STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: E.B.:

No. 11-0951 (Wood County 10-JA-51)

FILED
January 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother appeals the termination of her parental rights to her child E.B. The appeal was timely perfected by counsel, with petitioner's appendix 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 joining in the response of the DHHR.

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. 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 Petitioner Mother punched the child, then three years old, in the face. A few months prior, Petitioner Mother had been involved in a car accident wherein the child was not in a car seat, and Petitioner Mother tested positive for several drugs. Petitioner Mother admitted these allegations and was adjudicated as abusing and

neglecting. She was then given an improvement period. Once in foster care, the child began exhibiting sexualized behaviors in two different foster homes. He was placed in play therapy treatment, wherein he disclosed that he witnessed his mother and her boyfriend unclothed and "humping," and described various sexual acts in detail. An amended petition was filed, adding allegations of sexual abuse against Petitioner Mother. At the time of her adjudication on the amended petition, Petitioner Mother was incarcerated in another state and did not appear at the adjudicatory hearing. Two different foster mothers testified as to the child's behaviors, as did the treating play therapist. The circuit court found that the Petitioner Mother had sexually abused the child, and adjudicated her as an abusing parent. The circuit court then terminated her parental rights, finding that Petitioner Mother sexually abused the child, and therefore there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future.

On appeal, Petitioner Mother argues that her due process rights were violated when the adjudication and disposition hearings were held in her absence when she was in custody in another state, and no separate guardian ad litem was appointed to conduct an independent investigation, nor was there evidence that her attorney communicated with her in order to defend the allegations of abuse and neglect. Regarding Petitioner Mother's appearance at the adjudication, this Court found that "whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court." *State ex rel. Jeanette H. v. Pancake*, 207 W.Va. 154, 166, 529 S.E.2d 865, 877 (2000). Furthermore, there is no case law to support Petitioner Mother's argument that a respondent in an abuse and neglect proceeding is entitled to the appointment of a guardian ad litem, and this Court declines to extend the case law to support such a proposition. Upon a review of the record, there is no indication that Petitioner Mother was not communicating with prior counsel, as counsel informed the circuit court of Petitioner Mother's whereabouts. Also, counsel cross examined all of the witnesses and advocated for his client while she was incarcerated. We find no violation of Petitioner Mother's due process rights in this matter.

Secondly, Petitioner Mother argues that the three year old child was not a competent witness, so his out of court statements to his play therapist should not be admitted as evidence, even if said statements fall under an exception to the hearsay rule. This Court has held

> "When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of

> promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 9, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001), *cert. denied*, 534 U.S. 1142, 122 S.Ct. 1096, 151 L.Ed.2d 994 (2002).

Syl. Pt. 4, *Misty D.G. v. Rodney L.F.*,221 W.Va. 144, 650 S.E.2d 243 (2007). This Court reviewed the testimony and found it admissible because while the therapist initially gathered information in a forensic manner, it was gathered for the purpose of evaluation and treatment of the child as well. The therapist in this matter initially began treating the child based upon a referral from his foster care agency that he was exhibiting sexualized behaviors in the home. She saw him ten to eleven times, for an hour each session, for play therapy. The therapist's testimony was clearly admissible as a medical diagnosis and treatment exception to the hearsay rule, since the statements were gathered during play therapy. This Court finds no error in the admission of evidence of the child's statements and actions to the play therapist.

This Court reminds the circuit court of its duty to establish permanency for E.B. 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 E.B. 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