STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.M., J.P., and J.G.

No. 11-1370 (Webster County 10-JA-35, 10-JA-36, 10-JA-37)

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Christopher G. Moffatt, appeals from the Circuit Court of Webster County, wherein her parental rights were terminated by order entered August 1, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Joyce Helmick Morton, has filed her response on behalf of the children.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, 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 DHHR initiated the instant matter upon allegations that petitioner's abuse of controlled substances was affecting her judgment and ability to properly provide for the subject children's health, safety, and welfare. The DHHR visited the home and discovered drug paraphernalia and white residue on items in the home and in petitioner's nostril. At the home, petitioner admitted to snorting prescription medication. At adjudication, petitioner again admitted to snorting prescription medication, and also admitted that she may be addicted to and/or abuse controlled substances and that the same affects her judgment and ability to properly provide for the children's health, safety, and welfare. Petitioner was thereafter granted a post-adjudicatory improvement period, but the circuit court later revoked the same and terminated petitioner's parental rights based upon non-compliance with services offered and the terms of the improvement period. At disposition, it was found that petitioner violated the terms of the improvement period in the following ways: failure to comply with Seneca Health Services and attending substance abuse counseling for a period of three months; failure to remain drug and alcohol free, including providing positive drug screens; failure to keep alcohol out of her residence; failure to establish a fit and suitable home for the children; failure to accept responsibility for her actions and showing an attitude that she would continue to fail to comply with services; and, failure to be truthful regarding her drug use.

On appeal, petitioner alleges that the circuit court erred in terminating her parental rights when she made progress during her improvement period and where less restrictive alternatives existed. Petitioner argues that termination was clearly erroneous because she satisfied virtually all

of the requirements of her improvement period, including improving the condition of her home, visiting her children, complying with parenting classes, and holding a job. While petitioner admits that she missed some counseling sessions, she did so because of her need to work and states that her counseling had been reinstated prior to the termination hearing. Petitioner also argues that she had no knowledge of any alcohol in her home and that her allegedly renewed drug use was never established through expert testimony. In short, petitioner argues that she demonstrated a willingness and ability to support herself and her children and to better her condition. For these reasons, she argues that the evidence was insufficient to support the circuit court's finding that she could not substantially correct the circumstances of abuse and neglect in the near future. As such, petitioner argues that the circuit court should have employed a less restrictive alternative to termination of her parental rights by granting a ninety-day extension to her improvement period.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that while petitioner initially complied with services below, toward the end of her improvement period, she fell back into the lifestyle that led to the initiation of these proceedings. The guardian argues that the circuit court had no reason to believe that petitioner would substantially correct the circumstances of abuse in the near future, particularly since petitioner has still not entered into substance abuse treatment in order to obtain rights to post-termination visitation, as the circuit court allowed for in its dispositional order. The guardian argues that the children need stability and permanency, as the circuit court recognized, especially A.M., who is only three years old. As such, the guardian argues that the best interests of the children are promoted by the circuit court's termination of petitioner's parental rights. The DHHR fully concurs with the guardian's response, and requests that the circuit court's ruling 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).

In the proceedings below, the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected. Based upon the facts and evidence as expressed above, the Court concurs in this finding. West Virginia Code § 49-6-5(b)(1) states that circumstances in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected include situations in which "[t]he abusing parent . . . [has] habitually abused or [is] addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person . . . [has] not responded to or followed

through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning." In terminating petitioner's parental rights, the circuit court noted multiple violations of the terms of petitioner's improvement period, as outlined above. Most importantly, the circuit court found that petitioner continued to abuse controlled substances and had alcohol in the home. Contrary to petitioner's allegations that the evidence was insufficient to support this finding, the circuit court's order plainly states that petitioner "tested positive for opiates" on June 24, 2011, after she had been granted an improvement period. Additionally, the evidence presented clearly shows that petitioner did not satisfy "virtually all the requirements" of her improvement period, as she alleges above. The circuit court's termination order plainly states that petitioner failed to comply with her counseling through Seneca Health Services, failed to remain drug and alcohol free, had alcohol in her home, failed to establish a fit home for the children, failed to accept responsibility for her actions, and failed to address the issues of abuse and neglect despite resources available to assist her in that regard. As such, because there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected, the circuit court was within its discretion to terminate petitioner's parental rights in accordance with West Virginia Code § 49-6-5(a)(6).

Despite petitioner's argument that she should have been entitled to an extension of her improvement period for additional services, the circuit court found that petitioner demonstrated an attitude that she would continue in her failure to comply with services offered. We have previously 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). At disposition, the youngest child at issue was only two years old, which is of the age that the above-quoted language was intended to protect. Lastly, as the guardian correctly noted, the unlikelihood of future compliance is reflected in petitioner's subsequent failure to gain increased post-termination visitation with the children. The circuit court held in its dispositional order that petitioner "must undergo in-patient substance abuse treatment, must remain drug and alcohol free and must submit to drug and alcohol testing before the [c]ourt will consider post-termination visitation other than granted herein." There is nothing in the record to indicate that petitioner has complied with these requirements, nor does petitioner allege compliance in her petition. For these reasons, the circuit court's decision to terminate petitioner's parental rights was not error, and we decline to disturb this decision on appeal.

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 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: May 29, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

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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.