STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: S.M. and F.M:

No. 11-1079 (Kanawha County 11-JA-7 & 8)

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 S.M. and F.M. 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 on behalf of the children.

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 was filed alleging prior terminations of parental rights of both parents, a non-accidental subdural hematoma to S.M., severe growth delays to both children, and deplorable conditions in the home, including dog feces packed into the heating vents in the children's room. Within days of the petition being filed, the parents were arrested and

charged with operating a clandestine methamphetamine lab, while the children had been in the home. An amended petition was filed adding allegations related to the methamphetamine lab. The parents were adjudicated as abusing after neither could espouse a plausible explanation for S.M.'s injuries. Petitioner Mother has blamed the injuries on the family dog, on a fall, and on the father, as well as admitting to hitting the child in the face. The father denies hitting the child. As a condition of Petitioner Mother's release from jail after her incarceration on the methamphetamine lab charges, she entered a rehabilitation program. However, her parental rights were terminated, after the circuit court found that although reasonable efforts to preserve the family were not required due to the aggravated circumstances of the prior terminations, services were provided, just as services were provided in Arkansas before the prior terminations. The circuit court found that the parents failed to participate meaningfully in services and have not followed through with a reasonable family case plan. The court denied an improvement period, finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future. Post-termination visitation is not allowed as it is not in the best interests of the children.

On appeal, Petitioner Mother first argues that the circuit court erred by refusing to grant Petitioner Mother an improvement period after she enrolled on her own in an inpatient drug treatment and therapy program designed to help her parent her children. In order to receive an improvement period, the parent must demonstrate, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. *See* W.Va. Code § 49-6-12. While it is true that Petitioner Mother is participating in a treatment program, at least a portion of her motivation for such was release from incarceration. Moreover, this Court has found that reasonable efforts, such as services provided by the DHHR in an improvement period, are not required if there are aggravated circumstances such as felonious assault on the child or prior terminations of parental rights to other children. W.Va. Code §§ 49-6-5(a)(7)(B)(iv) and (C). In the present matter, the child suffered a nonaccidental injury, and various explanations were given for the injury. Further, Petitioner Mother has had prior terminations of parental rights in Arkansas. Thus, this Court finds no error in the denial of an improvement period.

Regarding the termination in this matter, 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). This Court finds no error in termination of Petitioner Mother's parental rights without an improvement period.

Finally, Petitioner Mother argues that she should have been granted post-termination visitation. This Court has held that "[w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). In the present case, the evidence indicates that S.M. was just over a year old at the time of her removal, and F.M. was only two months old. The guardian ad litem indicates that there is not a significant bond between Petitioner Mother and her children. Further, Petitioner Mother has not exercised visitation due to her incarceration throughout these proceedings. Thus, this Court finds no error in the denial of post-termination visitation in this matter.

This Court reminds the circuit court of its duty to establish permanency for S.M. and F.M. 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 S.M. and F.M. 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