

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

In Re: B.B. and Z.B. :

No. 11-0518 (Mineral County 10-JA-9 & 10)

FILED

October 25, 2011

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mineral County, wherein the Petitioner Grandmother's custodial rights to her grandchildren, B.B. and Z.B., were terminated. The appeal was timely perfected by counsel, with an appendix accompanying the petition. The guardians ad litem have filed a joint response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has also filed a response. Subsequently, the Petitioner Grandmother submitted a reply to these responses.

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 Grandmother challenges the circuit court's order terminating her custodial rights to her grandchildren, B.B. and Z.B.¹ She argues that because she successfully completed her improvement period, the circuit court's termination order was in error and should be reversed.

The Petitioner Grandmother obtained legal custody of the subject children in 2003.²

¹ In these same proceedings, the circuit court also terminated the children's mother's parental rights. She has filed a separate appeal for her termination. She did not file a response in the Petitioner Grandmother's appeal.

² The children's biological father has had little to no involvement in the children's lives. At the time of the adjudicatory hearing, B.B. was twelve years old and Z.B. was thirteen years old; yet, their father had not seen either of them since B.B. was about fourteen months old. The children's biological father lives in . . .

At that time, the children's mother had not had her parental rights terminated, but she had been in and out of prison, on and off of drugs, and was an unstable parent to the children. The petition in the instant case was filed against the Petitioner Grandmother and the children's mother in February 2010 after police officers found drug paraphernalia in the Petitioner Grandmother's home. At the time of the children's removal, known drug users and drug dealers also shared the Petitioner Grandmother's home and the home was in disrepair, unclean, and infested with cockroaches and rodents. At the adjudicatory hearing, the Petitioner Grandmother made a number of stipulations which addressed her knowledge of the drug users and drug dealers in her home and its general unsanitary and unsafe conditions. In addition to these stipulations, the Petitioner Grandmother also agreed that she would participate in services to improve these aspects of her life with the children. The circuit court granted the Petitioner Grandmother a six-month adjudicatory improvement period to do so.

This improvement period included a treatment plan that outlined goals for the Petitioner Grandmother to meet. To complete these goals, the treatment plan directed the Petitioner Grandmother to participate in classes and therapy to improve her parenting and to improve the cleanliness and conditions of her home, including creating an environment free of drugs, drug paraphernalia, and drug abusers. The treatment plan stressed the importance of only allowing people in her home who are sober and appropriate to have contact with the children. Several witnesses at the dispositional hearing testified of the Petitioner Grandmother's participation in the treatment plan. The DHHR worker and a couple of the Family Preservation Services workers testified that the Petitioner Grandmother improved the cleanliness of her home. However, ample testimony also indicated that she was still associating with drug users and may have even been involved in drugs herself. At the dispositional hearing, a physician who had treated the Petitioner Grandmother throughout the proceedings testified that he had prescribed various medications to her. In some of her drug tests, medications for prescriptions she had filled were not appearing in her test results. In others, drugs for which she should not have normally tested positive were appearing in the results. Two witnesses testified that they had observed other people either coming in and out of the Petitioner Grandmother's home (i.e., C.S. and M.H.) or actually staying in her home (i.e., the Petitioner Grandmother's son, T., and one of her nephews who was recently released from prison). DHHR caseworker Roann Welch testified that during the improvement period, C.S. and M.H., who had lived in the home with the Petitioner Grandmother and the children

. . . Missouri, participated in the first few hearings of these proceedings by telephone, but did not continue participation in any hearings as the case progressed. At the adjudicatory hearing, the circuit court found that he legally abandoned the children. However, at disposition, it did not terminate his parental rights because it did not believe that it had adequate jurisdiction to do so.

previously, were arrested for transporting heroin while operating the Petitioner Grandmother's vehicle.

In addition to the testimony addressing the Petitioner Grandmother's treatment plan, the court also considered testimony concerning the children's progress. The children's psychologist, Renee Harris, testified that since living in their foster home, the children have slept better and have done better in school. She testified that the home environment with the Petitioner Grandmother would not be in the children's best interests. DHHR caseworker Ms. Welch testified that although the Petitioner Grandmother has made attempts to work on her treatment plan, she has not been able to "bring it home" and that consequently, she lacks the capability to provide the children with a safe environment. Ms. Welch recommended termination of the Petitioner Grandmother's rights and she did not see a reason for a delay to do so. Based on the testimony and evidence, the circuit court made findings that the Petitioner Grandmother has continued to associate with known drug users, people in the drug trade, and those associated with criminal drug activity; although she has taken care of the cleanliness problems in the home, she still associates on some level with drugs users. The court also made findings on the record that the Petitioner Grandmother has tested positive for drugs that she was not prescribed and did not test positive for drugs that she had filled prescriptions. The court stated that it could only reasonably conclude that someone was selling those prescription drugs, whether that someone was the Petitioner Grandmother or another person. Consequently, it concluded that terminating the Petitioner Grandmother's custodial rights to the children would be in the children's best interests. The circuit court further held that there was no reasonable likelihood that the Petitioner Grandmother would be able to substantially correct the circumstances of abuse and neglect in the near future.

"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 the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Additionally, the Court is mindful 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 [1977] 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) [1977] 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 Grandmother argues that she successfully completed her improvement period and, therefore, the circuit court wrongfully terminated her custodial rights. In response, the children’s guardians ad litem and the DHHR submitted responses in support of the court’s termination order, highlighting that although the Petitioner Grandmother made some progress in her improvement period, the totality of the circumstances shows that she had difficulty completely disassociating herself from drug activity. A review of the Petitioner Grandmother’s appendix supports the court’s decision, revealing that the treatment plan clearly required that the Petitioner Grandmother not associate with drug users in her home. Witnesses testified that although she improved the cleanliness of her home, she was still maintaining an association with people who were drug users and drug dealers. The circuit court did not err in its decision to terminate her custodial rights in the best interests of the children, B.B. and Z.B.

This Court reminds the circuit court of its duty to establish permanency for B.B. and Z.B. pursuant to Rules 36a, 39, 41 and 42 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Further, this Court reminds the circuit court of its duty pursuant to Rule 43 to find permanent placement for B.B. and Z.B. within eighteen months of the date of the disposition order. 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.*, 2011 WL 864950 (W.Va. 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).

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

Affirmed.

ISSUED: October 25, 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