STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: E.M.:

No. 11-1365 (Mercer County 11-JA-70-OA)

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein Petitioner Mother's parental rights were terminated. This appeal of the order terminating Petitioner Mother's parental rights was timely perfected by her counsel Michael P. Cooke, with an appendix accompanying Petitioner Mother's petition. The guardian ad litem for the children, John Earl Williams Jr., has filed a response on behalf of the child supporting the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, also filed a response in support of termination.

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.

"'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 under West Virginia Code § 49-6-5b(a)(3) because Petitioner Mother's parental rights were previously terminated to her first child, A.M., the subject child's older sister. The May of 2009 petition in that case was based on Petitioner Mother's substance abuse and domestic violence issues. Her parental rights to A.M. were terminated in October of 2010. In January of 2011, this Court affirmed the circuit court's termination order. During this case, Petitioner Mother was also charged with, and convicted of, Possession With Intent to Deliver a Schedule III Controlled Substance. She was subsequently sentenced to one to five years imprisonment and released on parole

after one year. While incarcerated, Petitioner Mother became pregnant with the subject child and gave birth to him on May 6, 2011. Consequently, DHHR filed the instant petition for the subject child. Petitioner Mother waived her rights to a preliminary hearing.

At the adjudicatory hearing on June 13, 2011, Petitioner Mother did not contest the circumstances that led to her prior termination and the circuit court's findings of neglect in the present instance. She further testified to the circuit court that she understood that it may terminate her parental rights to the subject child. The circuit court set the matter for disposition on August 29, 2011, and directed Petitioner Mother to make her argument for an improvement period at that time. Petitioner Mother submitted her written motion for an improvement period on August 26, 2011, arguing that she would fully participate in any improvement period and in any case plan adopted by DHHR. At disposition, the circuit court heard testimony from Petitioner Mother's caseworker, William Renn; Petitioner Mother's parole officer, Pamela Sizemore; and Petitioner Mother. The circuit court found that due to Petitioner Mother's prior termination, DHHR was not required to make reasonable efforts toward reunification and that the circuit court "expended every resource to [Petitioner] Mother, and between May of 2009 through 2010, [Petitioner] Mother has had every opportunity to secure reunification with the [prior] infant child, [A.M.]," but has failed to do so. Consequently, the circuit court found that there was no reasonable likelihood that the conditions of neglect will be substantially corrected in the near future and it terminated Petitioner Mother's parental rights to E.M. without an improvement period. It is from this order that Petitioner Mother appeals.

Petitioner Mother argues that the circuit court erred by terminating her parental rights without the benefit of an improvement period. She also argues that the circuit court erred in this termination by placing an unnecessary amount of weight on her prior termination, without taking into consideration a significant change in circumstances. In support, Petitioner Mother asserts that she has made great improvement during her incarceration through various classes she has taken. She argues that where there has been a prior termination, the circuit court "must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syl. Pt. 4, in part, *In the Matter of George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

The child's guardian ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Mother's parental rights to E.M and did not err in terminating her rights without an improvement period. The child's guardian ad litem argues that under West Virginia Code § 49-6-12, a parent who makes a motion for an improvement period must show by clear and convincing evidence that he or she will fully comply with an improvement period and Petitioner Mother has failed to meet this burden. He further argues the Court's directive pertaining to improvement periods, as follows:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . 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." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

DHHR also supports the circuit court's order terminating Petitioner Mother's parental rights to E.M. It argues that "the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 4, in part, *In re Samantha S.*, Syl, 222 W.Va. 517, 667 S.E.2d 573 (2008) (internal citations omitted). It further argues that Petitioner Mother's termination without improvement period was proper because Petitioner Mother failed to show any improvement of her substance abuse issues after failing three times at treatment throughout the proceedings in her termination to her older child A.M.

The Court finds no abuse of discretion by the circuit court in its order terminating Petitioner Mother's parental rights without an improvement period. Pursuant to West Virginia Code § 49-6-12, a circuit court is not required to grant an improvement period. Rather, the subject parent has the burden of demonstrating by clear and convincing evidence that he or she is likely to fully participate in an improvement period. A review of the appendix indicates that Petitioner Mother filed a written motion for an improvement period. In this motion, she asserted "that full participation in the improvement will occur along with full participation period and in any case plan adopted by the [DHHR] and Treatment Team . . . ." However, Petitioner Mother provides no supporting documents or evidence in support of these assertions. A review of the dispositional hearing transcript indicates that Petitioner Mother's parole officer, Pamela Sizemore, testified that Petitioner Mother "hasn't gave [sic] me any indication that she's not going to do well." Also at disposition, Petitioner Mother testified that she took a number of classes while incarcerated, such as Open Gates; Ninety-Nine Days; and Get Up; in addition to anger management, parenting, and General Equivalency Diploma ("GED") classes. She further testified that she thinks she could comply with any of DHHR's requests. Despite all of these courses, however, Petitioner Mother also testified at disposition that she did not complete anything during her incarceration to address her substance abuse issues. Her caseworker, William Renn, also testified that in Petitioner Mother's prior abuse and neglect proceedings, she was offered treatment for her substance abuse three times but consequently, the circuit court terminated her parental rights because she did not follow through or respond to the treatments. The Court recognizes that a parent's prior termination does not mandate termination of parental rights merely upon filing of the petition, but the threshold of evidence necessary for termination is lower. *In re: Rebecca K. C.*, 213 W.Va. 230, 234-35, 579 S.E.2d 718, 722-23 (2003) (citing Syl. Pt. 5, *In re George Glen B.*, 207 W.Va. 346, 532 S.E.2d 64 (2000)). The first petition against Petitioner Mother was filed in May of 2009. Throughout the last two years, including throughout the course of Petitioner Mother's prior abuse and neglect case, the circuit court found that Petitioner Mother was given several opportunities for rehabilitation and reunification, but failed to make improvements. The Court finds that given the subject child's infancy and Petitioner Mother's failure since 2009 to make improvements to address her substance abuse issues, the circuit court did

not abuse its discretion in terminating Petitioner Mother's parental rights to E.M. Accordingly, the Court finds no error in the circuit court's decision.

This Court reminds the circuit court of its duty to establish permanency for E.M. 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 E.M. 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 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.

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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.

ISSUED: March 12, 2012

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

NOT PARTICIPATING:

Justice Margaret L. Workman