STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.H.

No. 11-1138 (Mercer County 10-JA-155-DS)

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein Petitioner Mother's parental, custodial, and guardianship rights to her child, M.H., were terminated by order entered July 13, 2011. The appeal was timely perfected by counsel, Michael P. Cooke, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Julie M. Lynch, has filed her response on behalf of the child.

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

The instant matter was initiated based upon petitioner's serious intravenous drug use and its effect on her ability to properly parent her child, as well as allegations that petitioner used drugs in the child's presence. Petitioner admitted to DHHR employees that she was addicted to Morphine and Dilaudid, and needles were found in the home in areas accessible to the child. Further, termination was ordered following petitioner's continued non-compliance with services offered, including drug screens, parenting education, and substance abuse treatment. Most importantly, however, the circuit court found at disposition that "despite the [DHHR]'s attempt at reasonable efforts to reunify the [petitioner] with her infant child, the [petitioner] did not participate in said services." As such, in terminating petitioner's parental rights, the circuit court found that petitioner has habitually abused or is addicted to controlled substances or drugs to the extent that her proper parenting skills have been seriously impaired, and further that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future.

On appeal, petitioner argues that the circuit court erred by not allowing her to participate in a post-adjudicatory improvement period and in terminating her parental rights. Specifically, petitioner argues that she admitted her serious issues with drug addiction, but also points out that she was denied entry into drug treatment facilities. Further, she argues that the denial of an improvement period robbed her of the chance to achieve the reunification she sought. Petitioner cites to her testimony concerning her desire to remain in her child's life, and also testimony related to her willingness to participate in a drug rehabilitation program and any services offered, to argue that she

would have complied with the terms of an improvement period. However, petitioner argues that she had difficulty contacting the DHHR and that the lack of support contributed to the termination. According to petitioner, had an improvement period been granted and had the DHHR been responsive to her requests for assistance, she could have entered a long-term substance abuse treatment program and achieved reunification with her child.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. She argues that improvement periods are left to the discretion of the circuit court, and that petitioner failed to meet the clear and convincing burden that she would be likely to fully participate in the same. Further, the guardian argues that the circuit court ordered services for petitioner in order to assist with parenting, address her substance abuse, and help her gain stability for the child. However, the guardian argues that for approximately four months, petitioner was not compliant with these services, provided three positive drug screens during this period, and lastly refused to complete long-term substance abuse treatment on two separate occasions. In response to petitioner's allegations that the DHHR was unresponsive, the guardian argues that it was actually petitioner who refused contact. She cites to repeated attempts at contacting petitioner, as well as refusals by petitioner for long-term substance abuse treatment and two scheduled psychological evaluations for which petitioner failed to appear. Despite these repeated failures to comply, the circuit court stressed the severity of the situation to petitioner and offered her multiple opportunities to enter treatment according to the guardian. Petitioner's parental rights were not terminated until almost two years after petitioner's initial contact with Child Protective Services ("CPS"), and the guardian argues that services were in place during that entire time. Despite assistance in achieving reunification, the guardian argues that the petitioner clearly failed to meet the requirements asked of her and showed no sign of improvement or the likelihood of complying in the future. The DHHR has also responded, and fully agrees, consents, and joins in 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).

As to petitioner's first assignment of error, 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. Petitioner cites no evidence supporting her assertion that she was likely to fully participate in an improvement period, other than her own testimony that she wanted her child in her life and was prepared to comply with services if granted an improvement period. However, petitioner's record

of non-compliance with the terms of the services offered to her clearly indicated that petitioner was more likely to continue with her history of non-compliance. As noted in the circuit court's dispositional order, petitioner did not take full advantage of the parenting classes offered, provided positive drug screens, refused five other drug screens, and refused multiple placements for treatment. 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). For these reasons, the circuit court's decision to deny petitioner an improvement period was not error, and we decline to disturb this decision on appeal.

As to petitioner's second assignment of error, we find that the circuit court similarly did not err in terminating petitioner's parental rights. As stated in West Virginia Code § 49-6-5(b)(1), situations in which there is no reasonable likelihood that conditions of neglect can be substantially corrected are considered to exist when "the abusing parent . . . [has] habitually abused or [is] addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person . . . [has] not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning." It is obvious from the record that the circuit court's findings in regard to the petitioner's habitual drug addiction having impaired her parenting skills and her subsequent inability to respond to or follow through with the appropriate treatment to correct her parenting are supported by the evidence. As such, West Virginia Code § 49-6-5(a)(6) directs that a circuit court has the discretion to terminate parental rights upon such a finding. For these reasons, the circuit court's decision to terminate petitioner's parental, custodial, and guardianship rights was not erroneous.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 child 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[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, and the termination of petitioner's parental, custodial, and guardianship rights is hereby affirmed.

Affirmed.

ISSUED: April 16, 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

[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.