

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: K.S.:

No. 11-0907 (Fayette County 09-JA-67)

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 Fayette County, wherein Petitioner Mother's parental rights to her child K.S. were terminated. 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.

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.

Petitioner Mother challenges the circuit court's order terminating her parental rights to K.S. She argues that the circuit court erred in terminating her parental rights after she substantially complied with the terms of her improvement period. Petitioner Mother argues that termination was not the least restrictive means available to the court at disposition.

The petition for this case was filed on October 6, 2009, after the Petitioner Mother's other child, J.S., died while in her care. J.S. was born on August 11, 2009, and had tested positive for benzodiazepine at birth. The day after his birth, the Petitioner Mother also tested positive for benzodiazepine and the petition was later amended to allege that the drugs in J.S.'s system contributed to his death. The petition also alleged neglect of the subject child, K.S. At adjudication, Petitioner Mother stipulated to consuming controlled substances not prescribed to her while pregnant with J.S., after the birth of J.S., and at the filing of this case's petition. The circuit court granted her a post-adjudicatory improvement period for six months.

The appendix filed with this appeal contains several Multi-Disciplinary Evaluation Team ("MDT") reports. These reports indicate that shortly after visits with Petitioner Mother, the child would break out in rashes and hives, her behavior would become more aggressive, and she would become more clingy towards her foster mother. The reports also indicated

that there were instances when the child would return to the foster mother with the same pull-up underwear from the beginning of the four-to-five hour visit and would need changing. The Petitioner Mother's service provider reported that Petitioner Mother has a negative attitude that hinders her progress with the child. The service provider also reported that Petitioner Mother only follows through with her services about fifty percent of the time. After the child was diagnosed with asthma, the circuit court ordered that the Petitioner Mother avoid exposing the child to tobacco smoke. Nevertheless, MDT reports in the appendix indicate that Petitioner Mother continued to allow the child to be exposed to tobacco smoke, either through Petitioner Mother's own smoking or through visits with the child's maternal grandparents who are smokers. This smoke exposure caused the child to break out in rashes and hives and required the child to undergo breathing treatments. Toward the end of her improvement period, Petitioner Mother tested a positive drug screen. Throughout the course of these proceedings, the circuit court extended Petitioner Mother's improvement period twice, but finally revoked her improvement period in March 2011, and set the matter for disposition.

In its May 12, 2011, termination order, the circuit court found that Petitioner Mother continued to abuse controlled substances, exhibited a lack of judgment and maturity, and has been deceptive with the court. Consequently, it found that it would not be in the best interest of the child to return her to Petitioner Mother and that there was no reasonable likelihood that the conditions of abuse or neglect could be corrected in the near future. As a result, the circuit court terminated the Petitioner Mother's parental rights.

“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 reviewed 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). Also, “[t]ermination 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.’ Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syl. Pt. 5, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011).

Petitioner Mother argues that the circuit court erred in terminating her parental rights because she substantially complied with her improvement period. In support, she argues that she submitted to the circuit court’s requirements of a substance abuse evaluation and entrance into a rehabilitation program and in addition, gained employment and expected to provide suitable housing with her parents. She also asserts that DHHR reported a smoke-free home on its home visits and she had clean drug tests for over eleven months before she failed drug tests twice in February 2011. In response, the child’s guardian ad litem and DHHR support the circuit court’s termination order. Both argue that the Petitioner Mother had multiple chances to successfully complete her improvement period, but continued to use illegal drugs and jeopardize her child’s health by exposing her to tobacco smoke. DHHR stresses the child’s need for permanency in a loving and supportive home as quickly as possible.

The appendix shows that the Petitioner Mother’s original six-month post-adjudicatory improvement period was extended twice, both for another two months each. Despite this time for improvement, the Petitioner Mother failed to fully cooperate with DHHR services, continued to abuse drugs, and continued to risk her child’s health by exposing her to tobacco smoke. Under these circumstances, the circuit court did not err in terminating the Petitioner Mother’s parental rights.

This Court reminds the circuit court of its duty to establish permanency for K.S. 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 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for K.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.*, 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 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