

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

In Re: B.L.-1, B.L.-2, and K.S.

No. 11-1664 (Jackson County 11-JA-22, 11-JA-23, 11-JA-24)

FILED

May 29, 2012

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

MEMORANDUM DECISION

Petitioner Mother’s appeal, by counsel Kennad L. Skeen II, arises from the Circuit Court of Jackson County, wherein her parental rights to the children, B.L.-1¹, B.L.-2, and K.S., were terminated by order entered on December 8, 2011. The West Virginia Department of Health and Human Resources (“DHHR”), by William L. Bands, has filed its response. The guardian ad litem, Laurence W. Hancock, has filed his response on behalf of the children.

This Court has considered the parties’ briefs and the appendix 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 appendix 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 after B.L.-1 reported that petitioner had subjected him to severe physical abuse. According to the petition, the child began choking on a piece of chicken when petitioner grabbed him by the throat and yelled at him, eventually slamming him to the ground and striking him. This was corroborated by B.L.-2, who witnessed the event, and who petitioner grabbed during the altercation because she was crying. The youngest child, K.S., also reported to a counselor at her school that “mommy was hurting [B.L.-1] so bad.” According to the petition, the children were scared to return to petitioner’s home for fear of being beaten, and B.L.-1 stated that petitioner had told him not to tell anyone about the abuse. The petition further stated that the father of B.L.-1 and B.L.-2 had noticed bruises on the children over a six-month period, and that B.L.-1 attributed the bruises to petitioner whipping him with a belt. According to the petition, both children told K.L. that petitioner calls them names, such as stupid, and degrades them. The petition also alleged that petitioner neglected the children by failing to provide them with the necessary food, clothing, and supervision. Specific instances include the children claiming that petitioner cooked food for the father of K.S., but would not make them meals which necessitated the children asking neighbors for food. The petition further alleged that ten-year-old B.L.-1 often has to cook for the other children, and that petitioner would keep them locked in their rooms for hours because she had

¹Because multiple children in this matter share the same initials, the children will be referred to throughout as B.L.-1 and B.L.-2.

friends over. Lastly, the petition alleged that petitioner used controlled substances in the children's presence.

At adjudication, the circuit court found that the children were abused and neglected, and that petitioner was an abusing parent. These findings were based upon the testimony of B.L.-1, who testified in camera, as well as the testimony of a counselor from the children's school. Petitioner did not testify at adjudication. Based upon the evidence, the circuit court found that the children's health and welfare was threatened by petitioner knowingly and intentionally inflicting or attempting to inflict physical, mental, and emotional injury upon the children. This was supported by testimony regarding petitioner slamming B.L.-1 to the ground, using excessive corporal punishment resulting in bruising under the child's eye, and in her use of illegal narcotics and controlled substances in the children's presence. At disposition, the circuit court found that petitioner had not accepted responsibility for abusing illegal narcotics and controlled substances, nor had she accepted responsibility for neglecting and physically abusing the children. Upon a finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse or neglect in the near future, the circuit court terminated petitioner's parental rights. On appeal, petitioner alleges the following assignments of error: that the circuit court erred in finding that petitioner was an abusing parent and that the children were abused and neglected; that the circuit court erred in permanently terminating petitioner's parental rights; and, that the circuit court erred in permitting petitioner to waive her right to testify at the adjudicatory hearing without further inquiry into petitioner's competency to make such a waiver. These assignments of error, along with the respondents' arguments, will be addressed in turn below.

“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 Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

To begin, petitioner addresses the circuit court's findings that she was an abusing parent and that the children were abused and neglected. She argues that the circuit court based this finding on the following three alleged actions: her intentionally inflicting physical, mental, and emotional injury on the children; her failure to provide the children with adequate food; and, her use of illegal narcotics and controlled substances in the children's presence. Petitioner argues that these findings were made based solely on the uncorroborated testimony of a ten-year-old child and a school counselor. She argues that the child's testimony concerning the choking incident can be explained as a panicked mother desperately attempting to dislodge the obstruction. Petitioner further challenges

the child's testimony related to alleged beatings with a belt, arguing that those allegations were uncorroborated. Petitioner cites to the counselor's testimony, and argues that she was unable to describe the bruise B.L.-1 had shown her after the choking incident. Further, according to petitioner, the counselor never testified to having seen bruises on the children. Petitioner also argues that the child's testimony as to petitioner calling him derogatory names should be disregarded because he could not recall a time frame during which such abuse took place, while the applicable statutes require the findings to be based on conditions existing at the time of the filing of the petition. As to the allegations that petitioner failed to provide adequate food, she argues that the child's testimony is insufficient upon which to base the circuit court's finding. Petitioner argues that a child's opinion as to being "starving" is subject to interpretation, and he acknowledged that petitioner often cooked full meals. Lastly, petitioner argues that the child's testimony regarding petitioner's substance abuse was also insufficient, again because the child did not testify as to the applicable time frame of the abuse. She further argues that no witness ever identified or confirmed the alleged substances to be illegal drugs.

In response, the guardian ad litem argues in support of the circuit court's termination of parental rights. The guardian cites the final DHHR child case plan to show petitioner's lack of compliance with the services offered. That summary notes petitioner's inability to admit that she has a substance abuse problem, despite multiple positive drug screens. The summary also alleges that petitioner failed to comply with parenting services, noting that the provider ended those services due to multiple missed and cancelled appointments. Further, the guardian argues that petitioner declined to visit with her children since June of 2011 because she did not want her visitations to be supervised by the DHHR. In short, the guardian argues that this evidence was sufficient to adjudicate petitioner as an abusing parent. The DHHR fully joins in and concurs with the guardian's response.

Upon review of the appendix, the Court finds no error in the circuit court's findings that the subject children were abused and neglected and that petitioner was an abusing parent. Petitioner's main argument is that the witnesses below lacked credibility. When reviewing the testimony introduced at the adjudicatory hearing, however, it is clear that the circuit court did not commit clear error in basing its findings of abuse on this evidence. B.L.-1 gave clear testimony of multiple instances of physical abuse, including petitioner striking him, slamming him to the floor, and hitting him with a belt buckle. Despite petitioner's argument that these allegations are uncorroborated, the appendix shows that the child's school counselor also testified to physical abuse. The counselor was presented with corroborating accounts of physical abuse from the other children, and she also witnessed bruising on B.L.-1's arm herself. Further, the child testified as to petitioner's drug use, including vivid descriptions of his mother crushing pills and inhaling them. While petitioner alleges that the child failed to indicate a time frame for the drug use that would indicate the problem was ongoing when the petition was filed, it is clear from the record that petitioner continued to abuse controlled substances throughout the proceedings below. In fact, in her petition for appeal, petitioner herself admitted that her drug abuse was ongoing at the time of the adjudicatory hearing. B.L.-1 further provided testimony sufficient to establish that petitioner used derogatory language towards all the children, and that she also failed to provide adequate food for them. Petitioner failed to testify at the adjudicatory hearing in order to refute this testimony.

This Court has held as follows:

“Because 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).

Syl. Pt. 2, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). The Court finds that no error was committed in adjudicating the children as abused and neglected. As outlined above, there was ample evidence that petitioner abused the children in multiple ways, including physically, emotionally, and through her continued substance abuse. Pursuant to West Virginia Code § 49-1-3(1)(A), an abused child is one whose health or welfare is harmed by a parent who “intentionally inflicts . . . physical injury or mental or emotional injury, upon the child or another child in the home.” Based upon this definition and the evidence presented, it was not clear error for the circuit court to adjudicate the children as abused. Further, West Virginia Code § 49-1-3(2) defines an abusing parent as a parent “whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to constitute child abuse or neglect.” Based upon this definition, it is clear that the circuit court did not err in finding petitioner to be an abusing parent, based upon its adjudication that her conduct constituted abuse, and further because petitioner’s silence constituted affirmative evidence of her culpability. Because the circuit court’s finding on this issue was not clearly erroneous, we decline to disturb the same on appeal.

Petitioner next argues that the circuit court erred in terminating her parental rights. Petitioner’s argument on this issue is brief, and consists solely of her reliance on the argument that the circuit court’s findings at adjudication were erroneous. In short, petitioner argues that because the circuit court erred in finding that she was an abusing parent, “it necessarily erred in subsequently terminating [her] parental rights based upon said findings.” In response, the guardian argues that petitioner’s abuse was supported by clear and convincing evidence and that termination was appropriate because petitioner refused to acknowledge the conditions that led to the petition’s filing. Again, the DHHR joins in and concurs with the guardian’s response. In short, the Court finds no merit in petitioner’s argument. As outlined above, the circuit court did not commit error in adjudicating the children as abused and neglected. For this reason, the circuit court’s decision to terminate petitioner’s parental rights was not based upon an erroneous finding.

In its dispositional order, the circuit court specifically found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future, based upon petitioner’s failure to fully acknowledge responsibility for the conditions of abuse and neglect, and her assertion that she does not believe she has a problem with substance abuse. In reaching this conclusion, the circuit court noted that petitioner’s refusal to acknowledge her substance abuse problems prevented her from following through with the recommended treatment. As such, the circuit court further found that petitioner had not participated in the proceedings. 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” It is clear that petitioner’s refusal to even admit to a substance abuse problem constitutes a failure to follow through with rehabilitative efforts. As such, the circuit court was within its discretion to proceed to termination of parental rights pursuant to West Virginia Code § 49-6-5(a)(6), and we find no error in the circuit court’s decision.

Lastly, petitioner argues that the circuit court erred in allowing her to refuse to testify at the adjudicatory hearing without further inquiry into her competency to make such a waiver. She argues that because of this error, the circuit court was then able to interpret her silence as affirmative evidence of her culpability. Citing United States Supreme Court precedent, petitioner argues that a person whose mental condition is such that they lack the capacity to understand the object and nature of the proceedings against them may not be subject to trial. In the instant matter, petitioner argues that her ongoing drug abuse rendered her incompetent when refusing to testify, and that the circuit court should have recognized the same and inquired further of her decision. In response, the guardian argues that petitioner was represented by counsel at the time she chose not to testify, and that the circuit court’s inquiry was sufficient. Again, the DHHR joins in and concurs with this argument.

Upon a review of the appendix, the Court finds no error in the circuit court’s decision to allow petitioner to refuse to testify at adjudication. The transcript of the adjudicatory hearing shows that petitioner was initially set to testify, at which point her counsel held a discussion with her off the record to “explain the implications of her testimony.” Following that discussion, counsel represented to the circuit court that petitioner had decided not to testify. Counsel stated, on the record, that he explained to petitioner the inference that could be held against her if she chose not to take the stand. The circuit court then explained this inference to her again, after which petitioner plainly stated that she wished not to testify. The Court finds that petitioner was represented by counsel at the time of this waiver, and that the implication of her decision was explained to her at least twice, which she openly admits in her petition for appeal. As such, we find the inquiry into her decision to be sufficient. Further, based upon her repeated failures to admit to her underlying substance abuse problems, it is unlikely that petitioner would have admitted to any alleged competency issues related to her ongoing substance abuse. For these reasons, the Court finds no error in the circuit court’s decision to allow petitioner to refuse to testify in the abuse and neglect proceedings below.

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 eighteen months of the date of the disposition order.² As this Court has stated, “[t]he eighteen-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: May 29, 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

² Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.