STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.R.:

No. 11-0572 (Mercer County 10-JA-114-OA)

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 Mercer County, wherein the Petitioner Mother's parental rights to her child, J.R., were terminated.[1] The appeal was timely perfected by counsel, with an appendix accompanying the petition. The guardian ad litem has filed his response on behalf of the child, in support of the circuit court's termination order. The West Virginia Department of Health and Human Resources ("DHHR") also filed a response in support of termination.

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 J.R. She argues that the circuit court erred in terminating her parental rights without the benefit of an improvement period.

The petition for this case was filed on October 14, 2010,[2] pursuant to W.Va. Code § 49-6-5b(a)(3).[3] J.R. was born on October 12, 2010. Less than one month earlier, in

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[1] The Court notes that the circuit court also terminated the parental rights of the child's father, H.R. He has filed a separate appeal for his termination.

[2] The Court notes that the circuit court's Initial Order Upon Filing of Petition indicates that the petition was filed on October 13, 2010. A copy of the petition included in the Petitioner Mother's appendix, however, is stamped as filed with the Mercer County Circuit Clerk's office on October 14, 2010.

[3] W.Va. Code § 49-6-5b(a)(3) reads, in part: "Except as provided in subsection (b) of this section, the department shall file or join in a petition . . . to terminate parental

September 2010, the parental rights of her parents, the Petitioner Mother and H.R., had been terminated as to six other children. Accordingly, when J.R. was born, DHHR filed a petition to remove J.R. from the custody of the Petitioner Mother and H.R.

In its decision to terminate, the circuit court considered testimony and evidence taken at the February 14, 2011, hearing. The Petitioner Mother testified of H.R.'s tendency to be violent when he drinks alcohol, and testified specifically about an incident of domestic violence with him in December 2010. During this incident, she had been lying in bed when he elbowed her off the bed and slapped her in the face.[4] At the time of the hearing, the Petitioner Mother was still living with H.R. She testified that she believes her parental rights were terminated in the prior proceeding because she failed to separate herself from H.R. Moreover, she testified she intended in the past to separate from H.R., but has not. She testified that she once filed for divorce against him, but never followed through with it.

The family's Child Protective Services ("CPS") worker, Cristal Tabor, also testified at the February 14, 2011, hearing. In her testimony, she pointed out that the concerns over J.R.'s parents' domestic violence, instability, and H.R.'s drinking existed at the first termination and remained concerns in determining the present matter involving J.R. She testified of H.R.'s cocaine use and his failure to remain in a rehabilitation facility. Ms. Tabor testified that since the last proceeding which led to the Petitioner Mother's prior termination, Ms. Tabor has stressed to the Petitioner Mother the importance of separating from H.R. Nevertheless, the Petitioner Mother has failed to ever make this separation. Ms. Tabor recalled at least four instances during the last proceeding where the Petitioner Mother falsely represented to her that she had separated from H.R., when she actually continued to be with him. Ms. Tabor testified that the Petitioner Mother is currently living with him now. Ms. Tabor testified that due to the parents' circumstances, J.R. would be in danger if she remained in her parents' custody.

After considering the testimony and evidence provided on February 14, 2011, the circuit court found that nothing appeared to have changed for the better since the Petitioner Mother's prior termination, but only for the worse. The circuit court outlined on the record

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rights: (3) If the court has determined . . . the parental rights of the parent to a . . . . . . sibling have been terminated involuntarily."

[4] Patrolman J.D. Lambert filed a criminal complaint against H.R. on December 23, 2010, for domestic battery. A copy of this criminal complaint was admitted into evidence at the February 14, 2011, hearing, and is included in this record of appeal. Patrolman J.D. Lambert also testified at the February 14, 2011, hearing, and further corroborated the Petitioner Mother's testimony of this incident of domestic violence.

that although the Petitioner Mother testified that she was going to separate herself from H.R., she has not. Finding nothing to suggest that the conditions of neglect could be substantially corrected in the near future, the circuit court found it necessary for J.R.'s welfare to terminate the Petitioner Mother's parental rights.[5]

"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). "Termination 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 Mother argues that the circuit court erred in terminating her parental rights without the benefit of an improvement period and as such, she argues that it also erred in terminating her parental rights to J.R. In support, she asserts that she complied with every aspect of her services and plan with DHHR, with the only exception of failing to separate from H.R. "When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syl. Pt. 4, *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

This Court stated that if a circuit court "determines based upon all of the evidence, including evidence from any prior abuse and neglect cases, and clearly enunciates in reasoned findings, that there is clear and convincing proof that conditions constituting abuse

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[5] The Court notes that the circuit court also made findings to terminate the parental rights of J.R.'s father, H.R.

and neglect are present, and if the court clearly explains why it has concluded that an improvement period would be pointless, then the court *may*, in its discretion, decide not to grant such a period." *In re: Rebecca K. C.*, 213 W.Va. 230, 235, 579 S.E.2d 718, 723 (2003).

Here, in deciding to terminate the Petitioner Mother's parental rights, the record shows that the circuit court considered whether the Petitioner Mother had made improvements from her prior termination. Based on these considerations, the circuit court properly denied the Petitioner Mother an improvement period and consequently, the circuit court also properly terminated her parental rights. The circuit court concluded that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and further, that it is necessary for J.R.'s welfare to terminate the Petitioner Mother's parental rights.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental 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