STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: K.S., C.S., and L.S.

No. 11-1222 (Mingo County 10-JA-20, 21 & 22)

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 Mingo County, wherein Petitioner Mother's parental rights were terminated by order entered on June 21, 2011. The appeal was timely perfected by counsel, Kathryn Cisco-Sturgell, with petitioner's appendix 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, Lauren Thompson, has filed her response on behalf of the children.

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 following the death of petitioner's then five-month-old child L.S. According to the record, all three children were in the petitioner's care when the child died under suspicious circumstances, having been found dead in his bed covered by a plastic bag. The remaining children were removed from the home, and abuse and neglect proceedings were begun. Throughout the proceedings below, petitioner maintained that her oldest child, two-year-old K.S., had accidentally caused the suffocation death of the youngest child while she was asleep in the home. Eventually, following denial of an improvement period, petitioner's parental rights were terminated below.

On appeal, petitioner alleges the three following assignments of error: 1) that the circuit court erred in terminating her parental rights; 2) that the circuit court erred in denying her post-termination visitation; and, 3) that the circuit court erred in denying her an improvement period. Specifically, petitioner argues that termination was improper because there was a reasonable likelihood that the conditions of abuse or neglect could be substantially corrected. Petitioner states that she was a good mother, but that she was exhausted at the time of the child's death. As opposed to actively taking drugs or otherwise negligently causing the child's death, petitioner simply fell asleep in her home. In regard to allegations that she was not compliant with services in this matter, petitioner cites the stressing nature of the ongoing criminal investigation as well as her grief over the loss of her child as reasons that she was not fully forthcoming during her psychological evaluation. Petitioner cites to specific instances of interaction with law enforcement which she describes as intimidating as

another factor leading to the perception that she was not remorseful about the loss of the child. Additionally, petitioner argues that she eventually explained how she believes the child died during disposition, and that she was able to talk about the incident then because more time had elapsed. In short, petitioner argues that there were never any accusations of substance abuse or alcoholism, and that she properly supervised her children. She argues that with the subsequent death of the children's father, the children's best interest requires placement with her. As to her second assignment of error, petitioner argues that, per this Court's prior holdings, she should have been granted post-termination visitation because of her close bond with the children. Lastly, in regard to her third assignment of error, petitioner argues that based on the foregoing, the circuit court should have allowed her to have either a post-adjudicatory improvement period or a post-dispositional improvement period, especially because the passage of time allowed petitioner to better participate with the children.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian contends that petitioner's argument that there was no way she could have prevented the tragedy is erroneous, because the DHHR had active services in the home at the time of the child's death stemming from prior incidents of domestic violence in the home. Further, petitioner repeatedly informed the DHHR that she had friends who lived nearby who helped her care for the children, and that she stayed with her parents immediately following L.S.'s birth until she felt able to care for all three children on her own. With all of this support, the guardian argues that it is difficult to understand how the child's death was not preventable. The guardian argues that the child was found dead under very suspicious circumstances, and that petitioner could not provide a reasonable explanation for the death. Per her discussions with investigating officers, after the child's death the parents cleaned the entire house with bleach to the point that the smell was so strong that it was difficult to be in the home.

According to the guardian, the parents blamed their then two-year-old child for the death, but that explanation was physically impossible because the child was not tall enough and did not have the ability to reach into L.S.'s bed. The guardian argues the child did not have the ability to kill L.S. because he suffers from difficulty seeing due to crossed eyes, in addition to his untreated behavioral issues and developmental delays. Further, the deceased child was not even crawling at the time of his death. The guardian states that, upon advice of counsel, the parents quickly stopped cooperating with the parties to this action. In short, the guardian argues that the circuit court's findings that the petitioner failed to properly supervise her children and repeatedly subjected them to neglect are "incontestable." By her own admission, petitioner slept through the entire day while the children were left unsupervised. Aside from the tragic death of one child, petitioner neglected to obtain bedding for the children, refused to seek medical attention for K.S.'s eyes or behavioral issues, and refused to cooperate in her psychological evaluation. As such, termination was proper.

The DHHR has also responded, and argues in favor of affirming the circuit court's decision. Specifically, the DHHR cites petitioner's conflicting stories about the specifics of her child's death, and further notes that petitioner removed and disposed of the bag that suffocated her child before law enforcement arrived such that no one else has ever seen it. The DHHR argues that petitioner's assertion that her two-year-old child accidentally suffocated L.S. was disputed by the West Virginia

Chief Medical Examiner, Dr. James Kaplan, who opined that it was impossible for K.S. to have committed the act. Further, according to the DHHR it was not possible to provide a complete psychiatric assessment of petitioner because she was defensive and refused to provide information surrounding the child's death on orders from her counsel. In short, the DHHR argues that petitioner never provided a reasonable explanation, or accepted responsibility, for the death of L.S. Echoing the guardian's arguments, the DHHR cites findings that petitioner was not properly supervising the children, engaged in at-risk behaviors in their presence, and was unable or unwilling to provide for their basic needs. For these reasons, the DHHR argues in support of termination, as well as denial of both post-termination visitation and any improvement period.

"'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. Further, we have previously held that "'in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.' *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)." *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). As noted above, petitioner never provided an explanation for the child's death that was consistent with the medical evidence. She was the only person above the age of two in the home at the time of death, and the circuit court noted that Dr. Kaplan stated that "his findings are inconsistent with the [petitioner]'s explanation of events." Further, the circuit court found that petitioner's disclosures to law enforcement concerning the state in which she found the child were inconsistent. As such, it is clear to this Court that the petitioner failed to acknowledge any of the basic allegations against her concerning neglect by improper supervision of the children. If petitioner's version of events is accepted, then her failure to properly supervise her oldest child contributed to the death of her infant. Despite this fact, petitioner argues on appeal that the child's death "occurred during an act of nature," and cited to her testimony below that "she did not feel she had done anything inappropriate" in sleeping in her home while her three young children remained unsupervised. Based upon these facts, it is clear that the circuit court did not err in denying petitioner an improvement period.

As to her allegation that termination was improper, the circuit court below found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected. Based upon the facts and evidence expressed above, the Court concurs in this finding. West Virginia Code § 49-6-5(b)(3) states that circumstances in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected include situations in which "[t]he abusing parent . . . [has] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child." As noted above, petitioner felt she did nothing wrong in allowing her child to remain unsupervised and die by suffocation, and further refused to cooperate in her psychological evaluation. On appeal, petitioner attempts to legitimize her lack of cooperation by arguing that she was unable to discuss the tragic incident, but the fact remains that she refused to comply with the services offered. As such, because there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected, the circuit court was within its discretion to terminate petitioner's parental rights in accordance with West Virginia Code § 49-6-5(a)(6). Further, 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). As noted above, petitioner's oldest child was only two years old at the time of L.S.'s death, and we find that the children at issue are of the age that the above-quoted language was intended to protect. For these reasons, the circuit court's decision to terminate petitioner's parental rights without an improvement period was not error, and we decline to disturb this decision on appeal.

Lastly, we decline to find that the circuit court erred in denying petitioner post-termination visitation, based upon the egregious facts of this particular matter involving the death of an infant. This Court has previously held as follows:

> "When 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." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 5, *In re Austin G.*, 220 W.Va. 582, 648 S.E.2d 346 (2007). A review of the record reveals

no evidence that continued contact with the children would not be detrimental to their well-being, and petitioner's only argument on appeal in support of this issue is that a close bond exists between her and the children. Based upon the foregoing facts, the Court agrees that continued contact with petitioner would not be in the children's best interest. As such, the circuit court did not err in denying petitioner post-termination visitation.

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 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 or post-termination visitation, and the termination of petitioner's parental rights is hereby 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.

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