STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.S. and K.S.

No. 11-1089 (Raleigh County 10-JA-08-K, 11-JA-01-K)

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Raleigh County, wherein Petitioner Mother's parental rights to her children, J.S. and K.S., were terminated. The appeal was timely perfected by counsel, R. Stephen Davis, though petitioner did not provide an appendix upon representations that the same was unnecessary. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Teresa D. Daniel, has filed her response on behalf of the children.

This Court has considered the parties' briefs on appeal. The facts and legal arguments are adequately presented in the parties' written briefs on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the briefs presented, the Court finds no substantial question of law and no prejudicial error as to assignments of error I and II. However, the Court does find prejudicial error as to assignment of error III. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

As more fully explained herein, the Court is of the opinion that the circuit court erred in terminating petitioner's parental rights to K.S. without holding a formal adjudicatory hearing in relation to this child. Because of this Court's prior holdings stating that a circuit court may not proceed to disposition until an adjudicatory hearing has been held and it is determined if the child in question is abused or neglected, the decision of the Court is set forth in a memorandum decision rather than an opinion. As noted below, this Court has held that the statutory requirement of West Virginia Code § 49-6-2 that a hearing be held to determine if the child in question is abused or neglected is a "prerequisite to further continuation of the case." Syl. Pt. 2, in part, *In re Emily G.*, 224 W.Va. 390, 686 S.E.2d 41 (2009). Accordingly, this case satisfies the "limited circumstance" requirement of Rule 21(d) and it is appropriate for the Court to issue a memorandum decision rather than an opinion.

On appeal, petitioner argues that the circuit court erred by terminating her parental rights based on the finding that there was no reasonable likelihood that the conditions creating the neglect could be substantially corrected in the near future. She argues that she was entitled to thorough efforts by the social services system to determine if she could adequately care for the children with intensive long-term assistance per our holding in *In re Maranda T.*, 223 W.Va. 512, 678 S.E.2d 18 (2009), because there was an allegation of neglect based upon her intellectual incapacity. Petitioner

states that little, if any, effort was made below to reach such a determination, and that there was no evidence presented in support of her inability to care for the children, beyond a single psychological report. As such, petitioner argues that there was insufficient evidence upon which to base a determination that she did not have the capacity to be rehabilitated or to improve her parenting skills. Further, petitioner argues that it was error to terminate her parental rights without giving her an improvement period during a time she was able to use medication for bi-polar disorder. Petitioner states that she was under doctor's orders not to take the medication during pregnancy, and that she was pregnant during the entirety of her improvement period below. Lastly, petitioner argues that it was error for the circuit court to terminate her parental rights to K.S. without having an adjudicatory hearing in relation to that child. Citing Rule 25 of the Rules of Procedure for Child Abuse and Neglect Proceedings and West Virginia Code § 49-6-2(c), petitioner argues that she was denied her rights by the circuit court's failure to hold an adjudicatory hearing.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. She argues that petitioner had previously had parental rights to another child terminated, and that she continued to engage in behaviors dangerous to the children such as smoking in the home, in the children's presence, and while pregnant. J.S. suffers from chronic breathing problems, and cannot be subjected to animals or smoke. Despite the family case plan specifically stating that animals could not be present in the home, the petitioner continued to allow dogs, a goat, and a lamb to live in the home, and also continued smoking therein. Additionally, the guardian argues that service providers testified to the petitioner's non-compliance with the terms of her improvement period, and further testified that the conditions in the home constituted a safety hazard. The guardian also cites testimony concerning petitioner sleeping through supervised visitations with her child. Lastly, the case plan required the home to be free of domestic violence, and the guardian cites testimony regarding several instances of domestic violence, including petitioner throwing chairs during such altercations.

The guardian notes the importance of petitioner having stipulated to the facts set forth in the amended petition regarding petitioner's child J.S., and also stipulating to the fact that she had failed in a previous improvement period and had her parental rights terminated. Part of that termination included a finding that petitioner would not obtain treatment for her mental health condition, and petitioner admitted in the current case that she did not seek such medical care. For these reasons, the guardian argues that the circuit court was correct in finding that there was no reasonable likelihood that the conditions of abuse and/or neglect could be substantially corrected in the near future, and in denying petitioner an additional improvement period. She also argues that the lack of a formal adjudicatory hearing in this matter should not constitute reversible error, because it was abundantly clear that the situation was not going to improve and because the circuit court had the child's best interests in mind when terminating petitioner's parental rights. The DHHR has also responded, concurring in and joining with the guardian'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).

To begin, the Court notes that improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. This Court has 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.' Syllabus point 1, *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). Petitioner admits that she did receive an improvement period, though the guardian represents that petitioner failed to comply with the terms thereof. The guardian further represents that in a prior abuse and neglect proceeding that resulted in termination of parental rights, the petitioner failed to seek medical care for her mental health condition, and admitted the same in this matter. Lastly, the guardian states that petitioner had several months after J.S.'s birth to establish a mental health plan, but failed to do so. The Court finds that the child at issue is of the age that the above language was intended to protect, being approximately one year old at disposition. Further, based upon the parties' representations, it is clear that petitioner was non-compliant with the terms of her improvement period in this matter, and had previously failed to obtain medical care for her mental health condition. For these reasons, the circuit court did not abuse its discretion in denying petitioner an additional improvement period.

As to petitioner's second assignment of error, the circuit court correctly found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and/or neglect in the near future due to petitioner's failure to comply with the terms of her improvement period. This Court has held that "'[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code [§] 49–6–5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code [§] 49–6–5(b) (1977) that conditions of neglect or abuse can be substantially corrected.' Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 5, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Based upon the parties' representations, it appears that petitioner refused to make even small changes, such as removing animals from her home to improve her child's breathing condition. As such, it appears that petitioner failed to follow through with a reasonable family case plan, which constitutes a situation

in which there is no reasonable likelihood that the conditions of abuse and/or neglect can be substantially corrected per West Virginia Code § 49-6-5(b)(3).

As for petitioner's argument that this finding was not supported by the evidence because social services made little, if any, effort to determine if she could adequately care for her child with intensive long-term assistance, the Court finds no merit in this argument. We have previously held as follows:

> "Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement." Syllabus point 4, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999).

Syl. Pt. 4, *In re Maranda T.*, 223 W.Va. 512, 678 S.E.2d 18 (2009). Per petitioner's admission, the circuit court ordered that she undergo a psychological evaluation, the results of which were admitted into evidence and indicated that the children should not even be allowed to undergo unsupervised visitation with petitioner. Based upon the above-quoted language regarding making such determination quickly in order to benefit the children, the Court finds this determination sufficient to satisfy the "thorough effort" requirement of that holding, especially in light of the guardian's representations that petitioner previously received services and stipulated to failing to complete the family case plan or obtain proper medical treatment for her mental health condition. Based upon these representations, it appears that petitioner was putting forth little to no effort to correct the conditions of abuse and neglect, and the DHHR made efforts to determine if she could adequately care for the children with intensive long-term assistance. Based upon all of the foregoing, the circuit court did not err in terminating petitioner's parental rights upon a finding that the conditions of abuse or neglect could not be substantially corrected.

Lastly, petitioner argues that the circuit court erred in terminating her parental rights to K.S. without holding a formal adjudicatory hearing as to that child. Upon representation of the parties, the Court finds that no such adjudicatory hearing was held, and that no determination was made as to whether the child in question was, in fact, abused or neglected. As such, we find that this constitutes reversible error, as we have previously held as follows: "'[i]n a child abuse and neglect [case], . . . a court . . . must hold a hearing under W.Va.Code [§] 49–6–2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case.' Syllabus Point 1, in part, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983)." Syl. Pt. 2, *In re Emily G.*, 224 W.Va. 390, 686 S.E.2d 41 (2009). As such, the Court hereby orders that the matter be remanded, in part, in order for a full adjudicatory hearing to be held as to K.S., and for the required statutory findings to be made as directed by our prior holdings.

This Court reminds the circuit court of its duty to establish permanency for the children. 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 children 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 Procedure 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).

For the foregoing reasons, we find no error in the decision of the circuit court to deny petitioner an improvement period or terminate her parental rights as to J.S., and the circuit court's order related to this child is hereby affirmed. However, as to the circuit court's termination of parental rights to K.S., we reverse the circuit court's rulings in relation to this child, and remand for further proceedings consistent with this memorandum decision .

Affirmed, in part. Reversed and Remanded, in part.

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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.

ISSUED: March 12, 2012

CONCURRED IN BY:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:
Justice Margaret L. Workman