STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In the Interest of: K.P., D.C., M.P., A.B., G.B. Jr., and T.P.:

No. 11-1717 (Monongalia County 10-JA-36 through 10-JA-41)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Monongalia County, wherein Petitioner Mother's parental rights were terminated by order entered on November 9, 2011. This appeal was timely perfected by Petitioner Mother's counsel Terri Tichenor, with an appendix accompanying her petition. The children's guardian ad litem, Teresa Lyons, 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 termination.

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).

DHHR filed the instant petition in November of 2010 after Petitioner Mother's youngest child, T.P., tested positive at birth for marijuana, cocaine, and opiates. Petitioner Mother also tested positive for these drugs at T.P.'s birth and also admitted that she drank alcohol throughout her pregnancy with T.P., usually drinking forty ounces of malt liquor every four to five days. The instant petition also referenced Petitioner Mother's prior abuse and neglect case, in which the petition was filed in 2007 and the case was dismissed upon reunification in September of 2010, just months

before the instant petition. Petitioner Mother received services for drug abuse in her prior abuse and neglect case. She has been receiving services from DHHR since 2004.

In December of 2010, Petitioner Mother waived her right to a preliminary hearing. At adjudication in January of 2011, Petitioner Mother made stipulations to her drug abuse problem, her exposure of her children to this drug abuse, her infant child T.P.'s positive drug tests at birth, her own positive drug screens at T.P.'s birth, and her admission to DHHR that she drank alcohol throughout her pregnancy with T.P. Petitioner Mother did not request an improvement period, but rather, sought admission for long-term substance abuse treatment. Petitioner Mother was admitted to the Maternal Options Toward a Healthy Environment for Recovery ("MOTHER") Program in Beckley and was receiving drug treatment at Pine Haven Homeless Shelter. However, she was later discharged from both facilities in July of 2011, before completion, because she had a physical altercation with another resident.

At disposition in September of 2011, the parties jointly requested that the circuit court take judicial notice of all prior proceedings and incorporate by reference the record of prior cases concerning the family. The circuit court made findings that Petitioner Mother has received services in her home since 2004 and that although she has made some improvements since the case began, "she has demonstrated that she cannot maintain a stable home and environment for any significant length of time." The circuit court denied Petitioner Mother's request for disposition under West Virginia Code § 49-6-5(a)(5) and terminated Petitioner Mother's parental rights to all of the subject children. Petitioner Mother appeals this termination order.

On appeal, Petitioner Mother argues that the circuit court erred in terminating her parental rights instead of entering an alternative disposition under West Virginia Code § 49-6-5(a)(5). She argues that she has demonstrated her ability to participate in an improvement period because even though she was not under an improvement period, she still participated in services throughout the duration of the instant case. She further argues that even after her discharge from the MOTHER Program, she continued to seek services on her own without DHHR's assistance. In further support of alternative disposition, Petitioner Mother argues that none of the subject children are in immediate danger. Moreover, Petitioner Mother asserts that there were multiple less restrictive alternatives available to the circuit court short of termination. She argues that the circuit court should have allowed her the opportunity to continue her services and possibly be reunified with her children.

The guardian ad litem and DHHR respond, contending that the circuit court did not err by not entering an alternative disposition under West Virginia Code § 49-6-5(a)(5) or by terminating Petitioner Mother's parental rights. The guardian raises that, upon the parties' agreement, the circuit court took judicial notice of all proceedings in the instant action and in Petitioner Mother's prior abuse and neglect action. Subsequently, Petitioner Mother did not contest the factual basis of the records in either the prior case or in the instant case, nor did she provide a legal basis for her requested type of disposition. Petitioner Mother argues that the circuit court erred in not allowing her the opportunity to regain custody of her children at a time unspecified in the future. In response, the guardian argues that time limits on improvement periods are established by West Virginia Code

§ 49-6-12 and by case law. Allowing an indefinite time for improvement would be contrary to statute and holdings expressed in *State ex. rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996), and Syllabus Point 6 of *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), which provides that "[a]t all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirements provided by W.Va Code § 49-6-2 (1996) (Repl.Vol.1999), W.Va.Code § 49-6-5 (1998) (Repl.Vol.1999), and W.Va.Code § 49-6-12 (1996) (Repl.Vol.1999)."

Moreover, the guardian argues that the time frames and circumstances in this case support termination. Petitioner Mother was adjudicated in January of 2011 and her dispositional hearing was in September of 2011. Petitioner Mother had nine months to make improvements, yet failed to do so. Her neglect of her children has spanned a long period of time and she began receiving services in 2004. Although her prior abuse and neglect case was dismissed in September of 2010 and she and her children were reunified, it was only two months later that the petition in the instant action was filed. The basis of Petitioner Mother's argument is that she "participat[ed] with services," yet does not point out specific facts in the record in support. Admittedly, she did not complete a long-term drug rehabilitation program. It would have been harmful to the children if the circuit court had not terminated Petitioner Mother's parental rights as the children would have remained in limbo and an alternative disposition would have further delayed the children's permanency. The guardian cites to the Court's holdings originating from *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980), as follows:

> "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, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Further, the Court also held the following:

> "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). The guardian argues that, accordingly, the circuit court was not required to order less restrictive alternatives to termination and

the circuit court did not err in terminating Petitioner Mother's parental rights.

DHHR also responds, arguing in support of termination. It reiterates that Petitioner Mother has not produced any evidence that any sort of services she participated in after her discharge from the MOTHER Program were helpful to her. Her argument that an alternative disposition is warranted because her children are not in immediate danger ignores the fact that the children need permanency. The evidence has shown that Petitioner Mother is in no better position to regain her children's custody than she was at the preliminary hearing. This is Petitioner Mother's second abuse and neglect case stemming from her substance abuse issues. She has not been successful with drug rehabilitation treatment and there is no evidence that her issues will be remedied in the near future, if at all.

The Court finds that the circuit court did not abuse its discretion in terminating Petitioner Mother's parental rights without an alternative disposition. 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. Here, a review of the appendix shows that at each step of these proceedings, Petitioner Mother made little, if any, improvement. Although she was admitted to one long-term drug rehabilitation treatment program, she failed to complete it because she was discharged for disorderly conduct with another resident. Although she asserts that she participated in subsequent services and programs, she does not provide specifics and the appendix is devoid of any documents that indicate Petitioner Mother's participation in other services during the pendency of the instant case other than the MOTHER Program and treatment she received at Pine Haven Homeless Shelter. The children in this case have been situated in their current placements for some time now and the two youngest children are very young. Given these circumstances, the Court finds no error in the circuit court's order terminating 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.[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: 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

[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.