STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.W.:

No. 11-1518 (Clay County 10-JA-115)

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by Jerome Novobilski, her attorney, appeals the circuit court's order terminating her parental rights to M.W. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem Julia R. Callaghan has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response.

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 instant petition was filed after Petitioner Mother, the child, who was then six months old, and the grandmother were found living in a car in temperatures below twenty degrees in a snowstorm. When police arrived, Petitioner Mother and the grandmother attempted to flee with the child. The child smelled of urine and dirty clothing when she was removed, and the vehicle was filled with clothing, garbage and empty food containers. Just after the child was born, Petitioner Mother was offered assistance with housing and refused. The grandmother living with them had a history of removals of children in her care. Multiple unsubstantiated reports came into Child

Protective Services ("CPS") that Petitioner Mother had been living in the vehicle for an extended period of time.

Petitioner Mother was adjudicated as abusive and neglectful, and was offered services, but was noncompliant. A psychiatric evaluation showed that Petitioner Mother refused to take responsibility for her actions and saw nothing wrong with her parenting style. The psychiatrist opined that petitioner's prognosis for improvement was poor. The State moved for termination of parental rights, and the circuit court terminated Petitioner Mother's parental rights. The circuit court found that Petitioner Mother has failed to take responsibility for her actions throughout these proceedings, failed to engage in services, failed to attend several of her therapy appointments, refused access to her home on several occasions, and lied about firearms in her home, which had to be removed after death threats were made against CPS workers by Petitioner Mother. The circuit court additionally noted that further services are not required, as Petitioner Mother had been uncooperative.

Petitioner Mother argues that the circuit court erred in finding her to be a drug user, as she passed every drug test she took and produced evidence of a valid prescription for painkillers. Further, she argues that the circuit court erred in finding that she was abusive and neglectful for sleeping in a car with her child, because she was fleeing a domestic violence situation, and there was no evidence that sleeping in the vehicle was harmful to the child.

The DHHR argues that the finding that petitioner was abusive and neglectful was legitimate, as petitioner was clearly neglecting the child and refused to admit her problems or comply in services. The guardian ad litem concurs, noting that petitioner testified that she was not living in the car, but was only moving; however, the officer on the scene testified that the vehicle had several inches of snow on it and there were no visible tire tracks. Moreover, the child was so unclean that the child's odor filled the officer's car.

In the present matter, the evidence supports the circuit court's findings. Petitioner Mother could not immediately produce a valid prescription, and reported that she did not have a prescription for one of the medications for which she tested positive, as she was given the medication by another individual. Further, the evidence supports the finding that petitioner was abusive and neglectful by living in her vehicle with an infant in temperatures which were below freezing, and the evidence suggests that Petitioner Mother had been living in the car for an extended period of time. This Court finds no error in these findings.

Petitioner Mother also argues improper use of hearsay because the psychiatrist's opinion was based almost completely on DHHR's records. Petitioner gives no specific examples of the improper hearsay. Moreover, petitioner gives no legal support to her contention that the psychiatrist, who

personally examined the mother, cannot refer to other evidence in the record. Thus, we find no error in the circuit court's review and reliance upon the psychiatrist's report.

Petitioner Mother next argues that the circuit court took "issue" with her aggressive actions, and also that Petitioner Mother had serious mental health issues that were not properly dealt with by the circuit court or the DHHR. Petitioner Mother argues that no one showed tolerance for her needs, and although the DHHR should be trained in "dealing with people with difficult personalities," it "never gave the mother an inch of allowance in that regard." Both the guardian ad litem and the DHHR argue that Petitioner Mother made no attempt at improving the conditions of abuse and neglect, and in fact even made death threats against CPS workers attempting to help her. Further, Petitioner Mother never admitted that there was any problem in her parenting.

This Court has held that "'in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.' *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)." *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Termination is proper when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child . . . ." W.Va. Code § 49-6-5(a)(6). Petitioner Mother saw nothing wrong in the child's condition or her own living situation, and failed to admit to any of the problems that led to the filing of the petition. Thus, this Court finds no error in the termination in this matter.

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: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman

[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.