STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
December 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: K.P., J.P., A.P., & L.C.

No. 11-0773 (Fayette County 10-JA-21 thru 24)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Fayette County, wherein the Petitioner Mother's paternal rights to the children, K.P., J.P., A.P., and L.C., were terminated. The appeal was timely perfected by counsel, with petitioner's appendix 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 his 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.' Syl. Pt. 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 termination of her parental rights, arguing that her due process rights were violated by her denial of effective assistance of counsel, and further that the circuit court committed error by impermissibly continuing the dispositional hearing for approximately eight months despite granting no improvement period in direct contradiction to Rule 32(a) of the Rules of Procedure for Child Abuse and Neglect Proceedings. A review of the record, however, indicates that petitioner's ineffective assistance of counsel argument is without merit, and

further that the delay in disposition was a procedural technicality brought on, in part, by the petitioner's own actions.

To begin, this Court has never recognized a claim for ineffective assistance of counsel in the context of abuse and neglect matters, and declines to do so in the instant matter. However, even if such a claim were recognized, it is clear from review of the record below that petitioner received effective assistance throughout the proceedings below. Petitioner specifically alleges that her counsel recommended that she not testify in her abuse and neglect proceeding below for fear of incriminating herself in the related criminal matter stemming from the sexual abuse of her daughter. Petitioner argues that this is not the case, and that per *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002), parents are afforded protection against testimony in abuse and neglect proceedings being used against them in criminal matters. However, petitioner misstates the holding in that case.

Not only does our holding in *In re Daniel D.* not provide such protection for parents in criminal matters, it plainly states that parents facing criminal charges stemming from abuse and neglect have a difficult decision to make regarding testifying in order to achieve reunification with their children. Petitioner is correct that it is well settled that "[b]ecause 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, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002) (quoting Syl. Pt. 2, *W. Va. Dep't. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996)). However, this Court clarified that "[a]s applied to the issue of culpability, the rule [allowing one's silence as affirmative evidence of culpability] simply confronts the accused parent with a choice: Assert the privilege against self-incrimination with the risk that silence will be considered in the civil proceeding as evidence of culpability, or waive the privilege and offer such evidence as the accused may alone possess to refute the charge of abuse and neglect." *In re Daniel D.*, 211 W.Va. 79, 87, 562 S.E.2d 147, 155 (2002). Based upon this holding, it is clear that counsel properly advised petitioner that her testimony in the abuse and neglect proceeding could be used against her in the associated criminal matter.

Petitioner next alleges that the circuit court's continuance of the dispositional hearing for approximately eight months constitutes reversible error because it was done in direct contradiction to Rule 32(a) of the Rules of Procedure for Child Abuse and Neglect Proceedings. She argues that she was unfairly prejudiced by the delay because she had been advised by counsel to not contact the DHHR without an attorney present, and therefore did not inquire about her children for several months. Petitioner's apparent lack of interest in her children's well being was then held against her and cited as a fact in support of

termination. The circuit court ordered petitioner's newly-appointed counsel below to inquire as to whether or not petitioner received such advice, and there is no evidence in the record that she did. Likewise, there is no evidence that petitioner ever requested that counsel inquire about the children's welfare on her behalf. Further, the record indicates that the dispositional hearing was held in abeyance at the request of the adult respondents below, including the petitioner, so that they could review the results of the child's psychological examination. The examination was being conducted in the Respondent Stepfather's related criminal matter, and was therefore out of the control of both the circuit court and DHHR. Petitioner was not unduly prejudiced by this delay.

This Court has held that "[a] mere procedural technicality does not take precedence over the best interest of the children." *In re Tyler D.*, 213 W.Va. 149, 160, 578 S.E.2d 343, 354 (2003). Prior to the instant matter below, petitioner voluntarily relinquished her parental rights to seven other children. In the instant case, petitioner refused to acknowledge the sexual abuse that her child suffered, despite clear and convincing evidence that such abuse occurred, and held fast to her position that the child is a liar. Further, the child reported sexual abuse to petitioner on two separate occasions, and the petitioner not only failed to report it in a timely manner, but also allowed the child to be subjected to additional sexual abuse in the interim. It is clear from the record that the petitioner failed to protect her child, and that, if returned to her, petitioner would refuse to believe the child if additional sexual abuse were reported. As such, petitioner's refusal to acknowledge the conditions of abuse and neglect have rendered the problem untreatable. For these reasons, termination of petitioner's parental rights was clearly in the child's best interest, and an alleged procedural technicality will not take precedence over the same.

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: December 2, 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