STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.D.:

No. 11-1507 (Mercer County 09-JA-171)

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

MEMORANDUM DECISION

Petitioner Mother, by P. Michael Magann, her attorney, appeals the Mercer County Circuit Court's order entered on October 3, 2011, terminating her parental rights to M.D. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem, Julie Lynch, has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response, joining in the response of the guardian.

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 petition in this matter was filed alleging drug abuse by both parents, as well as domestic violence in the home, and criminal activity by Petitioner Mother. The child was two months old at the time, and was removed from the home and placed with her maternal grandmother. Three months after the petition was filed, Petitioner Mother entered inpatient treatment in an attempt to detoxify her body, but was terminated from the program within five days for violating the rules. Almost two months later, Petitioner Mother entered another recovery program. She spent approximately seven months in this program, but repeated rule violations eventually led to her termination from the program prior to completion. Petitioner's termination from this program was also considered a

probation violation, and she was therefore incarcerated. Prior to her incarceration, she was granted an improvement period after stipulating to the neglect of her daughter. Petitioner Mother sought parole, but a condition of her parole was admittance into another treatment facility and she had to secure a home. She could not secure a home because her mother had custody of the child, and her grandmother was a victim of her crimes. Further, she failed to secure a rehabilitation placement. Therefore, she remained incarcerated. At the dispositional hearing, the circuit court found that the case has been pending since 2009, and reunification had not yet begun. Thus, due to the need for permanency, the circuit court concluded that reunification is not in the best interest of the child. The circuit court found that Petitioner Mother has been habitually addicted to drugs and her parenting skills have been impaired. The circuit court found that petitioner has not responded to or followed through with treatment offered by the DHHR; hence, Petitioner Mother's parental rights were terminated.

Petitioner Mother argues on appeal that the circuit court erred in failing to grant her a dispositional improvement period to include additional drug treatment, after she had secured release from incarceration after finding a drug treatment facility. Petitioner argues that an incomplete family case plan was filed, but she fails to provide a copy of the plan in her appendix to this petition. Petitioner argues that no treatment plan was listed for her in the case plan, which she indicates was only a problem after she was re-incarcerated following her discharge from her rehabilitation program. Thus, Petitioner Mother contends that since the case plan was incomplete, the DHHR could not establish how Petitioner Mother failed to comply and therefore, she should have been granted a post-dispositional improvement period.

Petitioner Mother also argues that the circuit court erred by not requiring the DHHR to assist her in obtaining housing and drug treatment while she was incarcerated so she could be released. Petitioner argues that it was the duty of the DHHR to assist her in the completion of her rehabilitation so she could reunify with her child. Petitioner further argues that the DHHR erred by not performing another substance abuse evaluation after she underwent treatment. She argues that she may not have even needed further treatment but without a new evaluation, she did not know what she needed to do in order to achieve her goals.

In response, the guardian argues that Petitioner Mother has a substance abuse addiction and has engaged in criminal activity in order to support her drug habit. The guardian also notes that petitioner was given drug treatment twice, and both times failed to complete the programs. The second time, her dismissal was due to multiple rule infractions, including obtaining pain medication from a dentist without disclosing the same, and taking more than the proper dosage. The guardian adds that Petitioner Mother continuously repeats the same problematic behaviors. Moreover, her probation officer testified that Petitioner Mother has been dealing with drug abuse for at least seven years. The guardian argues that petitioner fails to take responsibility for her actions, and blames the DHHR for not securing her acceptance into a third drug treatment facility and for not finding her a home. The guardian argues that termination is proper in this matter, as the child has lived with her

grandmother since she was two months old, and is now almost three years old. The guardian argues that in order to achieve permanency, petitioner's rights must be terminated. The DHHR concurs in the guardian's response.

With regard to Petitioner Mother's request for a post-dispositional improvement period, the relevant statute states that in order to receive another improvement period, she must show that she "has experienced a substantial change in circumstances. Further, the [petitioner] shall demonstrate that due to that change in circumstances, the [petitioner] is likely to fully participate in the improvement period . . . ." W.Va. Code § 49-6-12(c)(4). In the present case, the substantial change in petitioner's circumstances was that she became incarcerated. Thus, she was not likely to fully participate in an improvement period. Further, she previously failed to complete two different drug treatment programs. Moreover, this Court has recognized the need for a child to achieve permanency in a timely manner:

> The 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). Therefore, this Court finds no error in the circuit court's denial of a post-dispositional improvement period under the facts of this case.

As to the termination of Petitioner Mother's parental rights, this Court has found:

> "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va.Code [§] 49–6–5 (1977) will be employed; however, 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 re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). The child in this matter has been placed with her grandmother since she was two months old. At this point, it is unclear as to when, or if, Petitioner Mother could ever reunify with the child. Therefore, this Court finds that termination was in the child's best interest.

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 parental rights is hereby affirmed.

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

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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.