STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: I.F. and I.C.:

No. 11-1366 (McDowell County 11-JA-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 parental rights to her children I.F. and I.C. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response.

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 after six week old I.F. presented to the emergency room in an unresponsive state after Petitioner Mother called 911. However, Petitioner Mother then declined emergency medical assistance and took the child to her mother's home. Two hours later, Petitioner Mother again called 911 and this time allowed the child to be transported to the emergency room. I.F. was found with a fractured skull, bleeding on the brain, fractured legs and multiple bruises. Petitioner Mother claims she was in the shower and upon

completion of her shower, she found the child unresponsive. During the hospital examination, older injuries were found on the child, including a bruise on his head and bruising on the upper abdominal area. Petitioner Mother admits noticing the bruise on the child's head, but states that she believed the child's father when he told her the child bumped his head on the father's chest. The child's grandmother also gave statements indicating multiple unexplained bruises on the child in the past. Moreover, once the child was transferred to the trauma unit at another hospital, it was discovered that he had a healing rib fracture that dated back three to four weeks. It was also discovered that he had suffered multiple brain bleeds over time, and expert testimony showed that the child would have been in significant distress. Petitioner Mother claimed no knowledge of those injuries, although she admitted that the father had been physically abusive in the past. Petitioner also admitted that she thought something may be wrong with the child but did not seek treatment because she "wanted to believe her boyfriend."

At the adjudicatory hearing, Dr. Joan Phillips, a pediatric expert, testified that the child's injuries were not accidental and that his prior injuries, including the broken legs, a broken rib, and numerous bruises, would have been obvious to any caregiver. At the dispositional hearing, the circuit court terminated Petitioner Mother's parental rights, finding that continuation in the home is not in the child's best interest because of the "parents' torture and chronic, severe, physical abuse" of the child. The circuit court found aggravated circumstances under West Virginia Code § 49-6-5(b)(5), and therefore reasonable efforts at reunification are not required.

On appeal, Petitioner Mother first argues that the circuit court erred in finding her guilty of abuse in the adjudicatory hearing order when neither abuse by the mother nor the mother's knowledge of abuse by someone else were proven by clear and convincing evidence. Petitioner Mother argues that she had no prior knowledge of the abuse, and that when she found the child unresponsive, she immediately called 911. She then immediately left her boyfriend, who had injured the child, and never condoned his conduct. Petitioner Mother argues that she only learned of the prior abuse after the child was hospitalized.

The DHHR responds, arguing that the circuit court did not err in finding that petitioner knew her child was being abused, as testimony showed that petitioner knew that the child had been abused from the bruises, but states that she wanted to believe her boyfriend's explanation for the bruises. Further, the DHHR argues that the petitioner did not raise the issue of the father abusing I.F. until she was questioned, and she ignored the initial signs of abuse, which included bruising and tenderness around the broken ribs and bruising on the head. The bruising itself, not to mention the distress the child was in, should have raised red flags and caused petitioner to seek treatment for the child.

The guardian ad litem responds, arguing that Petitioner Mother knew of her boyfriend's violent tendencies and had previously seen bruises on I.F. She also knew that her boyfriend often became angry at the child and yelled at him, and chose to ignore this. The guardian opines that the abuse and neglect of the child would have continued if the grandmother had not told Petitioner Mother to call 911 and accept medical assistance.

In regard to children who have been physically abused, this Court has stated as follows:

> "W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Syl. Pt. 3, *W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S.* 197 W.Va. 489, 475 S.E.2d 865(1996). Moreover, this Court has found that "[p]ursuant to the provisions of West Virginia Code § 49-1-3(a)(1) (1995), the definition of child abuse encompasses a parent, guardian or custodian who knowingly allows another person to inflict physical injury upon another child residing in the same home as the parent and his/her child(ren)." Syl. Pt. 4, in part, *W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S.* 197 W.Va. 489, 475 S.E.2d 865(1996). In the present matter, it is clear that the child was physically abused. Although Petitioner Mother initially called 911 seeking help for the child, she then turned away the emergency medical personnel. At the urging of her own mother, she called them back two hours later. She claims to have only discovered the older injuries after the hospital told her about them, but the testimony shows that the child would have exhibited signs of his multiple prior injuries, which included several different bruises, broken legs, a broken rib, and prior head injuries. Petitioner Mother admits that she noticed some of the injuries, but chose to believe her boyfriend's accounts of how they occurred, even though Petitioner Mother knew that her boyfriend was violent. Thus, this Court finds no error in the circuit court's findings in the adjudicatory order.

Petitioner Mother also argues that the circuit court misapplied West Virginia Code § 49-6-5 to this case as it applies to the mother and used that as the basis for termination. Petitioner Mother argues that there is no evidence that Petitioner Mother abused the child, and notes that she immediately left her boyfriend upon learning of the abuse. However, she was denied services and was never given an improvement period.

The DHHR responds, arguing that petitioner only acknowledged the abuse after it was clear that the authorities would be alerted to the abuse. She made no effort to inform anyone of the abuse in spite of expert testimony that the child would have been in significant distress due to his prior injuries, and in spite of her own testimony that she saw multiple bruises on the child. The guardian ad litem agrees, arguing that Petitioner Mother should have known the child was previously injured from the bruising and his obvious discomfort from a broken rib. Further, the guardian argues that the term knowingly does not require the parent to actually be present, but requires that the parent have sufficient facts to determine that abuse has occurred. The guardian argues that Petitioner Mother had sufficient facts to determine that I.F. was being abused.

> West Virginia Code § 49-6-5 states, in pertinent part:
>
> (b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive: . . .
>
> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child. . .

Petitioner Mother argues that she did not "knowingly" subject the child to abuse at the hands of his father. This Court has stated that "[t]he term 'knowingly' as used in West Virginia Code § 49-1-3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred." Syl. Pt. 7, *W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S.* 197 W.Va. 489, 475 S.E.2d 865(1996). In the present matter, it is clear that Petitioner Mother did not physically abuse her son. However, as stated above, from the testimony and evidence presented, it is also clear that Petitioner Mother knew or should have known of the abuse prior to the incident which led to the filing of this petition. Expert testimony showed that the child was in significant pain due to the broken legs and rib, and the multiple bruises, and Petitioner Mother admits that she knew the perpetrator of the abuse was violent and often agitated toward the child. This Court finds no error in the circuit court's application of the above-cited code provision.

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 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 parental rights is hereby affirmed.

Affirmed.

ISSUED: February 13, 2012

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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.

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh