STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.H., J.H., Z.H., M.H., and M.H. :

No. 11-0364 (Mingo County No. 10-JA-17, 18, 19)

FILED
September 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mingo County, wherein the Petitioner Mother's parental rights to her five children, A.H., J.H., Z.H., M.H., and M.H., were terminated. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the children. The Department of Health and Human Resources (DHHR) did not submit a response in this matter.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. The case is mature for consideration. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Petitioner Mother challenges the circuit court's order terminating her parental rights to her five children. In support, she asserts that the circuit court did not consider her physical restrictions while on bed rest for the last two months of her pregnancy with two of the subject children, twins M.H. and M.H.; her compliance with her improvement period services; and the resulting substantial improvement in her life and in her parenting. The Petitioner Mother argues that accordingly, because the circuit court did not consider the totality of these circumstances, it improperly terminated her parental rights.

In its decision, the circuit court considered the Petitioner Mother's prior history with Child Protective Services (CPS) and her CPS involvement in the present matter. The DHHR had investigated the Petitioner Mother a few times before and on one occasion, it substantiated lack of supervision by the Petitioner Mother and one of the respondent fathers, I.H. Child Protective Services opened a case in that matter, the parents cooperated with parenting services, and the case was closed in July 2009. In the present matter, the Petitioner Mother was arrested for public intoxication. The DHHR investigated the matter, substantiated neglect and substance abuse by the respondent parents, and CPS opened a case

with the family. Throughout the course of the Petitioner Mother's work with CPS, she failed to submit to a number of drug tests, tested negative for some of the drug tests, tested positive for cocaine in one drug test, and did not participate in in-patient rehabilitation. Based upon these considerations, the circuit court found the Petitioner Mother addicted to substances and that she failed to follow through with treatment for this addiction. Accordingly, the circuit court concluded that the Petitioner Mother is presently unwilling or unable to correct the conditions of abuse and/or neglect that necessitated the children's removal. Further, it found that there is no reasonable likelihood that the Petitioner Mother can or will correct the conditions in the near future. Accordingly, the circuit court terminated the Petitioner Mother's parental rights to her children and denied post-termination visitation with them.[1]

This Court considers: "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 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 the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Accordingly, the Court has also held that, "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Petitioner Mother argues that because the circuit court did not consider the totality of the circumstances, it erred in finding no reasonable likelihood that the Petitioner Mother is able or willing to correct the conditions of abuse and/or neglect in the future. She argues that parental rights should only be terminated when clear and convincing evidence shows that the parent "has not responded to or followed through with rehabilitative efforts, willfully refused to cooperate, remains addicted to alcohol or controlled substances, and there is no reasonable likelihood of improvement," citing W.Va. Code §49-6-5. In support of her argument that

[1] In the same order, the circuit court also terminated the parental rights for one of the respondent fathers, I.H. However, he submits no comment or response in this appeal.

improvement is likely, the Petitioner Mother maintains that she "faithfully attended visits with her children, her psychiatric evaluation, parenting classes, and drug screens." She further asserts that she attended all court proceedings and that it was only during her last two months of her most recent pregnancy that she could not attend drug screens and appointments because she was bedridden. She highlights that her twins were born drug-free in October 2010.[2] Additionally, she raises that the circuit court failed to take into consideration her physical limitations and to reasonably accommodate her during her pregnancy.

The guardian ad litem supports the circuit court's order of termination. In doing so, the guardian ad litem refutes the Petitioner Mother's assertion of compliance in her improvement period; rather, the guardian ad litem asserts that her participation in these services was inconsistent. Here, a review of the record supports the guardian ad litem's argument and the circuit court's termination of the Petitioner Mother's parental rights. The Petition for Immediate Custody of Minor Children in Imminent Danger outlines the visits CPS made to the parties' home in April and May of 2010, indicating at least two occasions in which the Petitioner Mother refused to submit to drug screens (05/24/10 and 05/25/10) and one occasion in which the Petitioner Mother submitted to a drug screen and tested positive for cocaine (06/08/10). The Court has also reviewed the Petitioner Mother's psychological evaluation, completed by Appalachian Psychological Associates on June 8, 2010, and June 9, 2010, and contained in the record. The report addresses a number of concerns over the Petitioner Mother's mental and emotional well-being, and over her participation in a substance abuse assessment and parenting evaluation. The report also notes that "If current drug screens are negative, there is no reason to remove the children from her care if she is willing to comply with service providers and DHHR has no other information to suggest concern."

In its Final Dispositional Order of February 15, 2010, the circuit court makes findings of the Petitioner Mother's work with CPS following this June 2010 psychological evaluation. These findings stated that the Petitioner Mother kept approximately two-thirds (2/3) of her appointments with her in-home service provider, that another in-home service provider was seldom able to provide services to the Petitioner Mother because she was not available, and that the Petitioner Mother attended all supervised visits with the subject children. This order also included findings which concerned the drugs screens CPS requested of the Petitioner Mother. In between July 2010 and through October 2010, the Petitioner Mother submitted

[2] The Court notes that proceedings are still ongoing for another respondent father, N.P., who the circuit court believes is the biological father of the twins. The circuit court also made a previous finding that N.P. is also the biological father of one of the subject children, Z.H.

to three drug screens with negative results; during this same time frame, the Petitioner Mother also failed to submit to five (5) drug screens requested of her. The court also found that, as raised by the Petitioner Mother, her twins were born in October 2010 drug-free. Following their births, however, CPS requested more drug screens of the Petitioner Mother. On two occasions in November, the Petitioner Mother failed to submit to a requested drug screen. She failed to submit to another drug screen in December. Then, in January 2011, the Petitioner Mother submitted to a drug screen that produced a positive but diluted result for barbiturates and butalbital. Additionally, DHHR referred the Petitioner Mother to substance abuse counseling at Professional Counseling, which the Petitioner Mother did not attend.

Nothing else in the record refutes the circuit court's findings concerning the Petitioner Mother's drug screens and missed appointments with her in-home service providers. The circuit court carefully considered the Petitioner Mother's unwillingness to cooperate with rehabilitative efforts. Accordingly, the circuit court did not abuse its discretion in finding that clear and convincing evidence showed that there is no reasonable likelihood that conditions of neglect or abuse can be substantially corrected in the near future.

For the foregoing reasons, this Court finds no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: September 26, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh