

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: D.W., R.W. and N.W. :

No. 11-1715 (Barbour County 09-JA-7, 14 &15)

FILED

April 16, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Frank P. Bush, appeals the Circuit Court of Barbour County's December 6, 2011 order terminating her custodial rights to D.W., R.W. and N.W. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition. The guardian ad litem, Chaelyn Casteel, has filed her response on behalf of the children, D.W., R.W. and N.W. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

Having reviewed the appendix 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 appendix 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).

This petition was initiated for the purpose of placing D.W. under DHHR care for inpatient mental health treatment. Upon further investigation, it became apparent that there were significant abuse and neglect issues in the family, and thus an Amended Petition was filed, eventually including all three children, as well as Petitioner Mother, father, stepmother, and stepfather as respondents. The evidence shows that the stepfather has a lengthy criminal history and has engaged in domestic violence against Petitioner Mother, resulting in the filing of a restraining order, as well as prior incidents of domestic violence against another woman. An incident at D.W.'s inpatient facility

resulted in the stepfather being banned from the facility, and eventually the circuit court entered a no contact order, preventing the stepfather from contact with any of the children. The stepfather also sent a facsimile with a threatening message to the circuit judge during the pendency of these proceedings. Throughout the case, Petitioner Mother stayed with the stepfather, and testified that she has no intention of leaving or divorcing him.

The biological parents stipulated to the abuse and neglect, and began a post-adjudicatory improvement period. Stepfather refused to stipulate to the allegations against him, which included physical abuse, emotional abuse, a prior criminal record, domestic violence against the mother, and possible sexual abuse allegations. His proposed stipulation included only that he had witnessed Petitioner Mother punishing the children in an inappropriate manner, but under questioning by the circuit court, he stated that he did not believe that the punishments were inappropriate and indicated that he believed in corporal punishment. Due to the stepfather's failure to admit his role in any abuse and neglect, and due to his failure to cooperate with any services, the stepfather's custodial rights were terminated. That termination has been affirmed by this Court.

Petitioner Mother requested another improvement period in order for her husband, the children's stepfather, to be granted services such as anger management and batterer's intervention. However, at the time these services were requested, the stepfather's custodial rights had already been terminated. Petitioner Mother's custodial rights were ultimately terminated. The circuit court noted the parents' complete inability to co-parent. The circuit court further noted that Petitioner Mother has attempted to coach the children to say positive things about their stepfather, and that Petitioner Mother testified that she would not divorce him, and she wanted the children to have contact with him. The circuit court found that Petitioner Mother's home is not suitable for the children as the stepfather still resides there.

On appeal, Petitioner Mother's assignments of error all surround the denial of an additional improvement period.¹ Petitioner Mother argues that the circuit court failed to allow her to present evidence in support of her request for an improvement period due to her refusal to leave her husband. Petitioner Mother points out that there has been only one incident of domestic violence in her relationship with the stepfather, and that his criminal activity is in the distant past. Petitioner argues that there were no findings of fact or conclusions of law regarding her request for an improvement period, nor was she allowed to present evidence. Petitioner argues that too much emphasis was placed on the stepfather's anonymous letter to the judge, as he was only expressing an opinion.

¹Petitioner Mother implies that she was never granted an improvement period, but the record indicates she was granted a post-adjudicatory improvement period. Petitioner requested a dispositional improvement period, but was denied. It appears that although the petition repeatedly references a request for a post-adjudicatory improvement period, in fact petitioner sought a dispositional improvement period.

In response, the guardian ad litem argues that Petitioner Mother's motion for an improvement period was based entirely on whether the stepfather could be adequately rehabilitated. However, the stepfather was a respondent in the underlying proceedings and at no time admitted any wrongdoing. Thus, services were not given to him, and at this time would be wasted on him. The stepfather's custodial rights have already been terminated in this action. The guardian argues that petitioner has a pattern of shifting blame to others, including the biological father, the DHHR, her husband, and even her children, but at no time did she admit to any conduct that she could improve upon should an improvement period be granted. The guardian notes that an improvement period focusing on the terminated stepfather would be futile.

The DHHR argues in response that petitioner continues to minimize the effects of her actions and inactions on her children. The DHHR further notes that petitioner centers her request for another improvement period on her husband, whose rights have been terminated. Any issue regarding the stepfather has already been decided by final order. The DHHR also argues that petitioner has failed to comply in the most important requirement, which is separation from her husband. The circuit court noted that petitioner's home was not a viable option due to the presence of the stepfather. Further, the petitioner never takes blame for her own actions or inactions in this matter, and she has chosen to stay with her husband rather than parent her children. Petitioner's plan for improvement centered only around her husband's improvement, and did not address her own issues. Thus, the DHHR argues that the circuit court was correct in denying her another improvement period.

It is apparent from the record that petitioner was granted an initial improvement period. Therefore, in order to receive another improvement period, she must show that she "has experienced a substantial change in circumstances. Further, the [petitioner] shall demonstrate that due to that change in circumstances, the [petitioner] is likely to fully participate in the improvement period" W.Va. Code § 49-6-12(c)(4). In petitioner's request for a post-dispositional improvement period, she addressed the services she was requesting, which all surrounded treatment of her husband. However, the stepfather's custodial rights have already been terminated, and said termination affirmed by this Court. As the petitioner showed no substantial change in her circumstances, this Court finds no error in the circuit court's failure to grant her an additional improvement period.

Petitioner Mother also argues that termination of custodial rights was improper in this case. She states that she did everything that was asked of her during her improvement period and admitted her shortcomings. Petitioner argues that the only remaining issue is whether the stepfather can be rehabilitated so that he can have custody of the children. Petitioner argues that the stepfather was never abusive toward the children, and only one incident of domestic violence has occurred. Thus, she argues that the stepfather should be given another chance.

The guardian responds, arguing that termination of petitioner's parental rights would have been proper, and that the circuit court did not err in terminating petitioner's custodial rights. Petitioner continuously minimized the domestic violence in her home and continued a relationship with the stepfather with no admission as to how that relationship negatively impacts her ability to

parent. The guardian argues that the petitioner does not know nor appreciate what is in the best interests of her children.

The DHHR argues that the circuit court had no choice other than termination of petitioner's custodial rights, as she refused to terminate her relationship with the stepfather. The DHHR argues that "[i]n spite of two years of services, petitioner failed to effectuate a meaningful change in her overall attitude and approach to parenting." Further, the petitioner fails to admit that remaining with her husband means that she cannot parent her children. The DHHR argues that termination of custodial rights was proper in this matter.

With regard to the termination of Petitioner Mother's custodial rights, this Court has held that

"[a]s 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). In the present case, Petitioner Mother refused to comply with the most important directive, which was to separate from the stepfather who has had his custodial rights terminated. As long as Petitioner Mother remains with the stepfather, the children cannot be in her custody. As stated above, the termination of the stepfather's custodial rights is fully adjudicated and final. This Court finds that the circuit court employed the least restrictive means in terminating Petitioner Mother's custodial rights, and therefore finds no error in the circuit court order.

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

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

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 custodial 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

entered after January 3, 2012.