

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: M.M.

No. 11-1407 (Braxton County 11-JA-3)

FILED

May 29, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Daniel R. Grindo, arises from the Circuit Court of Braxton County, wherein her parental rights were terminated by order entered September 14, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, has filed its response. The guardian ad litem, David Karickhoff, has filed his response on behalf of the child.

This Court has considered the parties' briefs and the appendix record 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 instant matter was initiated upon allegations that petitioner was unable to provide a safe and sanitary home for the child at issue, that petitioner would leave the child with other caretakers for extended periods, that petitioner failed to provide adequate medical care due to the child being behind on immunizations, and that petitioner failed to provide enough formula for the seven-month old despite receiving vouchers from the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"). During the proceedings below, petitioner was granted a post-adjudicatory improvement period, but the same was terminated on the DHHR's motion because of petitioner's non-compliance with the terms thereof. In terminating petitioner's improvement period, the circuit court found that the DHHR "provided the [petitioner] with all necessary services even though [she] failed to avail herself of the services." Thereafter, the circuit court proceeded to disposition, and terminated petitioner's parental and custodial rights upon a finding that there was no apparent bond between petitioner and the child, and upon a finding that there was no reasonable likelihood that petitioner would substantially correct the conditions of abuse and neglect in the future.

On appeal, petitioner alleges that the circuit court erred in terminating her parental and custodial rights because the finding of non-compliance was inconsistent with the evidence. Petitioner asserts that the evidence adduced at the dispositional hearing showed that she was making reasonable and significant progress toward maintaining a fit and suitable home. After moving twice during the proceedings, petitioner argues that the DHHR acknowledged that her newest home was appropriate and approved of the same. She even cites to the circuit court's finding in its order terminating her

rights that she had made improvement in her living conditions. Petitioner argues that the only thing the DHHR relied upon in arguing for termination was alleged evidence of backsliding in the home's condition, which petitioner vehemently disagrees with. According to petitioner, she was otherwise reasonably compliant and termination of her parental and custodial rights was an abuse of discretion. Further, petitioner argues that termination of her rights was inconsistent with the best interests of the child because a strong bond existed between her and the child. Petitioner argues that she has a significant bond with the child, and that continued contact is necessary for the child's appropriate development. As such, petitioner argues that the circuit court abused its discretion in disregarding the child's best interests at disposition.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that petitioner was offered services in home-making skills, parenting skills, and adult life skills, but that she failed to follow through with any of the training in order to improve the conditions in her home. Further, the guardian argues that petitioner's argument that she was making substantial progress in her improvement period is simply without merit or basis in fact, in light of the circuit court's termination of the improvement period for her refusal to comply with the terms thereof. Likewise, the guardian argues that petitioner's argument that termination of her parental and custodial rights was contrary to the child's best interests due to an alleged bond between the two is also untrue.

The DHHR also responds and argues in support of affirming the circuit court's decision. To begin, the DHHR argues that while it is true that petitioner did move into a home it initially approved, the clean home quickly deteriorated. By the time of the dispositional hearing, the home had many of the same types of safety and sanitation issues that existed at the time the petition was filed, including being littered with debris, food, trash, and cat feces. Petitioner's in-home service provider testified that she addressed how to clean a house and maintain sanitary living conditions with petitioner, but that she was not willing to maintain the house once it was clean. The testimony from two different witnesses at disposition established that the only improvement petitioner made in her housing situation was when she initially moved into a suitable dwelling that was clean upon her arrival. However, within only one month and despite extensive services, the home had deteriorated to the point that the child's safety would be compromised if returned to petitioner. Further, the DHHR argues that the record clearly shows that no bond existed between petitioner and the child, as evidenced by petitioner's failure to visit the child on multiple occasions, and further through the fact that the child did not exhibit separation anxiety when leaving petitioner like she did when leaving her foster family. For these reasons, the DHHR argues that termination of petitioner's parental and custodial rights was appropriate.

“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)(3) 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] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child." In terminating petitioner's parental rights, the circuit court noted that petitioner failed to follow through with the skills she was taught in her extensive services, and further that petitioner's "attitudes and beliefs have no[t] changed as she fails to recognize the standard need[ed] to raise her child and the need for the child to have a safe and suitable home." Contrary to petitioner's allegation that the circuit court's finding that she was non-compliant with the services offered was inconsistent with the evidence, the Court finds that the evidence presented below clearly established that petitioner failed to implement the skills she was taught in order to provide a safe and suitable home for her child. As such, because there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected, the circuit court did not err in terminating petitioner's parental rights in accordance with West Virginia Code § 49-6-5(a)(6).

This is especially true in light of our prior holding 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 child at issue was only one year old, which is of the age that the above-quoted language was intended to protect. As to petitioner's allegation that a substantial bond existed between her and the child, the evidence simply does not support this assertion. To begin, the DHHR alleged that at the time the petition was filed below, petitioner had not seen her child for seventeen consecutive days. Further, the circuit court found that "[t]here is no apparent bond between the [petitioner] and the child though the child has been able to develop a very strong bond with the foster parents." This finding is supported by testimony that the child exhibited separation anxiety when leaving the foster family, but not upon being separated from petitioner. In fact, testimony established that the child did not even exhibit recognition of the petitioner during visitations. 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 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.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.

¹Rule 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: 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