STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: I.A. and M.A.:

No. 11-1161 (Mercer County 10-JA-84 & 85)

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 Mercer County, wherein Petitioner Mother's parental rights were terminated. This appeal was timely perfected by Petitioner Mother's counsel Paul Cassell, with an appendix accompanying Petitioner Mother's petition. The children's guardian ad litem John Williams Jr. has filed a response on behalf of the children. The Department of Health and Human Resources ("DHHR"), by its attorney Thomas Berry, filed a response joining in, and concurring with, the guardian ad litem's response.

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.

"'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 instant petition was filed in July of 2010 against Petitioner Mother and the subject children's father, based on allegations that Petitioner Mother and the children's father neglected the subject children, two-year-old I.A. and three-year-old M.A., by their failure to provide them with adequate shelter, food, and clothing. Various family members and Child Protective Services ("CPS") workers had witnessed physical marks of abuse on the subject children, lack of proper nourishment to the subject children, and stained and dirty clothing on the children. For instance, on one afternoon visit to Petitioner Mother's home, two CPS workers observed that child M.A. was eating dried food

stuck to his stroller. When asked of the last time he and child I.A. had eaten, Petitioner Mother claimed that she had fed them packets of ramen noodles two times earlier that day. However, she could not produce two empty packets as evidence. CPS workers also observed that the children had various markings on their bodies, such as finger marks, bite marks, and red marks underneath one child's eye, which were inconsistent with their parents' claims that the injuries were caused by accidental falls. Further, the petition alleged that Petitioner Mother and the children's father were unemployed and failed to take advantage of resources for their children, such as food stamps and the Temporary Assistance for Needy Families ("TANF") program and engaged in drug abuse and domestic violence. For example, other members of the subject children's family reported that they witnessed Petitioner Mother and the children's father throw things and hit each other in the presence of their children. One of the last referrals made to DHHR also alleged that Petitioner Mother was loading her children up in a vehicle to sell them to a sex offender and his girlfriend for $500. CPS workers were also informed that on one occasion, Petitioner Mother put I.A. in a bathtub, turned off the bathroom lights, and shut the door because I.A. would not stop crying. CPS was also informed that Petitioner Mother told I.A. that if she did not stop crying, she would turn the bath water on.

At adjudication in September of 2010, the children's parents stipulated to neglect and the circuit court granted them post-adjudicatory improvement periods. In May of 2011, DHHR filed a motion to terminate the parents' parental rights. In this motion, DHHR discussed that Multi-Disciplinary Treatment Teams ("MDT") had met and implemented family case plans for Petitioner Mother and the children's father to make rehabilitative efforts toward remedying their substance abuse and domestic violence. However, neither parent followed through with the case plan or made other efforts toward reducing or preventing the neglect of their infant children. Both parents were incarcerated in October of 2010, but at the time this motion was filed, DHHR did not know the whereabouts of either of the children's parents. DHHR also included a list of witnesses and the substance of their testimony anticipated for the dispositional hearing, which mainly consisted of the parents' failure to comply with a reunification program, failure to keep appointments, failure to report to drug screens, and failure to participate in the General Education Development ("GED") program.

At disposition in June of 2011, Petitioner Mother did not appear. Accordingly, Petitioner Mother's counsel moved for the circuit court to continue the dispositional hearing. Counsel explained that his attempts to contact Petitioner Mother were fruitless and that he did not know of Petitioner Mother's whereabouts. The children's father joined in this motion for continuance. The circuit court denied this motion and proceeded with the hearing and heard testimony and took evidence. Upon consideration of the testimony and evidence presented, the history of the case, and the pleadings filed, the circuit court found that due to the parents' failure to follow through with a reasonable family case plan or other rehabilitative efforts to reduce or prevent neglect of the children, there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. As such, the circuit court terminated the parental rights of both parents. It is from this order that Petitioner Mother appeals.

On appeal, Petitioner Mother raises one assignment of error. She asserts that the circuit court erred in denying her counsel's motion to continue the dispositional hearing when she was absent. In support, she argues that she was unable to attend the hearing because her father was seriously ill; she was stranded in Roanoke, Virginia; and due to personal issues, she lost track of time. Petitioner Mother argues that the circuit court wrongfully denied her motion to continue and erred in failing to make findings of fact in support of this decision. She cites the following excerpt from *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 235, 470 S.E.2d. 177, 189 (1996) (internal citations omitted):

> Whether a party should be granted a continuance for fairness reasons is a matter left to the discretion of the circuit court, and a reviewing court plays a limited and restricted role in overseeing the circuit court's exercise of that discretion. Of course, discretion is not to be confused with imperiousness. When a circuit court rejects a civil litigant's request for a continuance because the party is unable to attend, the court must articulate reasons for taking that action, and those reasons must be plausible. Therefore, we structure our review in accordance with four salient factors that appellate courts consider when reviewing denials of requests for a continuance. First, we consider the extent of [Petitioner Mother's] diligence in her efforts to be present and to ready her defense prior to the date set for the hearing. Second, we consider how likely it is that the need for a continuance could have been met if the continuance had been granted. Third, we consider the extent to which granting the continuance would have inconvenienced or been contrary to the interests of the circuit court, the witnesses, and the other litigants, including the public interest in the prompt disposition of these types of proceedings. Finally, we consider the extent to which [Petitioner Mother] might have suffered harm as a result of the circuit court's denial.

In support, Petitioner Mother argues that not only did the circuit court's order not reflect considerations of the factors outlined by the Court in *In the Interest of: Tiffany Marie S.*, but that all four factors weigh in favor of a continuance. In particular, she argues that first, she had been diligent in her efforts before to attend prior hearings and MDT meetings; second, had the continuance been granted, she could have been present to testify and defend her case pursuant to West Virginia Code § 49-6-2(c); third, a continuance would have caused little inconvenience as all of the witnesses in the case were state employees or contractors; lastly, Petitioner Mother argues that she was harmed tremendously because she was prevented from offering any explanation to DHHR's allegations of her failure to fulfill her responsibilities under the family case plan.

In response, the children's guardian ad litem contends that the circuit court did not abuse its discretion in denying Petitioner Mother's motion for a continuance at disposition. In support, the guardian ad litem argues the following:

> "[C]ourts 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). The guardian ad litem argues that in this case, Petitioner Mother continued to move from place to place without establishing residence, failed to keep her scheduled visits, failed to obtain employment, gave false information about taking her GED and obtaining employment, refused drug screens with the excuse that she was prescribed certain medication that would produce an unfavorable specimen, and left the area for several weeks. The DHHR's response joined in, and concurred with, the guardian ad litem's response.

Upon review of the appendix of this case and the pertinent discussion contained in *In the Interest of: Tiffany Marie S.*, the Court finds no error in the circuit court's denial of Petitioner Mother's motion for continuance at disposition. In the *In the Interest of: Tiffany Marie S.* decision, the Court also explained that the weight given to any of the four factors varies with the extent of showing other factors; in essence, they are all related factors that must be considered together with the relevant circumstances. *In the Interest of: Tiffany Marie S.*, 196 W.Va. at 236, 470 S.E.2d at 190. The Court also discussed in that opinion as follows:

> Although the circuit court could have afforded [Petitioner Mother] the continuance, it chose not to do so. In the absence of either a mistake of law or a palpable abuse of discretion, we cannot substitute our judgment for the circuit court's judgment. . . [I]t is the circuit court that is in the best position to weigh competing interests in deciding whether to grant a continuance or a postponement.

In the Interest of: Tiffany Marie S., 196 W.Va. at 236, 470 S.E.2d at 190. DHHR's May 31, 2011, motion to terminate indicated that even just a couple weeks before the dispositional hearing, the children's parents still had not complied with any family case plan and had not made efforts toward reducing the circumstances of neglect. At disposition, Petitioner Mother failed to inform her counsel that she would be absent and her counsel had been unable to communicate with her beforehand to find out why she was absent. "[T]he mere fact that an appellant suggests a continuance could benefit him or her does not necessarily require the circuit court to grant the continuance." *In the Interest of: Tiffany Marie S.*, 196 W.Va. at 236, 470 S.E.2d at 190. Corroborating testimony at disposition revealed that Petitioner Mother failed to respond with a reasonable family case plan or with other rehabilitative efforts of social, medical, mental health, or other rehabilitative agencies designed to reduce or prevent the neglect of the subject children. Given the circumstances of the parents' failure to rehabilitate their lifestyles that caused the instant petition, the children's young ages, and Petitioner Mother's failure to contact her attorney or the circuit court about her circumstances to merit a continuance, the Court finds that the circuit court did not abuse its discretion in denying a continuance. Accordingly, the Court finds no error in the circuit court choosing to go forward with

disposition and terminating Petitioner Mother's parental rights.

This Court reminds the circuit court of its duty to establish permanency for I.A. and M.A. 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 I.A. and M.A. within eighteen months of the date of the disposition order.[1] 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 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.

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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:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

NOT PARTICIPATING:

Justice Margaret L. Workman