STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: C.H., et al.

No. 11-0987 (Berkeley County No. 09-JA-37, 09-JA-38)

FILED
September 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Berkeley County, wherein the Petitioner Mother's parental rights to the children[1], C.H.-1 and C.H.-2, were terminated. The appeal was deemed 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 children. Intervenors below, S. B. and C. B., have also filed a summary response. Petitioner has also filed a reply brief.

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." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Petitioner challenges the circuit court's order denying her motion for reconsideration and upholding the

[1]The children in this matter have the same initials, so the Court will refer to them throughout as C.H.-1 and C.H.-2.

termination of her parental rights, arguing that her due process rights were violated by the circuit court's failure to properly follow the Rules of Procedure for Child Abuse and Neglect Proceedings and associated statutes. Specifically, petitioner alleges that the DHHR illegally took custody of her children without properly giving her a preliminary hearing and that West Virginia Code § 49-6-9(f) states that "[a]ny retention of a child or order for retention of a child not complying with the time limits and other requirements specified in this article shall be void by operation of law." Because she believes the retention of her children did not comply with the applicable statutory requirements, petitioner argues that the termination of her parental rights should be voided and the children returned to her custody. However, the record shows that petitioner's due process rights were not violated and that the parties below properly followed the applicable statutory provisions and rules governing such procedures, despite the circuit court's finding that petitioner's due process rights were violated.

Petitioner's argument hinges on paragraph sixteen of the circuit court's May 3, 2011 order denying her motion for reconsideration, wherein it was stated that "the Court returned physical and legal custody of the Infants to the Mother on July 20, 2009." A review of the record, however, illustrates that all parties to this action, as well as the circuit court, continued to operate as if the DHHR had retained legal custody following the preliminary hearing on that date. No order was entered to memorialize this preliminary hearing, but the transcript of the same is available for review, and it shows that petitioner entered into a safety plan with the DHHR in exchange for the physical custody of her children. Such arrangements are routine in these types of proceedings, with the DHHR retaining legal custody to ensure the safety of the children. During the hearing on July 20, 2009, petitioner waived her right to a preliminary hearing by entering into the safety plan; no particular findings of imminent danger were required as to her due to this agreement. As such, it is clear that no additional petition needed to be filed and no additional preliminary hearing held; petitioner was simply granted physical custody on a probationary basis.

Thereafter, petitioner failed to adhere to the terms of her safety plan, causing the DHHR to remove the children from her physical custody once again. Though she now alleges a violation of her due process rights for failure to file a new petition or hold a subsequent preliminary hearing, no such issues were raised at the time of the taking despite petitioner being represented by counsel throughout the pendency of the action below. At adjudication, petitioner stipulated to medical neglect for her failure to keep the children's immunizations current. It is also clear from her continued participation in these proceedings that petitioner waived any alleged due process violation. This Court is of the opinion that the record reflects a common understanding that the DHHR retained legal custody of the children following the July 20, 2009 preliminary hearing. Therefore, we find no violation of petitioner's due process rights in relation to the alleged illegal taking of the petitioner's children on July 27, 2009, and any related allegations concerning the lack of a new petition

or an associated preliminary hearing as required by statute or the Rules of Procedure for Child Abuse and Neglect Proceedings.

As for the termination itself, the record shows that petitioner failed to complete the terms of her improvement period. In fact, in the order denying petitioner's motion for reconsideration, the circuit court found that the number of times petitioner violated the terms of her improvement period led "to the only conclusion that sufficient improvement has not been made in the context of all of the circumstances of the case to justify return of the children." This is in spite of the circuit court's finding that the other parties' actions throughout the proceedings hampered petitioner's ability to follow through with the terms of her improvement period. This Court has held that "[a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child[ren]." Syl. Pt. 6, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). The record for this matter shows that petitioner herself admitted that she did not successfully complete her improvement period. While petitioner did not sustain any positive drug screens, she did miss multiple screens and also provided diluted screens. Petitioner further failed to complete required substance abuse and psychological evaluations, failed to complete a parenting education program, failed to obtain stable housing, failed to report changes in residency as directed, and failed to visit her children for long periods of time.

This Court has previously 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, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In Re: R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). The children in this matter were two years old and less than a year old, respectively, when the third amended petition was filed. As such, these are the specific type of children that the above-quoted case law was intended to protect. The Court therefore finds no error in the circuit court's finding that the conditions of abuse and neglect could not be substantially corrected in the near future.

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: September 26, 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