STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: T.S.:

No. 11-1239 (Raleigh County 11-JA-12)

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

MEMORANDUM DECISION

Petitioner Mother, by Michael D. Cooke, her attorney, appeals the circuit court's order terminating her parental rights to T.S. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem Jane E. Harkins has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response, joining in the response of the guardian.

Having reviewed the appendix 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 appendix 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 in this matter was instituted after T.S., then six weeks old, presented to the emergency room with subdural bleeding and skull fractures. It was later determined that T.S. actually had three separate skull fractures, subdural hematoma, and a broken clavicle. Dr. Joan Phillips testified as an expert witness, opining that the injuries were non-accidental in nature, and that the injuries occurred in at least two separate incidents. The child was adjudicated as abused. Petitioner Mother testified at the adjudicatory hearing that she had bumped the child's head once, but denied abusing the child, and offered no explanation as to how the child's extreme injuries occurred. Petitioner Mother admitted that the child was in the care of the father, petitioner's mother, or the

petitioner at all times, but the petitioner had no idea who could have abused the child. Petitioner Mother requested an improvement period, but the circuit court denied this motion, citing *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 690 S.E.2d 131 (2010). Petitioner Mother's parental rights were then terminated. The circuit court found that the child was seriously injured, yet both parents deny abuse, and there is no rational explanation for the injuries. The circuit court also found that there was no effort made by the parents to determine who abused the child.

Petitioner Mother first argues that the circuit court erred in denying her a post-adjudicatory improvement period, as she properly demonstrated the ability for improvement. She testified at the adjudicatory hearing that she would fully comply with the DHHR. Further, once she realized the child was in distress, she got help for him and she later admitted he had been abused. Petitioner asserts that she should have been granted an improvement period as she agreed that she would comply.

The guardian responds, arguing that Petitioner Mother has not offered a reasonable explanation for the multiple serious injuries suffered by her son. The guardian further argues that the circuit court properly denied an improvement period because Petitioner Mother did not make sufficient efforts to identify the perpetrator of the abuse. The DHHR joins in the guardian's argument.

Petitioner Mother next argues that the circuit court erred in improperly applying *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 690 S.E.2d 131 (2010). *Kaitlyn P.* states that in order to be granted a post-adjudicatory improvement period, a parent must identify the party who abused or neglected the child at issue, and acknowledge that said abuse occurred. Petitioner Mother was unable to identify the abuser in this matter, but attempted to identify the person. She did admit that the abuse actually occurred. Petitioner Mother argues that the fact that she did not know who committed the abuse was held against her improperly.

The guardian argues in response that the circuit court properly applied *Kaitlyn P.* in this matter, as the petitioner failed to present sufficient evidence that she is likely to fully participate in an improvement period, as she admits to no wrongdoing and has not taken sufficient steps to identify the perpetrator of the abuse. The child suffered severe injuries within weeks of his birth, and on more than one occasion. The guardian argues that the child would be in grave danger should the petitioner be allowed an improvement period.

This Court has 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). Moreover,

> "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 6, *W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). In the present matter, the petitioner has repeatedly stated that she has no idea who abused the child. Further, she has offered no explanation for the life-threatening injuries her child received on at least two different occasions in the first six weeks of his life. This Court finds no error in the circuit court's denial of a post-adjudicatory improvement period, and likewise finds no error in the termination of Petitioner Mother's parental rights.

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.[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

[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.

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.

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