STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.N.

No. 11-1350 (Marion County 10-JA-94)

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 Marion County, wherein Petitioner Mother's parental rights to her child, J.N., were terminated by order entered September 14, 2011. The appeal was timely perfected by counsel, Heidi M. Georgi Sturm, 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, Frances C. Whiteman, 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 an incident of domestic violence between petitioner and the Respondent Father that occurred in front of the child at issue. Originally, Respondent Father claimed that petitioner struck the child during the altercation, but he later recanted this allegation. Due to aggravated circumstances against petitioner for a prior involuntary termination of her parental rights to an older child, services were not offered to her in this matter. During the proceedings below, petitioner admitted that prior incidents of domestic violence had occurred in the home, but she continued to conceal her ongoing relationship with the abusing father in violation of a protective order prohibiting contact between the two. Petitioner was further denied a post-adjudicatory improvement period before her parental rights were terminated. At disposition, the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future, and terminated petitioner's parental rights.

On appeal, petitioner alleges the three following assignments of error: 1) that the guardian ad litem failed to fulfill her duties to the infant respondent and made her recommendation without taking the child's best interest into consideration; 2) that it was error to deny petitioner an improvement period pursuant to West Virginia law; and, 3) that it was error to terminate her parental rights without offering any services below. First, petitioner argues that the guardian did not address the child's wishes related to her placement because it was made clear that the child loved her mother. However, the petitioner argues that the guardian simply contends that because the child is in the same home as her maternal half-sibling, that her best interests are met. Petitioner argues that the

guardian did not take her significant progress made since the prior termination of her parental rights to an older child into account, and instead focused on petitioner's on-going relationship with the abusive father. Petitioner argues that she has a history of co-dependence and being involved with abusive and controlling men, and that the guardian failed to take into account the fact that she found her own apartment, had continued therapy, and enrolled in the VACT unit. Had these factors been taken into consideration, petitioner argues that she would have achieved reunification. Petitioner next argues that it was error to deny her an improvement period, especially in light of the fact that DHHR offered her no services in this matter. Had she been given an improvement period and services, petitioner argues that she would have been able to prove that she would comply with services offered, and she further could have remedied the issues of abuse and achieved reunification with her child. She further argues that her prior abuse and neglect proceedings did not involve allegations of domestic violence, and the services offered therein did not address such concerns.

Lastly, petitioner argues that instead of being praised for having the courage to contact the police when she was abused, the DHHR instead removed her child from her home and denied her services. Because she did not have an opportunity to show that she was an appropriate care giver for the child, termination of her parental rights was not the least restrictive alternative at disposition, nor was it in the child's best interest. Petitioner analogizes to our prior holding in *In re Tiffany P.*, 215 W.Va. 622, 600 S.E.2d 334 (2004). In that matter, this Court found that termination based upon the father's mental health issues, criminal history, and inappropriate behaviors was not the least restrictive alternative. The Court further permitted supervised visitation, and found that the father's concerning behavior did not justify termination. Petitioner argues that her case is very similar, and that had she been provided services, she would have been able to address the domestic violence issues.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. She argues that petitioner continually lied about the ongoing domestic violence in her house, both in this proceeding and in a very recent abuse and neglect proceeding involving the same infant. Further, the guardian notes that within days of checking into a shelter for battered women, petitioner was evicted from the shelter due to contact with Respondent Father. The parents continued to have contact, as witnessed by DHHR employees, and the father was even arrested for violating a protective order after the two were pulled over together during a routine traffic stop. During this entire period, petitioner denied the ongoing relationship. Because petitioner had already participated in all the services the DHHR had to offer in two prior abuse and neglect proceedings, the DHHR put the burden on petitioner to locate and participate in her own services. However, petitioner failed to seek out and participate in domestic violence counseling for victims, and even stated that it would be in the child's best interests to be placed with her other siblings who were in an adoptive home. In short, the guardian argues that petitioner did nothing to advance herself in regaining custody of her child, and her allegations against the guardian are without merit and are of no value on appeal because she is not alleging an error on the part of the circuit court. The guardian further argues that petitioner's allegations regarding the DHHR's failure to offer services is also without merit because it is alleged against another party and not the circuit court.

The DHHR mirrors the guardian's response, and argues in support of affirming the circuit court's termination. The DHHR argues that it was impossible for the guardian to consult with the child as to permanency because she was only two years old at disposition. However, the guardian was present for visitations between petitioner and the child, and noted that the child had a very difficult time at visits, and was upset and crying for most of the visits she attended. According to the DHHR, although the visitation supervisor noted that the child was more comfortable with petitioner than with Respondent Father, the father's visits were terminated due to the obvious fact that the child was afraid of him. The DHHR argues that petitioner's arguments concerning her progress with substance abuse are irrelevant given that there was no evidence she made any progress with regard to domestic violence, which is the issue that actually resulted in the abuse of the child.

As to petitioner's last two assignments of error, the DHHR argues that the circuit court had discretion to deny petitioner an improvement period pursuant to West Virginia Code § 49-6-12, and further that petitioner failed to meet the clear and convincing burden that she was likely to fully participate. The circuit court based its denial on petitioner's own admissions, and the DHHR argues that the circuit court's findings are sound in that they relate specifically to the likelihood that petitioner would not take any steps to address the issues which led to the abuse of her child. The DHHR disagrees with petitioner's argument that these infractions should be forgiven because she was the victim of domestic violence, and the law does not allow for petitioner's victimization to operate as a defense to child abuse. The DHHR cites West Virginia Code § 49-6-5(b)(7), which states that a situation in which no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected is one in which the battered parent's parenting skills are seriously impaired, and he or she is unable or unwilling to cooperate in the development of a reasonable treatment plan or has not adequately followed through with such plan. According to the DHHR, petitioner simply refused to take any steps to remove the abuser from her life, despite the DHHR encouraging her to seek treatment for domestic violence and advising her that the DHHR would pay for any services she could not afford. In short, the DHHR argues that the petitioner has chosen her abusive relationship with Respondent Father over her child, and the circuit court's decision is supported by sound findings. As such, the circuit court did not err and the termination of petitioner's parental rights 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).

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, as noted above, the petitioner bears the burden of establishing, by clear and convincing evidence, that she is likely to fully participate in such improvement period. As the guardian noted in her response, the circuit court relied on petitioner's own admissions in finding that she was not entitled to an improvement period in this matter. Specifically, the circuit court noted that petitioner "admitted to lying to the [Multi-Disciplinary Team ("MDT")]; to remaining in a relationship with [Respondent Father]; and to failing to report prior incidents of domestic violence between her and [Respondent Father]." Based upon this evidence, it is clear that the circuit court did not abuse its discretion in finding that petitioner had failed to meet her clear and convincing burden in requesting an improvement period, and we decline to find that the circuit court erred on this issue.

Further, the DHHR was not required to provide services in this matter based upon the prior termination of petitioner's parental rights to an older child. West Virginia Code § 49-6-5(a)(7)(C) clearly states, in relevant part, that "the [DHHR] is not required to make reasonable efforts to preserve the family if the court determines [t]he parental rights of the parent to another child have been terminated involuntarily." Based upon this determination, it was clearly not error to proceed to termination without providing petitioner services, especially in light of the circuit court's finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future. As noted above, West Virginia Code § 49-6-5(b)(7) states, in relevant part, that such conditions will be considered to exist in circumstances in which "[t]he battered parent's parenting skills have been seriously impaired and said person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan or has not adequately responded to or followed through with the recommended and appropriate treatment plan." The circuit court specifically found that petitioner "showed a pattern of continued failure to improve despite the significant efforts made by the WV DHHR to provide services and assistance." The circuit court further found that petitioner "was substantially non-compliant in this case by continuing a relationship with her abuser and trying to hide the same from the DHHR and multi-disciplinary team, and she has failed to participate in victim's domestic violence counseling."

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). Clear from the record is the fact that the welfare of the child was seriously threatened by petitioner's continued contact with the father, based upon the pattern of domestic violence he exhibited and also the detrimental effect that such violence had on the child. The Court finds that the child at issue is of the age the above language was intended to protect, being approximately two years old at disposition. For these reasons, the circuit court did not abuse its discretion in terminating petitioner's parental rights without the DHHR providing services.

As to petitioner's last assignment of error, the Court finds it to be without merit. Petitioner's argument hinges on the guardian's alleged failure to address the child's wishes and desires as they related to her permanency. However, the Court finds that the guardian could not have had such desires expressed to her, as the child at issue was approximately two years old at disposition. Further, the Court declines to find that the guardian failed to consider the petitioner's progress with her drug addiction because this matter was initiated due to domestic violence and the overwhelming evidence indicates that petitioner wholly failed to address this issue. As such, the Court declines to find error in regard to these allegations.

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 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 services or an improvement period, 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