

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: D.B., F.B. and T.S.:

No. 11-1311 (Ritchie County 10-JA-19, 20 & 21)

FILED

February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother appeals the termination of her custodial rights to D.B., F.B. and T.S. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem of each child has filed a response.

Having reviewed the record 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 record 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 instant petition was filed based on physical abuse by Petitioner Mother against two of the children. Petitioner Mother stipulated to the allegations in the petition, and was granted an improvement period. Shortly thereafter, the circuit court determined that Petitioner Mother was not cooperating, and the DHHR was to file a motion to terminate the improvement period if Petitioner Mother did not comply. She then complied, although there were some issues with visitation, including her failure to supply the children with food.

Eventually, Petitioner Mother and the DHHR entered into an agreed order, finding that she had completed her improvement period, and noting that two of the children would be returned to her in thirty days. However, the DHHR and the guardians ad litem quickly determined that Petitioner Mother had not been truthful in her statements that she had fully completed her improvement period. She had not been properly taking her medication and had not been truthful in therapy. Further, she continued to have anger and mental health issues, including an alleged suicide threat with a knife in the presence of one of the children, who later had to be hospitalized due to the emotional trauma of the event. Petitioner's improvement period was then terminated, as were her custodial rights. The court found that petitioner technically complied in the case plan but failed to exhibit any improvement. The court also found that the welfare of the children would be seriously harmed by returning them to the mother, and the mother is presently "unwilling or unable to provide adequately for the children's needs, due to her mental health, truthfulness, and anger management issues." The court also notes that the case has been pending for over a year with no improvement or meaningful compliance in the improvement period conditions. At the time, Petitioner Mother did not have a job after quitting the one she had, or a home of her own, even though the DHHR had provided her with housing assistance.

On appeal, Petitioner Mother argues that the circuit court erred in denying her Motion to Dismiss and in overruling her objections to proceeding toward disposition, because as of April 8, 2011, the parties had agreed that she had substantially complied in and completed her improvement period. The guardians and the DHHR respond, arguing that shortly after the agreement to transition the children back to Petitioner Mother, it was discovered that Petitioner Mother had been untruthful about completion of her improvement period. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). After the hearing on this issue, it was determined that in fact Petitioner Mother had not improved to the degree she claimed, as there were various incidents involving her uncontrollable temper, including an alleged suicide threat with a knife in front of one of the children. The threat of suicide was so traumatic for that child that the child ended up hospitalized for psychiatric treatment. Petitioner Mother had also been untruthful with her counselor and had lied about taking her mental health medications properly. Thus, this Court finds no error in the denial of Petitioner Mother's Motion to Dismiss and in the circuit court proceeding with the case.

Petitioner Mother next argues that the circuit court erred in finding that she failed to successfully complete her improvement period. Petitioner Mother claims “substantial progress” because she did obtain employment and housing, although she later lost both, and because she tried to take her medication properly but alleges it made her feel sick and gave her headaches. She also argues that she attended anger management classes and therapy, although she admits that she did not disclose all of her angry outbursts at home, including the alleged suicide threat, to her counselor. The guardians and the DHHR note that Petitioner Mother admitted her noncompliance in her testimony, and that she failed to learn from the services provided and failed to improve as a parent. “As we explained in *West Virginia Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990), it is possible for an individual to show ‘compliance with specific aspects of the case plan’ while failing ‘to improve . . . [the] overall attitude and approach to parenting.’” *In Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991). Although Petitioner Mother appears to have participated in visitation, anger management, and therapy, she did not improve her situation and she continually failed to apply the lessons learned in services. As stated by F.B.’s guardian, “[t]he improvement period requires more from a parent than simply showing up for appointments.” This Court finds no error in the circuit court’s finding that Petitioner Mother failed to successfully complete her improvement period.

Petitioner Mother argues that the circuit court erred in overruling her objection to continuing with the proceedings after the DHHR provided her with a case plan five calendar days prior to the disposition hearing, rather than five business days prior to the hearing, and due to the DHHR’s failure to submit a witness list. The guardians and the DHHR respond, stating that the case plan submitted was merely an updated version for the circuit court’s benefit, and that the witnesses called were all DHHR workers and service providers, as well as the father of one of the children, and their anticipated testimony had been previously discussed in at least two prior hearings. While it is concerning that the DHHR failed to strictly comply with the provisions of the Rules of Procedure for Child Abuse and Neglect Proceedings, this Court finds no error in the circuit court’s decision to continue with the proceedings in this matter.

Petitioner Mother next argues that the circuit court erred in terminating her custodial rights, as she substantially complied in the improvement period and visitation went well. The guardians and the DHHR argue that after ten months of an improvement period, Petitioner Mother had failed to make the required changes in her life, and continued to have uncontrolled anger and mental health problems. All three guardians and the DHHR support termination in this matter. Termination is proper when “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and when necessary for the welfare of the child” W.Va. Code § 49-6-5(a)(6). In the present case,

only custodial rights were terminated, and this was the least restrictive alternative. Petitioner Mother has failed to correct her anger and mental health problems, and at the time of the disposition, had lost her home and her job. D.B. and F.B. both had serious mental health issues relating to their treatment and thus returning to their mother's custody was not in their best interests. This Court finds no error in the termination of custodial rights.

Additionally, Petitioner Mother argues that the circuit court erred in conducting a disposition hearing prior to entry of an order terminating Petitioner Mother's post-adjudicatory improvement period. The guardians and the DHHR note that Petitioner Mother cites no authority in support of her contention that termination of an improvement period and a disposition cannot occur simultaneously, and this Court agrees that no such authority exists. Thus, this Court finds no error in the circuit court conducting the disposition hearing prior to entry of an order terminating Petitioner Mother's post-adjudicatory improvement period.

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.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

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.

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 of West Virginia 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 custodial rights is hereby affirmed.

Affirmed.

ISSUED: February 13, 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