STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: A.B.:

No. 11-1537 (Kanawha County 11-JA-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 Kanawha County, wherein Petitioner Mother's parental rights were terminated by order entered on October 18, 2011. This appeal was timely perfected by her counsel, Edward Bullman, with an appendix accompanying her petition. The child's guardian ad litem, Jennifer Victor, filed a response on behalf of the child in support of the circuit court's order, along with an amended list of appendix records. The Department of Health and Human Resources ("DHHR"), by its attorney Lee A. Niezgoda, also filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the appendices on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendices 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 appendices 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).

The instant petition was filed in January of 2011 based on allegations of the parents' drug use and domestic violence in the child's presence; her father's physical and sexual abuse toward the child; Petitioner Mother's knowledge of this abuse and failure to protect her; Petitioner Mother's physical abuse toward the child; and the parents' neglect of the child by inadequately providing the necessary food, clothing, supervision, and shelter. Both parents waived their right to a preliminary hearing.

At the adjudicatory hearing in April of 2011, the child's counselor, Maureen Runyon, testified of the subject child's disclosures to her. Ms. Runyon testified that A.B. disclosed to her details of her father's sexual abuse toward her. In particular, A.B. told Ms. Runyon that her father has, on more than one occasion, laid on top of her naked and that when he touched her vagina, it would feel "like something weird and pointy was in her [vagina]." A.B. further disclosed to Ms. Runyon that there were times when Petitioner Mother was present during these incidents, at least initially, and that afterwards, at times, A.B. would go take a warm shower and "there would be icky stuff that she would wash off of herself." A.B. also discussed her parents' drug use; she specifically explained that she had seen her father crush up Adderall and snort it into his nose, her mother smoke marijuana, and her mother take pills. A.B. told Ms. Runyon that their house was dirty and that sometimes her father would get so drunk that he would urinate in the bed, on her toys, or on the furniture. Moreover, A.B. told Ms. Runyon that her father has also smacked her in the face, legs, and on her bottom and that Petitioner Mother, as a method of discipline, would leave her outside in the cold for half an hour. The circuit court found both parents as abusive and neglectful and denied a post-adjudicatory improvement period to both of A.B.'s parents, but offered services to Petitioner Mother, including a psychological evaluation.

At the dispositional hearing in July of 2011, DHHR worker Charles Batch testified and recommended termination of both parents' parental rights. He specifically explained that, with regard to Petitioner Mother, his recommendation was "[m]ainly because of the interaction that has taken place during the visits with [Petitioner Mother] and with [the subject child.] There has [sic] been three or four extreme incidents that have occurred where I have talked to [the child], and she is afraid." In particular, Mr. Batch explained occasions where Petitioner Mother failed to moderate the volume and tone of her voice and failed to moderate her behavior. He also testified that there were times when Petitioner Mother discussed the child's paternal family inappropriately. On one occasion, Petitioner Mother came to "physical blows" with the child's aunt. Mr. Batch further testified that, according to the child, Petitioner Mother initiated this altercation and has fought with others, too. Moreover, Mr. Batch testified that Petitioner Mother has not acknowledged any personal wrongdoing in the matter and has "flip-flopped" on believing that any abuse has occurred to the child. Petitioner Mother testified and discussed that she has been going to domestic violence classes and has applied for housing. When asked, "Do you think you did anything wrong?" she responded with, "No." She further denied that her child ever came to her and told her about her father's abuse. Based on the testimony and evidence provided in this case, the circuit court found that termination was proper, denied improvement periods to both parents, and denied post-termination visitation to both parents. Petitioner Mother appeals the circuit court's decision.

On appeal, Petitioner Mother argues two assignments of error. She argues that the circuit court erred in denying her an improvement period and that it erred in denying her post-termination visitation. Petitioner Mother argues that she should have received an improvement period because her participation in recommended services demonstrated that she would likely benefit from an improvement period. She argues that "unless goaded by the aunt, [she] did well during the visits." She further asserts that she is enrolled in domestic violence counseling; has sought housing; has participated in the circuit court-ordered psychological evaluation, but did not subsequently receive

any recommendation for programs. Her April 26, 2011, supervised visitation summary indicates that she has been using the skills and techniques she has learned to interact with the subject child. She further asserts that she testified that she had no knowledge of the child's sexual abuse by her father and that she would be willing to protect her child from the father.

The guardian ad litem and DHHR respond, contending that the circuit court did not abuse its discretion in denying Petitioner Mother an improvement period. The guardian and DHHR argue that Petitioner Mother did not show by clear and convincing evidence, pursuant to West Virginia Code § 49-6-12(b)(2), that she would be likely to fully participate in an improvement period. They both assert that Petitioner Mother never admitted to any parenting inadequacies that would benefit from remedial or reunification services. In support, they assert that Petitioner Mother did not cooperate adequately in her services, had anger outbursts and spoke about inappropriate topics at her supervised visits with the child, and once had a physical altercation with the child's aunt in the child's presence. Moreover, the guardian highlights that the child has shared that she is afraid of Petitioner Mother. DHHR further argues that the evaluating psychologist indicated that she could not make a clear diagnosis of Petitioner Mother's mental condition because Petitioner Mother refused to release her medical records and Petitioner Mother's recollection of her medical history was poor. DHHR also notes that under West Virginia Code § 49-6-3(d)(1), it is "not required to make reasonable efforts to preserve the family if the court determines: (1) [t]he parent has subjected the child . . . to aggravated circumstances which include, but are not limited to, . . . sexual abuse."

The Court finds no abuse of discretion in denying Petitioner Mother an improvement period. 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, under West Virginia Code § 49-6-12, a circuit court is not required to grant an improvement period, but rather, has the discretion to grant or deny one. It is the subject parent's burden to show that one would be beneficial. Moreover, the Court has held as follows:

> 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.

In re Kaitlyn P., 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010) (quoting *W.Va. Dep't. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)). Here, a review of the appendix record indicates that the circuit court found that the child's father sexually abused the child. Although Petitioner Mother has participated in some services, she failed to

acknowledge this abuse or any wrongdoing on her part in this case. Further, her assertion that "unless goaded by the aunt, [her] visits went well" is not supported by any evidence. The record indicates that the supervised visitation summaries discussed Petitioner Mother's behavior with this aunt on only one occasion. On other occasions, she acted inappropriately even without other family members present. Petitioner Mother did not meet her burden before the circuit court to show by clear and convincing evidence that she would benefit from an improvement period. Further, Petitioner Mother's psychological evaluation indicates that she was a "poor informant," and continued to deny any abuse to the child and denied any current substance abuse. The Court finds no error in the circuit court's decision to deny Petitioner Mother an improvement period.

Petitioner Mother also argues that the circuit court erred in denying her post-termination visitation. In support, she asserts that there was no evidence presented that visitation would be harmful to the child and there was no evidence presented that visitation would not be in the child's best interests. She asserts that the option of visitation should have been left to the discretion of the care providers and the child and not completely foreclosed by the circuit court.

The guardian ad litem and DHHR respond, contending that the circuit court did not abuse its discretion in denying Petitioner Mother post-termination visitation. The guardian asserts that the Court has held as follows:

> "'When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.' Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995)." Syl. Pt. 8, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syl. Pt. 8, *In re Charity H.*, 215 W.Va. 208, 599 S.E.2d 631 (2004). Furthermore, the guardian asserts that visitation is a right that belongs to the child, not the parent. *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Moreover, such visitation should not be permitted to "'unreasonably interfere with [a child's] permanent placement.' *State ex rel. Amy M. [v. Kaufman]*, 196 W.Va. [251] at 260, 470 S.E.2d [205] at 214 [(1996)]." *In re Alyssa W.*, 217 W.Va. 707, 711, 619 S.E.2d 220, 224 (2005). The guardian asserts that here, visitation would be contrary to A.B.'s best interest due to the history of her case, particularly Petitioner Mother's actions which subjected the child to physical, sexual, and emotional abuse; Petitioner Mother's denial of such; and Petitioner Mother's erratic behavior and her unwillingness or inability to conform to the child's needs. DHHR shares the guardian's position and supports the circuit court's denial of post-termination visitation.

The Court agrees and finds no abuse of discretion in denying post-termination visitation to

Petitioner Mother. A review of the appendix record indicates that although there were some positive notes of Petitioner Mother's interactions with the child, e.g., when Petitioner Mother brought the child gifts, the child would smile and thank Petitioner Mother, Petitioner Mother also had outbursts during these visits that caused the child alarm and led the child to make requests that the visits end early. Petitioner Mother also inappropriately discussed the child's paternal family, including the child's current relative placement. The appendix indicated that the child told Petitioner Mother that although she misses her, she does not want to live with her. On another occasion, Petitioner Mother told the child that she misses her and the child replied, "Get over it." Given the tension between Petitioner Mother and the child's paternal family and the lack of emotional bond between Petitioner Mother and the subject child, the Court finds no error in the circuit court's decision denying Petitioner Mother post-termination visitation.

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).

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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.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental rights, denial of an improvement period, and denial of post-termination visitation, 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