STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: Z.B., A.M. and B.M.:

No. 11-1522 (Boone County 10-JA-41, 42 and 43)

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

MEMORANDUM DECISION

Petitioner Mother, by Joel Baker, her attorney, appeals the Boone County Circuit Court's order entered on August 23, 2011, terminating her parental rights to Z.B., A.M. and B.M. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem L. Scott Briscoe has filed his 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 and a supplemental appendix.

Having reviewed the appendices 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 appendices 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 after Petitioner Mother's boyfriend allegedly assaulted her in front of her daughter. The child ran to a neighbor's house for help, and Petitioner Mother was found "covered" in blood. Petitioner Mother, however, claimed that she had fallen and that there was no domestic violence in the home, despite the child's reports. The petition also notes that Child Protective Services ("CPS") has been involved with this family since 2007. At the preliminary hearing, Petitioner Mother was ordered to undergo drug screens, over the objection of her attorney, who claimed that since there were no allegations of drug abuse in the case that his client should not

have to undergo said testing. The drug screens were required by Petitioner Mother's pre-adjudicatory improvement period. Petitioner Mother tested positive for drugs many times throughout the proceedings, and failed to appear for many of the required drug screens. The DHHR arranged inpatient drug treatment upon Petitioner Mother's request, but she left the program within days.

Eventually, Petitioner Mother stipulated to the allegations in the petition, admitting to the domestic violence in the home and admitting that she was addicted to drugs. The children were adjudicated as abused and neglected, and despite Petitioner Mother's failure to engage in services in her pre-adjudicatory improvement period, she was granted a post-adjudicatory improvement period over the DHHR's objection. The circuit judge warned her that should she fail to comply in her post-adjudicatory improvement program that she would lose parental rights to her children. During the post-adjudicatory improvement period, Petitioner Mother failed to regularly contact the DHHR, failed to engage in services, and had numerous positive drug screens. The circuit court therefore terminated Petitioner Mother's parental rights.

On appeal, Petitioner Mother first argues that the circuit court erred in failing to dismiss the case as moot when the sole allegation in the petition was domestic violence, and this issue was remedied by the death of petitioner's boyfriend and co-respondent. The children in this case were removed after petitioner's boyfriend allegedly struck her in the face and she was found covered in blood. The petition does not mention any substance abuse issues, and even absent such an assertion, the circuit court ordered drug testing. Petitioner admittedly failed some of her drug screens and failed to appear for some others, but this was never the cause of an abuse and neglect petition. The person who allegedly assaulted petitioner is now deceased, and since this was the sole allegation in the petition, the petition should have been dismissed.

In response, the guardian argues that Petitioner Mother failed to argue or raise the issue that the conditions in the original petition were moot during any of the proceedings below. Further, the guardian notes that petitioner's drug abuse was a topic discussed throughout the case, and despite two improvement periods and two rehabilitation placements, petitioner continued to abuse drugs. Termination is in the best interests of the children. The DHHR makes essentially the same arguments in its response.

Petitioner Mother next argues that her rights were terminated based on a condition which was not alleged in the petition, and the DHHR failed to file an amended petition. Petitioner notes that Rule 19 of the Rules of Procedure for Child Abuse and Neglect Proceedings allows for the filing of an amended petition. Petitioner further argues that the DHHR had knowledge of substance abuse issues from early in the case but failed to allege substance abuse problems in the petition, and failed to file another petition.

The guardian argues in response that petitioner did not raise this issue below. As noted above,

petitioner's drug use was a constant concern. Termination was proper as Petitioner Mother showed an inability to correct this problem. Further, there is no mandate that the DHHR file an amended petition, and the petitioner has cited no legal authority requiring an amended petition be filed. Termination was the least restrictive alternative in this matter.

The DHHR also argues that drug abuse was a concern throughout this case. Moreover, the DHHR argues that petitioner failed to raise this issue below, and in fact put on no evidence or testimony at the disposition hearing. The circuit court made extensive findings in its orders showing that termination was proper in this matter. The DHHR argues that petitioner was given several chances for improvement, but failed to improve, and thus termination was the only alternative. Additionally, the DHHR argues that the petitioner had identified no requirement that the DHHR file an amended petition.

Petitioner's first two assignments of error are similar and thus, this Court responds to them together. While petitioner is correct in her assertion that the petition does not allege substance abuse issues, it is clear that from the time of the preliminary hearing, the circuit court noted that Petitioner Mother had a substance abuse problem. In fact, petitioner has admitted as much repeatedly, requesting drug treatment and stipulating to her drug addiction at the adjudicatory hearing. At no time did petitioner move to dismiss the petition herein. This Court finds no error in the failure of the circuit court to *sua sponte* dismiss this petition.

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 . . . ." 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). Petitioner Mother has an admitted drug addiction. Although the DHHR made several attempts at helping her, including finding her not one, but two, drug treatment placements, petitioner failed to complete any drug treatment program and continued to test positive for drugs. In fact, she failed to even regain her rights to visit her children because she could not test negative for drugs. This Court finds no error in the termination of parental rights in this matter.

Finally, Petitioner Mother argues that the DHHR erred by not filing a family case plan as required by Rule 23 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Petitioner argues that the filing of this case plan is not optional. Petitioner also argues

that the failure to file this plan frustrated her attempt at reunification.

The guardian responds, arguing that petitioner failed to raise this issue below. Further, the guardian argues that there were at least eight DHHR Summary Reports filed between May of 2010 and August of 2011, each of which informed all parties of the DHHR's opinions and findings regarding the placement of the children and the termination of parental rights. The DHHR likewise argues that it issued several Summary Reports in this action, and that Petitioner Mother had knowledge of the evidence against her and the fact that the DHHR was seeking termination of her parental rights.

This Court has found that "'[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings . . . has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.' Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001)." Syl. Pt. 6, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005). In the present case, the DHHR failed to file a family case plan. While this Court reminds the circuit court of its duty to adhere to the Rules of Procedure for Child Abuse and Neglect Proceedings, we do not find that the failure to file said case plan"substantially disregarded or frustrated" the process established by the rules in this case. Petitioner had clear knowledge of the conditions which needed to be remedied in order for her to reunify with her children, but failed to make the necessary improvements. Although we are concerned about the allegations that the DHHR failed to follow procedures such as the proper preparation of the child case plan, we conclude that such alleged omissions do not warrant reversal in light of all the circumstances in this case.

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

[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

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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entered after January 3, 2012.