

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

FILED

April 16, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

In Re: J.N.

No. 11-1340 (Hampshire County 10-JA-08)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Hampshire County, wherein Petitioner Mother's parental rights to her child, J.N., were terminated by order entered August 26, 2011. The appeal was timely perfected by counsel, Lawrence E. Sherman, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, has filed its response. The guardian ad litem, Joyce E. Stewart, 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 matter below was initiated following allegations of abandonment by petitioner. According to the appendix, the family has been the subject of several DHHR referrals throughout the years, ranging from referrals made by each parent in the midst of custody disputes, to a referral for the past sexual abuse of the subject child by her paternal uncle, a convicted sex offender. The child at issue has been hospitalized for mental health issues on a number of occasions beginning in 2006 at the age of ten. The last three hospitalizations occurred between 2009 and 2010, and resulted from allegations that the child was aggressive towards petitioner and the other siblings in the home. Prior to her removal from petitioner, the child had been involved with Youth Services and had been receiving in-home services for about five weeks. The Hampshire County Sheriff's Department took physical custody of the child after petitioner called law enforcement based upon a fight between the child and her sibling. According to the amended petition below, petitioner stated that she wanted the child removed from her home. The amended petition further alleged that three days later, petitioner informed a Youth Services Worker that she did not allow the child to go to school that day because she did not want her to speak with a Family Preservation Worker, and again stated that she wanted the child removed from her home. Later that same day, petitioner was alleged to have contacted the DHHR and reported the child as a runaway, but also stated that she had locked the child out of her home. It was further alleged that petitioner contacted the Hampshire County Prosecuting Attorney's office on the same morning to report the child as a runaway and expressed her desire to have the child removed from her home. The amended petition also alleged neglect against Respondent Father due to the sexual assaults suffered by the child while in his care.

Following the child's removal from petitioner's home, she was placed in a treatment program and later released to foster care. Both parents were initially granted pre-adjudicatory improvement periods, but reunification could not be achieved and they both stipulated to adjudication. Each parent was then granted a post-adjudicatory improvement period, which petitioner failed to successfully complete. According to the parties herein, petitioner's behavior became erratic and inappropriate, she missed numerous therapy sessions, and eventually attempted suicide. Additionally, because the relationship between petitioner and the child was so strained, the treating therapist could never recommend family therapy below. At disposition, the circuit court noted that the child had made great progress during these proceedings, and noted her desires concerning termination. However, based upon petitioner's failure to comply with and complete the terms of her case plan, and her failure to remedy the conditions that led to the petition's filing, the circuit court terminated petitioner's parental rights.

On appeal, petitioner alleges that the circuit court erred by terminating her parental rights because the ruling was not supported by the substantial evidence, the ruling was against the great weight of the evidence, and the termination constitutes an abuse of discretion. Specifically, petitioner argues that she should have been entitled to post-termination visitation. According to petitioner, none of the sets of circumstances enumerated in West Virginia Code § 49-6-5(b) are present in her case, and therefore any finding that there was no reasonable likelihood that the conditions of abuse or neglect could not be substantially corrected was erroneous. Petitioner argues that the goals of the family case plan all required participation from the child, and that it was her failure to complete treatments that resulted in the goals not being met. Further, petitioner argues that multiple factors beyond her control prevented her from engaging in family therapy with the child. According to petitioner, she had successfully completed parenting classes and was engaged in ongoing therapy during the proceedings. As to the allegations that petitioner requested the child be removed from her home, petitioner denies ever making such statements and further qualifies her stipulation to abandonment as "wanting to get help for her daughter in April 2010 by contacting the Sheriff's Office, DHHR, the Prosecuting Attorney's Office and upon not getting any help she did stipulate to neglect by abandonment to get the help and services that she needed to get for [the child]."

In short, petitioner argues that her parenting skills have not been impaired in any way, and she does not have an emotional or mental illness of such nature as to render her incapable of proper parenting. Petitioner accuses the child at issue of "running the show" in the proceedings below, and "manipulating circumstances to best serve her desires and wants." Petitioner argues that she attended all the child's prior treatments as well as all of the meetings and hearings in the proceedings below, whereas Respondent Father stopped participating during his improvement period yet retained his parental rights and was awarded post-termination visitation. According to petitioner, she was simply attempting to get help for her daughter by initiating this matter because no other organization has been able to offer her assistance.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. She argues that petitioner specifically stipulated to preventing her daughter from going to school because she did not want her to talk to the Family Preservation Worker, and further that she

told at least two different agencies that she wanted the child removed from the home. Further, she argues that petitioner engaged in ongoing conflicts with her child which prevented family therapy, and also that despite concern over her own mental health, petitioner delayed seeking individual therapy under the case plan. According to the guardian, petitioner provided numerous excuses as to why she could not visit the child, and also advised the child that her siblings did not wish to visit or speak with her on the telephone. In short, the guardian argues that the petitioner's compliance with the improvement period began to diminish and waned until such point that her cooperation became nonexistent. The guardian argues that petitioner routinely expressed anger toward her ex-husband and disbelief at her child's progress, and also screamed or stormed out of meetings and open court when confronted with inaccuracies in her perception of what was in the child's best interest.

Contrary to petitioner's argument, the guardian states that petitioner displayed an inadequate capacity to solve the problems of abuse on her own or with help, which is a situation in which there is no reasonable likelihood that the conditions of abuse can be substantially corrected as defined in West Virginia Code § 49-6-5(b). The guardian argues that petitioner has consistently failed to accept responsibility for the conflicts in her home, has continually described the child in a negative manner, and demanded that the child be placed in an inpatient psychiatric hospital despite the improvement she demonstrated in residential care. According to the guardian, while the child at one point expressed a desire to be reunited with petitioner, she later came to believe that her mother's negativity would continue unabated and determined it was not in her best interest to return to that atmosphere. As such, the guardian notes that the child expressed a preference for foster care over reunification with petitioner. The guardian concludes by stating that reunification with petitioner is simply not in the child's best interest.

The DHHR mirrors the guardian's response, and argues in support of affirming the circuit court's termination. To begin, the DHHR argues the circuit court was correct in finding that there was no reasonable likelihood the conditions of abuse could be substantially corrected because of petitioner's failure to follow through with the case plan and rehabilitative efforts, and further because her own mental health issues rendered her incapable of proper parenting. The DHHR asserts that petitioner blames everyone but herself for the poor relationship with her child, despite her failure to avail herself of the services offered below. Petitioner failed to attend all of her individual therapy sessions despite being diagnosed with personality disorder, displayed emotional outbursts, failed to visit the child, and even attempted suicide during these proceedings, according to the DHHR. The DHHR argues that when the child made decisions that petitioner did not like, she reacted by locking her out of the home or denying her visitation with her siblings. Contrary to petitioner's argument that the child's lack of cooperation caused her to fail to meet her goals, the DHHR notes that the circuit court actually found that the child had addressed her emotional and behavioral issues while the petitioner had not.

Further, the DHHR argues that there is no evidence that petitioner's stipulation at adjudication was not a knowing, intelligent, and voluntary stipulation made in open court with assistance of counsel. In-home services were already in place for the child at the time of removal, contrary to petitioner's argument that she could not get help for her behavioral issues. Rather than

seek help from this provider, petitioner admittedly kept the child home from school to prevent contact with a case worker. According to the DHHR, the services were implemented in order to keep the child in the home, but petitioner chose not to utilize the same once it became clear that the worker would not allow petitioner to place all the blame on the child. Simply put, the DHHR argues that the petitioner was unwilling to accept any responsibility for the situation in the home, and refused to accept help from anyone who would not blame the child for the problems. The DHHR argues that throughout the proceedings below, petitioner refused to acknowledge her own problems, and could not remedy the same despite sixteen months of services including parenting classes and therapy. Lastly, the DHHR argues that this Court has held that post-termination visitation is the child's right, not the parent's, and that a child of appropriate age must be consulted regarding disposition. In this case, the circuit court determined the child was a mature fifteen year old, and took her wishes into consideration by allowing visitation with Respondent Father. Conversely, according to the DHHR, the relationship with petitioner remained strained despite sixteen months of services, and the circuit court correctly considered the child's desire to have no more contact with petitioner. As such, the decision to deny petitioner post-termination should be affirmed.

“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).

Based upon the record below, it is clear to the Court that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and/or neglect, despite sixteen months of services having been offered during the proceedings below. West Virginia Code § 49-6-5(b)(3) states, in relevant part, that such conditions will be considered to exist in circumstances 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.” At disposition, the circuit court specifically found that the child had made many improvements during the proceedings, but that petitioner “[had] not demonstrated the same degree of success, although services were provided and offered to [her].” The circuit court further found that petitioner “missed numerous therapy sessions and appear[ed] to have a less than credible excuse for every term of the case plan which she . . . failed to complete, including ordered visitations.” Based upon this evidence, it is clear that the circuit court did not abuse its discretion in proceeding to termination.

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’ 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). Clear from the record is the fact that petitioner received sixteen months of services in this matter alone, not taking into consideration the in-home services designed to allow the child to remain in the home prior to the petition’s filing. Further, the record clearly shows that the welfare of the child was seriously threatened by continued contact with petitioner, as noted by the circuit court’s finding that continuation in the home is not in the child’s best interest and that she “cannot wait any longer for a successful reunification to materialize.” For these reasons, the circuit court did not abuse its discretion in terminating petitioner’s parental rights, and we find that the termination was clearly supported by the substantial evidence, and that the ruling was not against the great weight of the evidence.

As to post-termination visitation, this Court has 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). Based upon the circuit court’s findings at disposition, it is clear that it was not an abuse of discretion to deny petitioner post-termination visitation in this matter. West Virginia Code § 49-6-5-(a)(6)(C) requires a circuit court to consider the wishes of a child age fourteen or older as to disposition. The child at issue in this matter was fifteen years old at disposition, and the circuit court noted that she “attempted to work through her issues in a mature fashion,” and further that she “advised the [c]ourt of her desire that the parental rights of [petitioner] . . . be terminated,” despite the child’s recognition that she may need to remain in foster placement rather than be placed with other relatives. Further, the circuit court had to admonish petitioner at disposition after petitioner stated that she would not allow the sibling visitation that the circuit court ordered. Based upon the child’s request, petitioner’s objection to the court-ordered sibling visitation, and the evidence above establishing that placement in the petitioner’s home was not in the child’s best interest, the circuit court clearly did not abuse its discretion in denying petitioner post-termination visitation with the child.

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 Proceedings¹ 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 petitioner’s 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

¹Rule 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.