# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**In Re: B.C., C.C., and A.C.:**

**No. 11-1027** (Cabell County 09-JA-69, 70 & 71)

**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 children B.C., C.C. and A.C. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has filed its 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. 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).

The petition in this matter was filed after the children were found unsupervised in a home, with their father and his girlfriend's mother passed out from drug use. At the time the petition was filed, Petitioner Mother could not be located, and was later determined to be homeless. She already had an open case with the DHHR for drug abuse. Petitioner Mother

was given an improvement period, but almost immediately had three positive drug screens and was noncompliant in services. Due to her frequent moves, she failed to remain in contact with her counsel and with the DHHR. A case plan was put into place, but Petitioner Mother again failed to comply by not showing for drug screens and not attending drug treatment. She did have some negative drug screens, but often would appear one to three days after the date she was to take her drug test. During this time, she was dismissed from the parenting program for noncompliance. However, the circuit court allowed her more time to improve, and Petitioner Mother did complete her drug treatment intake. She then began another period of noncompliance, and was arrested on criminal charges, which were dismissed so that the prosecutor could take the charges directly to the grand jury. She again failed to take her drug screens, and became homeless again as well. The circuit court found that Petitioner Mother has not consistently completed her responsibilities. She has been charged with two felonies, and presents many excuses for her failure to fully comply with the family case plan. One major problem is that Petitioner Mother fails to have stable housing. The court noted that disposition had originally been set for a year earlier. The court also noted that Petitioner Mother failed to remain in contact with the DHHR and her attorney, as ordered by the court. Petitioner Mother failed to complete the substance abuse assessment and follow up with any recommendations after the assessment. She failed to complete all of her drug screens, and failed to fully participate in parenting services. She failed to pay child support. Since she has failed to comply with or benefit from services, her parental rights were terminated.

On appeal, Petitioner Mother first argues that the circuit court erred in terminating Petitioner Mother's parental rights as it was not the least restrictive alternative available, did not preserve the children's health and safety, and was not necessary to establish stability and permanency for the children. This Court has stated that "when a parent cannot demonstrate that he/she will be able to correct the conditions of abuse and/or neglect with which he/she has been charged, an improvement period need not be awarded before the circuit court may terminate the offending parent's parental rights." *In re Emily*, 208 W.Va. 325, 336, 540 S.E.2d 542, 553 (2000). Moreover, termination is proper when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child . . . ." W.Va. Code § 49-6-5(a)(6). The evidence shows that the circuit court properly found that there was no demonstration that Petitioner Mother could correct the conditions of abuse and neglect. She continued the same pattern of improper behavior for approximately seventeen months. Her drug use and repeated homelessness caused instability that threatened the children's health and safety, and permanency could not be established while Petitioner Mother maintained her parental rights. This Court finds no error in the termination of parental rights.

Petitioner Mother also argues that the circuit court erred in finding that the conditions

of abuse and neglect could not be substantially improved in the foreseeable future. As stated above, West Virginia Code § 49-6-5(b) mandates that when a court considers whether or not to terminate parental rights, the finding must be that there is no reasonable likelihood that the conditions of abuse or neglect can be corrected. In the present case, Petitioner Mother was given over a year to correct the conditions of abuse and neglect. However, as the circuit court noted, the same issues continued throughout the case, including failure to comply in drug screens, repeated homelessness, drug use, and general noncompliance. This Court finds no error in the circuit court's finding that the conditions of abuse and neglect could not be substantially improved in the foreseeable future.

Next, Petitioner Mother argues that the circuit court erred in referring to Petitioner Mother's felony arrest in its Findings of Fact when the felony charges had already been dismissed by the Magistrate Court of Wayne County. First, the circuit court specifically noted in its order that the felonies were dismissed so that the prosecutor could bring the matter before the grand jury. There is no indication that the felonies were dismissed due to Petitioner Mother's innocence. Further, the circuit court gave a myriad of reasons for the termination in this matter. Thus, this Court finds no error in the circuit court's reference to Petitioner Mother's arrest.

Additionally, Petitioner Mother argues that the circuit court erred in finding that Petitioner Mother failed to complete her family case plan. A review of the record in this matter shows that Petitioner Mother in fact failed to complete the goals of the case plan, as she was continually noncompliant in most areas of her improvement period. She failed to appear for many drug screens, and when she did appear, she would appear a day or more after her scheduled screen. She was removed from the parenting program once for noncompliance. She was repeatedly homeless, and never paid child support for her children. She had positive drug screens at various periods throughout the proceedings. This Court finds no error in the circuit court's finding that Petitioner Mother failed to complete her case plan.

Petitioner Mother next argues that the circuit court erred in finding that she did not communicate with the DHHR and with her counsel. By counsel's own admission during a hearing, Petitioner Mother failed to communicate with him regularly, even after ordered to do so by the circuit court. Further, testimony showed that she failed to keep in contact with the DHHR as well, in violation of court orders. The DHHR repeatedly testified at various hearings that it had difficulty contacting Petitioner Mother, as she changed addresses and telephone numbers frequently, and failed to inform the DHHR of these changes.

Finally, Petitioner Mother argues that the circuit court erred in failing to order the DHHR to pursue relative placement for the children. Specifically, she argues that the children should have been placed with her mother, the children's grandmother. While it is true that the West Virginia Code creates a preference for abused and neglected children to be placed with grandparents, this Court has clarified that the preference is not absolute and does not require lower courts to place children with their grandparents in all circumstances. *In re Elizabeth F.*, 225 W.Va. 780, 786-87, 696 S.E.2d 296, 302-03 (2010). Providing further explanation, we have held that "an integral part of the implementation of the grandparent preference, as with all decisions concerning minor children, is the best interest of the child." *Id*. In fact, once a lower court has properly determined that a child has been abused or neglected and that the natural parents are unfit, "the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody." Syl. Pt. 8, in part, *In Re: The Matter of Ronald Lee Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). Based upon this guidance, "adoption by a child's grandparents is permitted only if such adoptive placement serves the child's best interests. If, upon a thorough review of the entire record, the circuit court believes that a grandparental adoption is not in the subject child's best interests, it is not obligated to prefer the grandparents over another, alternative placement that does serve the child's best interests." *In re Elizabeth F.*, 225 W.Va. at 787, 696 S.E.2d at 303 (2010) (citing Syl. Pts. 4 and 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005)). Although the record is scant at best on this issue, it appears that the circuit court did consider the grandmother as a placement, but she failed a home study performed by the DHHR. She has a criminal history which includes driving under the influence charges, and Petitioner Mother has related to the DHHR that the grandmother was physically abusive to Petitioner Mother when she was a child. There is no evidence that permanent guardianship would have protected the children in this matter, especially given the fact that the grandmother failed a home study. This Court finds no error in the failure to place the children with the grandmother.

This Court reminds the circuit court of its duty to establish permanency for B.C., C.C., and A.C. 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 B.C., C.C., and A.C. 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