STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: K.A.O., K.O., A.D., and D.D.

No. 11-1520 (Marion County 10-JA-49, 10-JA-50, 10-JA-53 & 10-JA-54)

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

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Terri L. Tichenor, arises from the Circuit Court of Marion County, wherein her parental rights to her children, K.A.O., K.O., A.D., and D.D., were terminated by order entered October 7, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Frances C. Whiteman, has filed her response on behalf of the children.

This Court has considered the parties' briefs and the appendix 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 controlled substances, including heroin, marijuana, and hydrocodone, were being sold in petitioner's home; that petitioner admitted to police that she used marijuana; and, that one child was extremely dirty, was not wearing pants, and had bad diaper rash that appeared to be untreated. During the proceedings below, petitioner was granted two separate improvement periods, but ultimately the circuit court terminated her parental rights. In its dispositional order, the circuit court based termination on several factors, including that petitioner habitually lied to the multi-disciplinary treatment ("MDT") team about her continued drug abuse, and her failure to seek drug treatment. The circuit court found that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected because the petitioner was addicted to drugs and failed to follow through with a reasonable family case plan or other rehabilitative efforts. It is from this order that petitioner appeals.

On appeal, petitioner argues that the circuit court erred in failing to grant her an alternative disposition under West Virginia Code § 49-6-5(a)(5), which sets forth six potential dispositional options, the least restrictive of which should be applied based upon the specific facts of each case. Petitioner states that the first factor bearing on the circuit court's decision is the ability of the parent to participate in a program of reunification. Petitioner asserts that she had been participating in services until she was involved in a serious motorcycle accident that required an initial hospitalization followed by recuperative care in her family's home in Virginia. Under the second

factor, which is whether the child is in immediate danger of abuse and/or neglect, petitioner argues that he children had been placed with a relative and were not in immediate danger. Lastly, the third factor is whether there is a less restrictive means of protecting the child. Petitioner cites to our prior holding in the case of *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991), to argue that the least restrictive alternative should be employed at disposition. Petitioner argues that there were multiple less restrictive alternatives other than the termination of her parental rights below, and that the circuit court should have granted her an alternative disposition to allow her to continue services and possibly be reunified with her children at a future date.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that during petitioner's two improvement periods, she failed to correct the conditions of abuse and/or neglect over the several months this matter was pending. While petitioner did participate in some services, the guardian argues that petitioner stopped complying with services and used drugs prior to her motorcycle accident. According to the guardian, the circuit court gave petitioner numerous opportunities to correct these issues, but petitioner ultimately failed to comply. For these reasons, the guardian argues that the circuit court was correct in denying alternative disposition and in terminating petitioner's parental rights. The DHHR fully concurs with the guardian's response in support of affirming the circuit court's ruling.

"'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 petitioner habitually lied to the MDT about her continued drug abuse and failed to seek drug treatment during the pendency of the action below. As such, the circuit court found that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected because petitioner was addicted to drugs and failed to follow through with a reasonable family case plan or other rehabilitative efforts. 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."

Contrary to petitioner's argument that the circuit court was presented with six different options at disposition, the Court notes that based upon the specific facts of the instant matter, the circuit court was left with only one option: termination of parental rights. West Virginia Code § 49-6-5(a)(6) directs a circuit court, upon a finding that 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, to terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent. In short, the circuit court had no option but to terminate petitioner's parental rights because of the finding that there was no reasonable likelihood that she could substantially correct the conditions of abuse or neglect, and because the child's best interests required termination.

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 . . . .' 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). Despite petitioner's argument that she was participating in all services offered, 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. This is evidenced by the multiple positive and suspect drug screens petitioner provided during the proceedings below, as well as her dishonesty surrounding her substance abuse. 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 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

[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.

(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