STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: C.T., J.T., and S.T.

No. 11-1551 (Clay County 11-JA-22 - 24)

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

MEMORANDUM DECISION

This appeal, filed by counsel Kevin Duffy, arises from the Circuit Court of Clay County, wherein Petitioner Mother's parental rights were terminated by order entered on October 12, 2011. The children's guardian ad litem, Barbara Harmon Schamberger, 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, William Bands, filed a response joining in and concurring with the guardian ad litem. The parties filed a joint appendix record.

This Court has considered the parties' briefs and the appendix record 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.

"'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).

Petitioner Mother and the children's father were subject to a previous abuse and neglect petition in 2004. The oldest child, S.T., was the only subject child of that petition based on allegations that the home was unsafe without running water; contained a strong foul odor, excessive clutter, dirt, and trash; had a toilet filled with excessive waste; was filled with excessive cigarette and marijuana smoke; and that S.T. was unclean and had caked, dried diaper rash ointment over an excessive diaper rash. The petition provided that the parents admitted to smoking marijuana around S.T. and having cared for her while under the influence of marijuana. The petition also provided that Petitioner Mother stated that she was smoking marijuana for most of the months she was breast-

feeding S.T. The petition further alleged that the parents have lived in various residences where there were past histories of crime and Child Protective Services ("CPS") involvement. The circuit court dismissed this case in 2005 with services provided to the parents for successful reunification of their family.

The petition in the instant case was filed in April of 2011. DHHR alleged that the parents engaged in domestic violence in the children's presence. In particular, there was a recent episode in which the father shot a firearm in the direction of Petitioner Mother and the children. The petition further alleged that the parents' home was found unfit and unsuitable for the children. The circuit court ratified an emergency removal of the children from the home. Petitioner Mother and the children's father waived their rights to a preliminary hearing. In May of 2011, DHHR filed an amended petition to include the father's termination of parental rights in March of 2010 to another child of a different mother.

At the adjudicatory hearing in June of 2011, the circuit court reviewed the allegations in the petition, to which the children's father agreed to stipulate. However, when the father later testfied, he stated that the firearm discharged on the opposite side of the trailer from the children. At one point, he also testified that the firearm was fired by a third person, but then later admitted in his testimony that he fired the gun himself. Child J.T. testified outside of the parents' presence. She testified that her parents had gotten into an argument and her father shot a gun over her sister's head while she and her siblings were with their mother near the road. CPS worker Rebecca Fussell testified that upon interviewing Petitioner Mother about this domestic violence incident, Petitioner Mother denied that the father fired a firearm or shot one in her direction. Based upon the petition and the testimony presented, the circuit court found that the parents engaged in a domestic altercation that led to the father discharging a firearm in the direction of the children and Petitioner Mother. The circuit court further found that Petitioner Mother failed to protect the children from their father, failed to protect them from exposure to domestic violence, and that she continues to protect their father. The circuit court further found that the parents kept a "terribly unkempt" home. The circuit court found abuse and neglect and subsequently ordered that the parents receive services and each undergo a psychological evaluation.

At the dispositional hearing in July of 2011, DHHR moved for termination based on the parents' failure to fully participate in services, classes, and visitation with their children. DHHR asserted that Petitioner Mother only attended two classes with the YWCA Resolve Family Abuse Program and only one visitation with her children. Leah Bush, a CPS worker for the family, supported these assertions. She testified that the parents did not take advantage of every visitation, stating that since June, Petitioner Mother missed four visits and the father missed five visits. She further testified that the parents continued to reside together, neither parent had admitted any responsibility for the alleged domestic violence in this case, and that the current problems of their accountability and domestic violence were problems in the 2004 case, too. Dr. Clifton Hudson, the licensed psychologist who evaluated both parents, testified that both parents told him that the facts of the domestic violence incident were misunderstood and that the gun was fired by someone else at the opposite end of the home. Dr. Hudson further testified that there was "no expression of intent

to really work on managing the condition" and Petitioner Mother prioritizes her relationship with her husband over the well-being of her children. Dr. Hudson also testified that "a failure to acknowledge past [] child maltreatment is always a risk factor for future child maltreatment" and added that a "failure to adequately protect is also a form of child maltreatment." Based on the testimony presented, coupled with the history of this case, the circuit court found that there is no likelihood of substantially correcting the conditions of abuse and neglect. Accordingly, the circuit court terminated both parents' parental rights to the children and denied visitation. It is from this order that Petitioner Mother appeals.

Petitioner Mother argues that the circuit court erred when it terminated her parental rights when the evidence presented did not support the circuit court's findings of fact or the conclusions of law. She contends that the DHHR simply failed to present testimony or evidence to meet the standard required for termination of parental rights. She asserts that she was never given the time or opportunity through a post-adjudicatory improvement period that she could correct the conditions that led to the filing of the abuse and neglect petition. In support, Petitioner Mother asserts that she made much progress prior to the dispositional hearing because she passed all of her random drug and alcohol tests, submitted to a psychological evaluation, and began participation in various classes and visitation with her children. Accordingly, Petitioner Mother argues that it would have been in the best interests of the children for the circuit court to have granted her an improvement period.

The guardian ad litem responds, contending that the circuit court did not err in terminating Petitioner Mother's parental rights. She argues that the Court has held as follows:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code [§] 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code [§] 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Here, the guardian argues that the circuit court ordered various services and visitation for Petitioner Mother. Nevertheless, she failed to attend and complete all of her services and she did not attend all of her visitation. Testimony by her evaluating psychologist, Dr. Clifton Hudson, also provided that Petitioner Mother has a "lack of willingness to protect" and that Petitioner Mother has a "failure to acknowledge" the past maltreatment of her children. This testimony was not refuted by Petitioner Mother or any other witness. Accordingly, the guardian argues that the circuit court did not abuse its discretion in terminating Petitioner Mother's parental rights without an improvement period. DHHR also supports termination, joining in and concurring with the guardian's response.

The Court finds that the circuit court did not abuse its discretion in terminating Petitioner Mother's parental rights without an improvement period. Under West Virginia Code § 49-1-3(1)(A), a child whose health or welfare is harmed or threatened by a parent knowingly or intentionally

inflicting physical, mental, or emotional injury, or allowing another in the home to do so, is considered abused. "'[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). Moreover, "'the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008). The appendix record indicates that this family has a history of abuse and neglect, exhibited through domestic violence issues, exposing the children to this domestic violence, and maintaining an unsuitable home. These were issues in the parents' prior case with CPS that persist as issues in the instant case. The circuit court has the discretion to grant or deny an improvement period under West Virginia Code § 49-6-12. In moving for an improvement period, the subject parent has the burden to show by clear and convincing evidence that he or she would fully participate in an improvement period. Here, a review of the appendix record submitted in this appeal confirms that although Petitioner Mother did not test positive for drugs, she also did not fully participate in services and visitation during this case. Petitioner Mother did not meet her burden for the circuit court to grant her an improvement period. Further, 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." *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). A review of the appendix record confirms that throughout the case and at the final dispositional hearing, Petitioner Mother failed to acknowledge to Dr. Hudson or to the circuit court domestic violence in the home or the danger behind the father's behavior in brandishing and firing a weapon toward her and the children. The Court finds no error in the circuit court's decision to terminate Petitioner Mother's parental rights without an improvement period.

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 (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: May 29, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

[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.