STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: C.H., J.F., and J.G.:

No. 11-1521 (Mineral County 11-JA-3, 4 & 5)

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 Mineral County, wherein Petitioner Mother's parental rights were terminated by order entered October 7, 2011. This appeal was timely perfected by her counsel, Agnieszka Collins, with an appendix accompanying her petition. The children's guardians ad litem, Kelley Kuhn and Meredith Haines, 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 Lee Niezgoda, 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).

In July of 2011, DHHR filed the instant petition based on allegations that Petitioner Mother and her husband, who is stepfather to the subject children, left two of their young children, C.H., age five, and J.G., age three, home for hours by themselves. At approximately 11:30 in the evening, police officers were called to the family's home and found that the two children were left in the home by themselves, in separate rooms. They reported that no adults were present and the children were dirty and wearing dirty diapers. Clothes, used diapers, trash, dirt, and cat feces were strewn about the home. The police further reported that it was so hot inside the home that they had to take turns stepping outside to cool off. One of the police officers spotted Petitioner Mother and her

husband earlier in the evening walking on the streets, hand in hand, and estimated that the children were alone at home that evening for at least two to three hours. When Petitioner Mother and the stepfather came home, the children asked for food. In response, Petitioner Mother handed them a bag of chips and warm Mountain Dew. The petition further alleged that this family has been involved with Child Protective Services ("CPS") in the past. One past incident involved a call alleging that the youngest child, J.G., had crawled out on the roof from her bedroom window. Petitioner Mother waived her right to a preliminary hearing.

At the adjudicatory hearing in August of 2011, the circuit court heard testimony from several witnesses. Both of the police officers who responded to Petitioner Mother's home in July of 2011 testified and both testified to the home's deplorable conditions, the children left alone in their rooms, and the high temperature inside of the home. Pictures the police took that evening were submitted into evidence and are included in the appendix on appeal. Both police officers also spoke of past calls they had responded to at the family's home concerning neglect of the children. CPS workers involved in the family's case also testified and spoke of the night that initiated the instant petition and also of prior calls they had received in the past about the family's living conditions and lack of care for the children. One of the supervising CPS workers testified that Petitioner Mother had told her that she knew that locking her children in their rooms and leaving them alone was wrong but had done so on more than one occasion. Caseworker Chris Brown testified that in her work with Petitioner Mother, she had noted that, "[Petitioner Mother] said she is open to hearing what I have to say, but doesn't plan to change." Chris Brown also testified of another note she made in her reports that Petitioner Mother is "very stuck in her ways and is unwilling to try something new." She further testified that the oldest child was still not toilet-trained. The circuit court found that Petitioner Mother abused and neglected her children and denied her an improvement period. The circuit court further continued the physical custody of the children with each of their biological fathers.[1]

At disposition in September of 2011, the circuit court heard testimony from DHHR worker Jackie Davis and from Petitioner Mother. Jackie Davis testified about prior calls to the family's home. On one occasion, one of the children was yelling and crying for Petitioner Mother from his bedroom window; Petitioner Mother was home and had locked her son in his bedroom. On another occasion, the police came to the home and Petitioner Mother was intoxicated. A separate call was made to police when the youngest child crawled through her bedroom window onto the roof. Jackie Davis testified that she did not believe that the concerns which caused removal of the children from Petitioner Mother's home could be remedied in the near future. She further testified that Petitioner Mother has received services in the past and has not changed and lacks the motivation to change. Petitioner Mother testified that the youngest child only went out on the roof one time. With regard to the evening in July, Petitioner Mother testified that she was only going to the store for a few minutes to pick up a couple of things. She agrees that pictures taken by the police officers of her

[1] J.G. was later removed from her biological father's home and placed in foster care. DHHR later filed a petition against J.G.'s biological father and he has a separate abuse and neglect case pending.

home are an accurate depiction of what her home looked like that evening. Petitioner Mother further admits that she made a past statement to DHHR that she is not motivated to parent the children. The circuit court recapped its findings at adjudication and found that "one of the patterns that's run through here is [Petitioner Mother's] lack of empathy for these children." Accordingly, the circuit court terminated Petitioner Mother's parental rights without an improvement period. Petitioner Mother appeals this decision.

On appeal, Petitioner Mother argues that the circuit court erred in terminating her parental rights without an improvement period at disposition. She argues that although DHHR has accused her of several incidents where she left the child unattended, the only substantiated occasion was the July of 2011 incident which led to the filing of the abuse and neglect petition. Petition Mother further argues that she testified that she would be willing to cooperate fully with any services and requirements asked of her in an improvement period and that despite one of her children's fathers testing positive for drugs and keeping a home in a worse condition than hers, this father received an improvement period.

The guardians ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Mother's parental rights without an improvement period. The guardians assert 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 . . . ." 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). Further, "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). The guardians argue that in the instant case, police officers were called to the family's home on multiple occasions concerning the children's care. The guardians reiterate that testimony at the adjudicatory hearing indicated that specifically, police officers responded to a call where the children were locked in their bedrooms while Petitioner Mother was listening to music on the porch, a call where one of the children was calling and yelling for Petitioner Mother from his bedroom window while Petitioner Mother was at home, and a call in which the youngest daughter had crawled out of her bedroom window and onto the roof. On the occasion in which one of the sons was yelling of out his window, the police officers found that his bedroom only contained a mattress and a blanket. DHHR responds, citing West Virginia Code § 49-6-12(b)(2) in support of the circuit court denying Petitioner Mother an improvement period. DHHR notes Petitioner Mother's history of participation in Birth to Three services and other individualized parenting sessions through Family Preservation, but without any change. Petitioner Mother's worker noted that Petitioner Mother is open to hearing suggestions, but does not plan to change.

The circuit court is not required to grant an improvement period at disposition. Rather,

pursuant to West Virginia Code § 49-6-12, it is the subject parent's burden to first prove by clear and convincing evidence that he or she would substantially comply with the terms of an improvement period. A review of the submitted appendix confirms the circuit court's findings of fact and conclusions of law in its termination order. The dispositional hearing transcript provides testimony by the patrolmen who responded to the family's home in July of 2011, the family's caseworkers, and Petitioner Mother. These testimonies indicate that Petitioner Mother has a history of neglecting her children, leaving them unattended on more than one occasion and failing to properly care for them in their home. Petitioner Mother's testimony did not indicate that she had any interest in improving or working toward her children's return. In her testimony, she admitted that she once stated to DHHR that she does not have the motivation to parent the children. The appendix includes summaries of Multi-Disciplinary Treatment Team ("MDT") meetings and "Client Contact Reports." One MDT summary of August 23, 2011, indicated that Petitioner Mother expressed that she has no interest in changing. One of the Client Contact Reports indicates different dates CPS workers made visits to the home. One visit summary indicates that there was white powder residue on the coffee table and the house was "a mess"; another visit summary indicates that child C.F.'s bottom had a sore from wearing his unchanged diaper so long, that his diaper had dried feces, and that his bottom was so red and irritated that a pinprick of blood came out of his skin; and another summary indicated that the children's stepfather bragged about picking up the children by their "throats and body slam[ming] them on the bed" when he was irritated with them. Various entries indicated that the children were often dirty, smelled of urine, and had marks on their legs and arms. Other entries indicated that there were times when the children were left untreated with coughs and ear infections. Petitioner Mother did not meet her burden to the circuit court for an improvement period at disposition. Given these circumstances and given the subject children's fairly 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.[2] 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

[2] 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.

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