STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: E.M.

No. 11-0913 (Roane County 10-JA-19)

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Roane County, wherein the Petitioner Mother's parental rights to her child, E.M., 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 appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

On appeal, petitioner argues that the circuit court erred and abused its discretion in denying her motion for an improvement period. Petitioner argues that the circuit court denied this motion solely because she was incarcerated and therefore could not complete an improvement period. Further, the allegation against petitioner was that she had neglected her child due to her incarceration. Petitioner argues that she left the child with a family member prior to incarceration and neglected to leave the proper paperwork to effect a temporary custody agreement. However, it is petitioner's contention that the family member was clearly a suitable custodian because she became the child's guardian after the DHHR took emergency custody. Additionally, petitioner argues that she testified that she would fully comply with the terms of any improvement period, and argues that she could satisfy the same within the time allowed by statute.

In response, the guardian ad litem argues that denial of an improvement period and termination were proper because petitioner failed to acknowledge or appreciate that her substantial drug use affected her ability to parent her child. Despite being under the influence of drugs at least half of the time she had the child in her custody, petitioner stated that her drug use did not impair her ability to care for the child. Because of this lack of appreciation for the negative role drug abuse has on her parenting skills, there is no way that

petitioner can seek to improve the conditions which caused E.M. to be removed from her custody. The guardian ad litem also makes note that petitioner previously relinquished her parental rights to an older child when faced with disposition in a prior abuse and neglect proceeding stemming from her drug abuse and the presence of a methamphetamine laboratory in the kitchen of the home where her older child lived. While it was not the basis for the petition in this matter, the guardian ad litem also notes that E.M. tested positive for methamphetamine, morphine, and TCH at birth because of petitioner's drug use. Contrary to petitioner's assertion that incarceration was the sole factor relied upon in denying her an improvement period, the guardian ad litem argues that the circuit court also considered petitioner's long-term addiction and lack of belief that her drug use adversely affected her son. The State has also responded, and joins in and concurs with the guardian ad litem's response.

"'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). The circuit court below found that petitioner "is a drug addict with a fifteen year history of substance abuse," and further that "she [would] remain incarcerated throughout the entire period of an initial six months [sic] post-adjudicatory period of improvement." The circuit court also found that petitioner "does not believe that her drug use during the first two months of the child's life adversely affected her ability to parent the child." It is clear on review of the record, that contrary to petitioner's allegations, the circuit court considered several factors in denying petitioner an improvement period in this matter. Further, it is the Court's position that consideration of petitioner's incarceration was not necessary to deny her an improvement period.

Improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. Further, this Court has held that "in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense." *W. Va. Dep't of Health and Human Res. ex rel. Wright v. Doris* S.,

197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). Clear from the record is the fact that petitioner failed to acknowledge the underlying problem, i.e. her extensive drug abuse and its impact on her ability to properly parent a child. This Court has also 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). As such, the circuit court was within its discretion to deny petitioner an improvement period based upon the best interest of the child.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 the child 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[1] 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 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).

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[1]Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

For the foregoing reasons, we find no error in the decision of the circuit court to deny petitioner an improvement period, and the termination of petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: February 13, 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