STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: J.J., S.L., and A.L. III:

No. 11-1412 (Mingo County 10-JA-21, 22, and 23)

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mingo County, wherein Petitioner Mother's parental rights were terminated by order entered on September 29, 2011. This appeal was timely perfected by her counsel Susan Van Zant, with an appendix accompanying her petition. The children's guardian ad litem, Diane Carter Weidel, filed a response on behalf of the children in support of 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 the circuit court's order.

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 a year after a referral in October of 2009 alleged that Petitioner Mother and her boyfriend at the time, A.L. II, engaged in domestic violence in front of the children. By the time of the preliminary hearing in August of 2010, the parents had separated from each other and were no longer living together. At the preliminary hearing, both of the parents waived their right to a hearing. Subsequently, the circuit court found that one of the children, S.L., had had a black eye, which the parents attributed to her falling down the steps. Petitioner Mother acknowledged that there was domestic violence in the home between she and A.L. II and, at times, in front of the children.

Petitioner Mother further discussed that on one occasion, A.L. II choked her. She further discussed that when S.L. fell down the steps, she and A.L. II had been arguing. In the year before the petition for this case was filed, Child Protective Services ("CPS") made unannounced visits to the residence. Petitioner Mother's in-home service provider, Ron May, reported that on one of these visits, Petitioner Mother "exhibit[ed] unusual behavior and was extremely nervous" and that when several unknown individuals kept coming into the home, Petitioner Mother appeared nervous and would motion for them to leave. Upon request for a drug test, Petitioner Mother tested positive for marijuana. She had expressed a concern that the test would be positive for marijuana, Lortab, and alcohol. Sergeant David Rockel of the Williamson Police Department reported to DHHR that local law enforcement was called to the home on several prior occasions for domestic violence issues. Upon these findings and the parents' waivers of a preliminary hearing, the circuit court found the subject children endangered by Petitioner Mother's abuse of substances and domestic violence with A.L. II.

At the adjudicatory hearing of October 18, 2010, the circuit court denied the children's parents' motions for post-adjudicatory improvement periods, ordered for case plans to be filed, and set the matter for disposition on November 15, 2010. At this hearing, the circuit court continued disposition and granted each parent a ninety-day improvement period. On January 25, 2011, the circuit court extended each parent's improvement period for another ninety days and disposition was again continued. At disposition on May 16, 2011, the circuit court did not terminate the parents' rights. Rather, it entered a two-month post-dispositional improvement period for each of them under conditions that they complete services previously ordered by the circuit court and remain free of drugs and alcohol.

At a review hearing in August of 2011, the circuit court learned that since disposition in May, A.L. II tested positive for cocaine and that Petitioner Mother had been in domestic altercations with a man named D.I., who had his parental rights terminated to his own children in another abuse and neglect case and with whom she made drug runs to Detroit, Michigan. The circuit court further found that a domestic altercation with D.I. resulted in a CPS investigation in Cabell County. DHHR consequently motioned for a supplemental dispositional hearing. Subsequently, at the supplemental dispositional hearing of September 13, 2011, several witnesses testified, most notably Petitioner Mother's case manager, Alonzo Croaff, and Petitioner Mother. Mr. Croaff testified that DHHR substantiated that D.I. was back in Petitioner Mother's home, as indicated by D.I.'s clothes and personal items in Petitioner Mother's home. Mr. Croaff further confirmed that the two had a past domestic altercation that led to a call to DHHR. He confirmed that D.I. has a history of drug-related charges and has had his parental rights terminated to his own children after another abuse and neglect case. Petitioner Mother testified that D.I. became her boyfriend in February of 2011 after they made drug runs together. She admitted that in March of 2011, D.I. physically abused her but she did not do anything about it. She also admitted that she allowed A.L. II more visitation with the subject children than was ordered by the circuit court. Petitioner Mother acknowledged the reasons why D.I. should not have contact with her children and also acknowledged that she was not truthful about her relationship with D.I. to her case manager, Mr. Croaff. In addition to this testimony, other witnesses testified to observing D.I. in Petitioner Mother's home and of his presence in Petitioner Mother's

life. At the close of testimony at the supplemental dispositional hearing, the circuit court terminated both parents' parental rights. It is from this order that Petitioner Mother appeals.

On appeal, Petitioner Mother argues that the circuit court erred in terminating her parental rights to J.J., S.L., and A.L. III. She asserts that because she has shown substantial improvement to her life and parenting skills since the petition of this case was filed, the circuit court's termination of her parental rights was improper. In support, she argues that she fully complied with services offered by DHHR and faithfully attended her visits with her children, her psychological evaluation, her parenting classes, her drug screens, and all of the court proceedings in this case. She argues that pursuant to West Virginia Code § 49-6-5, DHHR has the burden to prove by clear and convincing evidence that a parent will not respond with rehabilitative efforts in order to sustain termination. Here, Petitioner Mother argues, she has changed her living situation since the filing of the petition. She has since obtained employment and has remained free from drugs and alcohol. She has also moved from the original home in Mingo County, which was in an area surrounded by those who trafficked drugs from Detroit, Michigan, into the area, to another home in Huntington in Cabell County. She argues that accordingly, the circuit court erred in terminating her parental rights instead of returning her children to her care.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Mother's parental rights. The guardian points out that Petitioner Mother has received extensive improvement periods and although she was participating in all services offered to her and submitted to and passed most, if not all, of her drug screens, she made the conscious decision to take into her home a man with a known drug history. She chose to risk her right to parent her children by placing this man back into her life. The guardian supports termination. DHHR also argues in support of termination, reiterating that Petitioner Mother continues to involve herself and her children in the area drug culture. In support, it asserts 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.*, 222 W.Va. 517, 667 S.E.2d 573 (2008) (internal citations omitted). Further, it asserts that this Court has held as follows:

> "[C]ourts 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).

The Court agrees. A review of the submitted appendix reflects the circuit court's findings of fact and conclusions of law at termination. Petitioner Mother contends that DHHR's allegation that D.I. was living in her home is unsubstantiated; yet, she offers no evidence or support to refute the

testimony of such by her caseworker, Alonzo Coaff, or others who have observed D.I.'s presence in her life. Although Petitioner Mother made improvements throughout the duration of this abuse and neglect case, she failed to completely separate herself from a known drug trafficker who abused her. Given the circumstances that Petitioner Mother failed to make the most important improvement in this matter by separating from D.I. and given the subject children's especially young ages, the Court finds no error in the circuit court's termination of Petitioner Mother's parental rights.

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 parental rights is hereby 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.

Affirmed.

ISSUED: April 16, 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