STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: O.E.

No. 11-1472 (Mingo County11-JA-58)

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

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Stacey Kohari, arises from the Circuit Court of Mingo County, wherein her parental rights were terminated by order entered September 29, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Diana Carter Wiedel, has filed her response on behalf of the child. Petitioner has additionally filed a reply brief.

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 after the DHHR discovered that Respondent Father, who at the time was a fugitive wanted by the State of Ohio, was living with petitioner. Petitioner has an extensive history of DHHR involvement, and Respondent Father was on parole stemming from an incident in which he physically beat the petitioner while she was seven months pregnant with the subject child. Shortly before this was discovered, petitioner was involved in an abuse and neglect proceeding in the Circuit Court of Logan County concerning the subject child, who exhibited symptoms of withdrawal upon her birth. Petitioner admitted to abusing heroin, cocaine, and methadone during her pregnancy, though she was able to achieve reunification with the child and the Logan County proceedings were dismissed. The initial petition in this matter alleged aggravated circumstance against petitioner due to prior terminations in relation to other children, and also that the child's safety was threatened by Respondent Father living in the home. Petitioner was adjudicated as a neglecting parent due to her inability to protect the child, and also for engaging in at-risk behaviors such as domestic violence and substance abuse. At the dispositional hearing, the circuit court noted that petitioner was either unwilling or unable to provide for the child's needs, and that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. As such, the circuit court terminated petitioner's parental rights and ordered that she have no post-termination visitation with the child.

On appeal, petitioner alleges that the circuit court erred in terminating her parental rights and in denying her post-termination visitation. Specifically, petitioner argues that despite prior

termination of her parental rights to several other children and a prior abuse and neglect proceeding involving the specific child at issue, she made great strides in her life and those efforts were not recognized by the circuit court. According to petitioner, she was able to successfully complete an improvement period and achieve reunification with her child in a prior abuse and neglect proceeding concerning this child in Logan County. She argues that in that prior matter, no findings were made as to the child not having contact with Respondent Father, but despite her lack of notice on this issue, she immediately made him move out of her home when told that his presence was inappropriate. Petitioner argues that she was compliant with all services in this matter and did everything she was asked to do. While she did admit to using old prescription medication and occasionally smoking marijuana, petitioner argues that she did so to cope with the removal of her child and stated she would be willing to undergo inpatient substance abuse treatment. However, petitioner argues that she was prevented from putting on all of her intended witnesses at the dispositional hearing, as several individuals who were subpoenaed to attend did not appear, and the circuit court failed to take any action to require their testimony. In short, petitioner argues that no change in her circumstances existed between the close of her Logan County abuse and neglect case and the instant proceedings, other than Respondent Father's presence in her home, which she quickly remedied. As to post-termination visitation, petitioner argues that a Logan County DHHR employee testified that visitations went well and that petitioner's interactions with the child were always appropriate. Despite the child's young age, petitioner argues that a strong bond exists between the two, and the child's best interests would be served by preserving this important relationship.

Further, in her reply brief, petitioner reiterates that she had made significant strides toward improvement that the circuit court failed to take note of, including active participation with all services offered, obtaining appropriate housing, and maintaining employment. She further emphasizes the quickness with which she remedied the issue of Respondent Father living with her when told the same was inappropriate, which resulted in the father being out of the home before the petition was even filed. Petitioner cites to her prior counsel's testimony that while petitioner did state during the prior Logan County proceeding that she would not be reconciling with Respondent Father, she was never instructed that a petition would be filed if she allowed him to have contact with the child. Petitioner further asserts that her drug use during these proceedings was a manner of treating depression and anxiety brought on by her daughter's removal which went untreated because the DHHR did not issue her a medical card. Lastly, petitioner states that visitations with her child have been sporadic because of illness, and also because service providers routinely reschedule the visitations.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that the circuit court did take note of petitioner's efforts toward improvement, but any improvements petitioner makes during such proceedings only last as long as the DHHR provides structure in her life. In this particular case, despite participation in several abuse and neglect proceedings, the associated services, and two long-term inpatient substance abuse treatment programs, petitioner proved she was unwilling or unable to properly parent her child without direct supervision. According to the guardian, this is evidenced by petitioner's decision to move a convicted felon who was wanted for a parole violation into her home, and her relapse into substance

abuse. In response to petitioner's argument that she was not told that the Respondent Father could not live with her, the guardian notes that petitioner has testified that he beat her on numerous occasions, and further that petitioner knew he was incarcerated for domestic violence against her when she was pregnant because petitioner maintained contact with the father while he was incarcerated. Most telling, according to the guardian, is that petitioner did not mention that Respondent Father was living with her until he was discovered in her home. The guardian argues that had petitioner gained any benefit from the numerous services throughout the years, she would have known that it was inappropriate to have a felon with long-standing substance abuse issues who had physically assaulted her on numerous occasions in her home with her infant daughter. Further, the guardian argues that it is obvious that petitioner has not changed her lifestyle, as she admitted to using drugs and alcohol throughout these proceedings.

As to post-termination visitation, the guardian argues that there is no evidence that continued contact with petitioner would be in the child's best interest, and that such contact would likely be detrimental because it would be difficult to establish permanency for the young child and would confuse the child. Further, petitioner's visitation has been sporadic and it is unlikely that a significant bond exists between the two. Lastly, the guardian argues that petitioner continues to live in the circumstances that led to removal of her children, including continued substance abuse, association with inappropriate individuals, and an untreated mental illness.

The DHHR also responds and argues in support of affirming the circuit court's decision. The DHHR cites petitioner's significant history with the DHHR and her past criminal conviction resulting in incarceration for abuse and neglect of her other children. The DHHR notes that petitioner has received services since 2000, and that petitioner was adamant that she had no intention to reconcile with Respondent Father during the prior Logan County proceedings. For this reason, the final order in that matter did not address continued contact with the father, though the DHHR notes that during a multi-disciplinary team ("MDT") meeting in the prior matter, it was discussed with petitioner that she not have contact with Respondent Father because of the past domestic violence. The DHHR argues that petitioner stated there would be no issue with her living with Respondent Father in the future, which is why the same was not addressed by the circuit court. In regard to this matter, the DHHR notes that petitioner was harboring a fugitive by allowing Respondent Father to live with her, and that she admitted to abusing drugs and alcohol subsequent to the filing of the petition in the proceedings below, as corroborated by multiple failed drug screens. Further, the instant petition alleged aggravated circumstances, as petitioner has previously lost custody of children in Ohio and Kentucky. Petitioner underwent a psychological evaluation, and the DHHR notes that the evaluator concluded that petitioner had not benefitted from the numerous services she received over the years. Petitioner was diagnosed with multiple mental health issues, and the DHHR cites to the evaluator's conclusion that petitioner's anti-social features could not be remedied, and the subsequent recommendation that petitioner not have custody of the child. In short, the DHHR argues that petitioner has repeatedly regressed into her old lifestyle despite numerous services, and that it was clear petitioner could not remedy the conditions of abuse and neglect at issue.

"'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).

At disposition in this matter, the circuit court found that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in the near future. This finding was based on her repeatedly engaging in at-risk behaviors such as substance abuse and domestic violence; the fact she knowingly permitted Respondent Father, an inappropriate individual, to be in her home; her significant mental health issues; and, the fact that she has not benefitted from the extensive services offered. 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."

As noted above, the prior abuse and neglect proceeding involving O.E. was initiated based upon petitioner's admission to using heroin, cocaine, and methadone during pregnancy to the point that the child exhibited withdrawal symptoms at birth. Further, petitioner tested positive for controlled substances on multiple occasions during the instant matter, and even admitted to smoking marijuana to cope with the stress of the child's removal. It is also important to note that substance abuse has been an underlying issue in many of petitioner's prior abuse and neglect proceedings involving her other children dating back to 2000, and that she has previously undergone long-term inpatient substance abuse treatment programs. Based upon this evidence, it is clear that the circuit court correctly found that the conditions of abuse and neglect could not be substantially corrected due to petitioner's habitual abuse of controlled substances and inability to correct the same through services offered. As such, 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). The child at issue was only one year old at disposition, and of the age the above-quoted language was intended to protect. Despite petitioner's argument that she made great strides toward improving her circumstances, it is clear that the circuit court did not err in proceeding to termination based upon the finding that petitioner could not substantially correct the conditions of neglect in the near future. Further, it is clear that the circuit court based this finding on more than the Respondent Father's presence in the home, which is contrary to petitioner's argument that her circumstances had not changed since the close of her Logan County abuse and neglect proceeding. 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.

As to petitioner's argument that the circuit court erred in denying post-termination visitation, the Court declines to disturb this decision on appeal. We have previously held as follows:

> "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 5, *In re Austin G.*, 220 W.Va. 582, 648 S.E.2d 346 (2007). In short, there was no evidence presented below establishing that continued contact with petitioner would be in the child's best interest, and on appeal petitioner relies only upon bald assertions that a strong emotional bond exists in arguing that the circuit court erred. Petitioner does cite to testimony from a DHHR employee that visitations went well and that petitioner's interactions with the child were always appropriate, but this testimony does not rise to such a level as to entitle petitioner to visitation. The Court agrees with the guardian's argument that continued contact with petitioner would actually be detrimental to the child, especially in light of the child's young age, and petitioner's continued lifestyle of substance abuse, untreated mental illness, and association with inappropriate individuals. As such, the Court declines to find error in the circuit court's decision to deny post-termination visitation.

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.

ISSUED: May 29, 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

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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.