STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.S., A.S., A.S. and K.S.:

No. 11-1364 (Nicholas County 11-JA-50, 51, 52 & 53)

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by Samuel R. White, his attorney, appeals the circuit court's order terminating his parental rights to his children, A.S., A.S., A.S. and K.S. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem Julia R. Callaghan has filed her response on behalf of the children. 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 ad litem.

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 instant petition was filed based on allegations of sexual abuse perpetrated by Petitioner Father on twins A.S. and A.S., who were fourteen years old at the time the petition was filed. The petition also alleges failure to protect against the mother, and alleges physical abuse by the mother

against all three daughters.[1] Petitioner Father denies any abuse of his daughters. One of the twins (A.S. I) reported that the other (A.S. II) had been abused by the father after he forced the child to watch pornography, and then forced her to undress so that he could look at her nude body on two occasions. A.S. I also reported that her father asked to see her breasts, indicating that as her father, he needed to know how her body looked. A.S. I eventually reported the incident to several individuals, including her guidance counselor, her mother and her grandmother. During the DHHR's initial investigation, A.S. II denied the abuse for fear of getting into trouble, but A.S. I confirmed that the abuse occurred and was then punished at home. At one point, A.S. II reported the abuse to her mother via letter, and the mother stated that she was going to leave the father and divorce him. However, she quickly changed her mind, ordering both A.S. I and A.S. II to apologize to the father. A.S. III, the youngest daughter, reports physical abuse by the mother toward all three daughters in the form of hitting, hair pulling, slapping, and pushing. A safety plan was implemented in 2010 after the initial allegations were denied by A.S. II at the time, which included establishing their mother as a protective caregiver and enrolling the children in therapy. The mother failed to follow through with that safety plan.

The DHHR has been involved with this family for many years, dating back at least to 1997. Referrals have included allegations of domestic violence in the home, drug abuse, and that the father was watching pornography with a then four-year-old child. Both the mother and father deny that any abuse occurred. At the adjudicatory hearing, both A.S. I and A.S. II testified *in camera* to the abuse each had suffered, and testified to their other sisters' abuse. Further, two other minors testified about A.S. I and A.S. II's disclosures of abuse. A psychologist also testified, stating that the abuse allegations were credible and that A.S. I and A.S. II's stories corroborate one another. Both parents were adjudicated as abusive and neglectful; the adjudicatory order found that A.S. I and A.S. II were sexually abused by their father, and that their mother failed to protect them from said abuse. Moreover, the circuit court found that the children were physically abused by the mother. Both the mother and father continued to deny the abuse. The circuit court found that reasonable efforts to preserve the family were not required due to the aggravated circumstances of sexual abuse, and terminated their parental rights.

On appeal, Petitioner Father argues that the circuit court erred in terminating his parental rights because there was insufficient evidence for the finding that he sexually abused two of his children. Petitioner Father argues that the testimony of the children was inconsistent in that A.S. I's boyfriend testified that she had disclosed the abuse to him, although A.S. I denied disclosing said abuse and believed that her boyfriend learned the information from her cousin, whom she had previously told. Petitioner Father also argues A.S. II's testimony was inconsistent, as she testified that her father pulled her legs open, yet did not relate this to the psychologist.

[1] Son K.S. lives with his grandmother, and has lived there for an extended period. There were no allegations that he was abused.

In response, the guardian ad litem argues that termination was proper due to the physical and sexual abuse of the children, and the failure of the mother to protect the children. Petitioner Father relies on minor discrepancies in the children's testimony, but these discrepancies were explained by the psychologist who noted that A.S. II was the primary victim, and she relayed some of the information to A.S. I. The guardian argues that the recollection was the same between the girls, but with more details given by A.S. II. Petitioner Father continues to deny the abuse ever occurred. The guardian argues that the testimony was by and large very detailed and consistent throughout the case. The DHHR concurs in the guardian's response.

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). There is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when a parent has sexually abused the child and the degree of family stress and the potential for further abuse precludes reunification. W. Va. Code §49-6-5(b)(5). Regarding the termination in this matter, this Court has stated that "when a parent cannot demonstrate that he/she will be able to correct the conditions of abuse and/or neglect with which he/she has been charged, an improvement period need not be awarded before the circuit court may terminate the offending parent's parental rights." *In re Emily*, 208 W.Va. 325, 336, 540 S.E.2d 542, 553 (2000). Moreover, 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, the overwhelming evidence showed that Petitioner Father sexually abused the children. Petitioner Father complains of minor discrepancies in the children's testimony, such as A.S. II's disclosure that her father pulled her legs apart while she was nude, and her failure to relay this detail to the psychologist. This Court finds the discrepancies pointed out by Petitioner Father to be minor, and finds no error in the circuit court's determination that the children's testimony was credible. Thus, there is no reasonable likelihood that the conditions which led to the filing of the petition can be corrected, and the evidence shows that the children's welfare would be threatened should they return to the home.

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.[2] 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 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: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman

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[2] 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.