STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.S., M.S., M.S., M.S., M.S.,& M.A.S.:

No. 11-0844 (Raleigh County 10-JA-104 thru 109)

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

MEMORANDUM DECISION

Petitioner Father appeals the circuit court's order denying him a post-adjudicatory improvement period. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response concurring in the guardian ad litem's response.

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.

"'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).

This petition was initiated after one of the children, then six years old, was taken to Raleigh General Hospital, and then transported to Charleston Area Medical Center Women's and Children's Hospital, weighing less than twenty pounds, severely dehydrated and

malnourished, and with bruises on her body. An investigation revealed that the child was subjected to various abuse, including having her food restricted, being tied into a carseat on a regular basis, and being locked in a utility room at night with no bed or blankets to prevent her from eating in the middle of the night. The investigation revealed that this abuse had been ongoing for at least two to three years, dating back to when the child lived with both her mother and Petitioner Father in Tennessee. Several referrals were made to the state of Tennessee, but due to errors by those officials, law enforcement was never contacted. The mother had moved to West Virginia less than a year before the child's hospitalization, and the petitioner had been to see the child in West Virginia approximately one month prior to her hospitalization. The mother and her girlfriend were arrested on various charges, and remain incarcerated. A Tennessee police officer testified before the circuit court that an indictment was being sought against Petitioner Father in Tennessee.

Petitioner Father stipulated to neglect, and admitted that he had restricted the child's food regularly upon instructions of the mother, and that he had allowed the child to be locked in a utility room and forced to sleep on the floor without a bed or blankets. The investigation revealed that this had been ongoing for a significant period of time while Petitioner Father and mother still lived together in Tennessee. Petitioner Father requested an improvement period, but the circuit court denied the motion. The circuit court found that there was "compelling evidence to demonstrate that the [petitioner] father shows a complete lack of responsibility to protect this child by failing to feed the child or failed to place the child at night in a bed with blankets allegedly to protect the child which is clearly child abuse and neglect and occurred over a significant period of time."

Petitioner Father appeals, arguing that he should have been granted an improvement period after he stipulated to neglect in this matter. "W.Va.Code [§] 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Syl. Pt. 2, *In re Joseph A.*, 199 W.Va. 438, 485 S.E.2d 176 (1997)(citations omitted). However, "[a] parent's right to an improvement period is carefully defined because the pre-eminent concern in abuse and neglect proceedings is the best interest of the child subject thereto." *In re Charity H.*, 215 W.Va. 208, 216-17, 599 S.E.2d 631, 639 - 40 (2004) (citing Syl. Pt. 3, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999)). In the present matter, the circuit court found that Petitioner Father had participated in the abuse of the six year old child and had failed to report it for years. The circuit court found that Petitioner Father's actions were tantamount to abuse, and bordered on torture. Statutorily, the DHHR is not required to make reasonable efforts to preserve the family if the court determines that the parent has subjected the child to aggravated circumstances which include abandonment, torture, chronic abuse and sexual abuse. W.Va. Code § 49-6-5(a)(7)(A). Thus, this Court finds no error in the denial of a post-

adjudicatory improvement period in this matter.

This Court reminds the circuit court of its duty to establish permanency for M.S., M.S., M.S., M.S. and M-A. S. pursuant to Rules 36a, 39, 41 and 42 of the West Virginia Rules of Procedure for Child Abuse and Neglect. Further, this Court reminds the circuit court of its duty pursuant to Rule 43 to find permanent placement for M.S., M.S., M.S., M.S. and M-A. S. 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 of West Virginia v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998).

For the foregoing reasons, we find no error in the decision of the circuit court and the denial of a post-adjudicatory improvement period 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