STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.D.

No. 11-0807 (Monongalia County 10-JA-7)

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 Monongalia County, wherein the Petitioner Mother's parental rights to her child, B.D., 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 her response on behalf of the child.

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 order terminating her parental rights, arguing that there was insufficient evidence upon which to adjudicate her as abusive and/or neglectful, that it was error to deny her an improvement period, and further that it was error to deny the child's paternal grandmother appointed counsel to assist in her attempts to gain custody of the child. However, the record shows that there was ample evidence upon which to adjudicate petitioner as an abusive and/or neglectful parent, and that the circuit court correctly exercised its discretion in denying her an

improvement period. Lastly, petitioner's argument as to appointment of counsel is without merit.

In regard to her first assignment of error, petitioner argues that the circuit court erred in adjudicating her as an abusive and/or neglectful parent because there was insufficient evidence upon which to make this finding. Specifically, she argues that the Respondent Father admitted to physically abusing the child outside the petitioner's presence and that he never informed her of the incidents. She also argues that she eventually sought treatment for the child's injuries after she noticed he was "fussy or not acting normally." It is important to stress the severity of the child's injuries, which include multiple fractures to the skull, tibia, and several ribs. It is also important to note that, at the time the child received treatment, he was only fifty-one days old. This Court has held that "[t]he term 'knowingly' as used in West Virginia Code § 49-1-3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred." Syl. Pt. 7, *W.Va. Dep't. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). In the action below, the Respondent Father stipulated to injuring the child on at least three occasions, and later testified that he was under the influence of heroin at the time of at least one of the incidents. Clearly, this evidence establishes that petitioner was presented with sufficient facts that she should have recognized the abuse occurred. Further, at adjudication, a DHHR case worker testified that after the child was found to have rib fractures at the hospital, the petitioner quickly left the facility with the child prior to receiving treatment, leaving behind her belongings and necessitating the involvement of law enforcement. As such, the circuit court did not err in adjudicating petitioner as an abusive and/or neglectful parent.

As to her second assignment of error, petitioner argues that the circuit court erred in denying her an improvement period because she had demonstrated that she had done all that was possible to remedy the issues that resulted in her adjudication. She argues that this Court has held that conviction of a criminal offense does not forfeit a parent's right to custody of a child, and further that at the time of disposition she anticipated being released from custody in Ohio within a matter of months. It is true that this Court has held that "'[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.' Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970)." Syl. Pt. 7, *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000). However, we also held in that matter that "[t]he commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period." Syl. Pt. 5, *Id*. A review of the record and briefs indicates that petitioner was in custody in Ohio on criminal charges at the time of the dispositional hearing, and was unsure

as to a definitive release date. As such, the circuit court properly denied the same, as it was precluded from granting petitioner a delayed improvement period. Further, improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. In this matter, the record demonstrates that petitioner did not meet her burden to show by clear and convincing evidence that she was likely to fully participate in an improvement period. In its dispositional order, the circuit court noted the an Ohio caseworker testified that petitioner had previously been involved in an abuse and neglect proceeding in that state regarding an older child. During the improvement period in that matter, the petitioner and Respondent Father essentially abandoned this older child by coming to West Virginia without notifying the proper authorities. Based upon this evidence, as well as other factors presented to the circuit court, it is clear that petitioner was not likely to fully participate in an improvement period, and the circuit court's decision to deny the same was not an abuse of discretion.

Lastly, petitioner argues that it was error to deny the motion to appoint counsel for the child's paternal grandmother to assist in her attempts to gain custody of the child. Simply put, there is no authority that requires a circuit court to appoint counsel for a relative seeking placement of a child in an abuse and neglect proceeding. Likewise, there is no evidence in the record to indicate that the paternal grandmother was not being considered as a potential placement, and the record in fact illustrates that she was free to intervene as a pro se litigant. As such, the Court finds no merit in petitioner's argument as it relates to the circuit court's denial of appointed counsel for the paternal grandmother.

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