STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: I.G., L.G., J.H., G.N. III, and T.N.

No. 11-0696 (Lewis County 10-JA-10 through 14)

FILED
January 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Lewis County, wherein the Petitioner Mother's parental rights to her children, I.G., L.G., J.H., G.N. III, and T.N., were terminated. The appeal was timely perfected by counsel, with petitioner's appendices from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her 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 in the parties' written briefs and the record on appeal, 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.

"'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). Petitioner challenges the circuit court's order terminating her parental rights, arguing that it erred in adjudicating her as an abusive and neglectful parent, and further that it erred in terminating her parental rights. However, a review of the record clearly demonstrates that the circuit court had sufficient

evidence before it to both adjudicate petitioner as abusive and also to order that her parental rights be terminated.

As to her first assignment of error, petitioner argues that she was denied the right to confront the main witness against her, her child I.G. She further argues that it was error to not allow her to recall the child as a witness after he recanted his allegations. Petitioner also asserts that it was error to prevent her other children from testifying as to the conditions in the home and the care provided. The initial petition was filed below after the child reported to school with bruising, abrasions, and puffiness to his left eye, which he indicated was caused by petitioner slapping him repeatedly. He also had redness and puffiness around his mouth, which he stated was the result of being slapped in the mouth by a man who also resided in his home. At adjudication, the circuit court conducted an in camera review of the child, finding that "the presence of the attorneys in this case would [be] especially intimidating to said child witness." Rule 8(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings states that:

> The presiding judicial officer may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the presiding judicial officer determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the presiding judicial officer shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes.

This rule provides circuit courts with discretion in making these determinations, and the circuit court in this matter stated in the adjudicatory order that "[s]aid in camera interview was electronically recorded and said recording was made available to, by playing the same for, the attorneys before the evidentiary hearing was resumed." As such, it is clear that the circuit court properly followed the procedure for such an in camera interview. As such, petitioner's argument as to her inability to cross examine this witness is without merit.

Petitioner also argues that she should have been entitled to recall I.G. to the stand after he recanted and indicated that his mother did not strike him. The record clearly illustrates that the interview with the DHHR in which the child recanted was made a part of the record to be considered by the circuit court, and the DHHR stipulated to the change in the child's story. The circuit court, however, found the child's initial testimony to be convincing, especially in light of medical expert testimony and photographs corroborating the child's

allegations. As such, the circuit court was not required to allow petitioner to recall I.G. Pursuant to Rule 8(a) of the Rules of Procedure for Child Abuse and Neglect Proceedings:

> there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the presiding judicial officer shall exclude this testimony if the potential psychological harm to the child outweighs the necessity of the child's testimony. Further, the judicial officer may exclude the child's testimony if . . . the equivalent evidence can be procured through other reasonable efforts."

The circuit court was within its discretion to deny the recall, not only because of the potential harm to the child, but also because any evidence potentially obtained from such testimony was already before the court. Further, the record is devoid of any evidence that petitioner could offer to show that the potential psychological harm to the child outweighed the necessity of his testimony. Similarly, petitioner offered no evidence in support of her argument that two of her other children should have been allowed to testify concerning the conditions of the home and the care they received. The circuit court had before it ample evidence of the unacceptable conditions in the children's home, including the fact that eight children and four adults were living in a three bedroom home that was filthy and had a strong odor of animal feces and urine, with trash and refuse strewn about the yard. Further, because of petitioner's long history of involvement with Child Protective Services ("CPS") and the DHHR, the circuit court likewise had ample evidence before it concerning the care the children received. Therefore, because petitioner offered no evidence that the potential psychological harm to the children was outweighed by the necessity of their testimony, and because equivalent evidence was already before the circuit court, it was not an abuse of discretion to deny petitioner's requests to recall I.G. and to allow two of her other children to testify.

As to petitioner's second assignment of error, she argues that it was error to terminate her parental rights because she was denied an improvement period despite having successfully completed two improvement periods in prior abuse and neglect matters. However, improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. While it is true that petitioner has completed two previous improvement periods, the fact that she has had three prior abuse and neglect proceedings against her demonstrates her repeated pattern of unacceptable parenting. Further, the DHHR has been providing services to petitioner since 1999, which have included individualized parenting, safety services, drug testing, housing/rent, supervised visitation, and private transportation. Despite these services, petitioner again found her children removed from her custody and failed to meet her clear and convincing burden of proof that she was likely to fully participate in the improvement period. Further, this Court

has held that "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . .' Syllabus point 1, [in part], *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Therefore, the circuit court's decision to terminate petitioner's parental rights without providing her an improvement period was not an abuse of discretion.

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 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. 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 of West Virginia 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: January 18, 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