the petition's filing. The guardian asserts that petitioner failed to successfully complete her improvement period and the extensions granted thereto. The guardian argues that establishing permanency for the children is the primary objective of abuse and neglect

proceedings, and that the termination of petitioner's parental rights was necessary to achieve the same.

Based upon our review of the record, the Court finds no error in the circuit court's decision to terminate petitioner's parental rights. The circuit court was presented with sufficient evidence upon which to terminate petitioner's parental rights, finding no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. West Virginia Code § 49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where

[t]he abusing parent . . . [has] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child.

Accordingly, and for the reasons set forth above, the circuit court was presented with sufficient evidence to find that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in the near future. Further, the circuit court noted that after petitioner failed in her post-adjudicatory improvement period, petitioner "continued to miss appointments . . . and visitations with her children." As detailed above, the circuit court's findings relate to a period of noncompliance beyond the one-month period during which petitioner's transportation services lapsed. Petitioner even testified that she was frequently denied transportation services because she failed to make such requests with the appropriate amount of notice. Because there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future and because termination was necessary for the welfare of the children, the circuit court did not err in terminating petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

Lastly, petitioner argues that the circuit court erred in denying her post-termination visitation with her children because the DHHR did not offer any evidence that continued contact with the children would be detrimental to their well-being or would not be in their best interests. Petitioner argues that she was attending therapy with the children in order to work on their bonding and worked separately with each child to address issues of favoritism.

In response, the DHHR argues that this Court has directed that a circuit court, in determining if post-termination visitation is appropriate, should consider whether a close emotional bond has been established between the parent and child. The DHHR argues that there was no evidence to establish that the children had a close emotional bond with petitioner and that petitioner failed to attend over half of the appointments established to assess and develop this bond. Petitioner's therapist testified to only a "mild bond" between petitioner and her sons. The DHHR argues that a more substantial bond is required to meet the best interest standard and is a prerequisite to post-termination visitation. Further, the DHHR stresses that post-termination visitation is the right of a child, not a parent, to remain in contact with a person who shares a

strong emotional bond. For these reasons, the DHHR argues that the circuit court did not err in denying post-termination visitation.

The guardian also supports the circuit court's decision to deny post-termination visitation and argues that petitioner failed to demonstrate how post-termination visitation would be in the children's best interest. Further, the guardian argues that no evidence supports the contention that such visitation would be in the children's best interest and that the proper standard requires petitioner to demonstrate that continued contact would be in the children's best interests because the right of continued contact vests in the children.

Upon our review of the record, the Court finds no error in the circuit court's denial of post-termination visitation. We have previously held as follows:

“When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.” Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 11, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). In the instant matter, the evidence established that the DHHR implemented services in order to foster the bond between petitioner and her children, but that petitioner attended only fourteen of her thirty-nine scheduled appointments. As such, and as evidenced by the testimony of petitioner's therapist, the bond between petitioner and the children improved only mildly during the proceedings. Further, the children at issue were only three and four years old at the time of disposition, well below the age at which a circuit court may consider a child's wishes. Based upon this evidence, it is clear that the circuit court did not err in denying petitioner post-termination visitation.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within twelve months of the date of the disposition order. As this Court has stated,

[t]he [twelve]-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.

Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that

[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.

Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, “[t]he guardian ad litem’s role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.” Syl. Pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court, and the termination of petitioner’s parental rights is hereby affirmed.

Affirmed.

ISSUED: September 24, 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