STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.D., C.M., A.M., and M.L.:

No. 11-0303 (Cabell County 09-JA-85 - 88)

FILED
June 27, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Cabell County, wherein the Petitioner Mother's parental rights to J.D., C.M., A.M., and M.L. were terminated. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her response on behalf of the children. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

Having reviewed the record 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 record 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." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Petitioner challenges the circuit court's termination of her parental rights, alleging several assignments of error. First, petitioner alleges that the DHHR failed to make reasonable efforts to assist in the reunification of her family. Petitioner argues that the DHHR's decision to place the children in the custody of caregivers with whom she had strained relationships made visitation difficult, and that the DHHR should have honored her request to change the children's

placement. Further, petitioner argues that her caseworker's maternity leave caused her case to go unmonitored, creating several delays in her services and a lack of adequate investigation into the petitioner's substance abuse treatment. However, the record demonstrates that services were offered to petitioner throughout her post-adjudicatory improvement period, and that she failed to fully take advantage of them. The circuit court noted that petitioner missed multiple drug screens, tested positive for controlled substances on several other occasions, failed to timely enroll in the appropriate court-ordered drug treatment program, and failed to apply the skills learned in parenting classes. Because the record shows that petitioner was provided with appropriate parenting and substance abuse services, it was not error to find that the DHHR made the reasonable efforts to achieve reunification required by West Virginia Code § 49-6-5.

Petitioner also argues that the circuit court erred in finding that the children had been abused and neglected and that these conditions could not be substantially corrected. Petitioner asserts that she made improvement throughout the proceedings below that showed her to be drug-free, and that the circuit court's finding that she could not substantially correct the conditions of abuse and neglect was clearly erroneous because her substance abuse was the sole condition of neglect at issue. Because petitioner believes the evidence to have shown her to be drug free, she believes that she demonstrated her ability to correct the lone condition of neglect affecting her children. The Court notes that, following her newborn infant testing positive for various controlled substances and exhibiting symptoms of withdrawal, petitioner stipulated to use of a controlled substance and was therefore adjudicated as a neglectful parent. Further, the circuit court stated that petitioner fell "woefully short" in almost every aspect of the family case plan, and relied on several factors in making its determination that the conditions of neglect could not be substantially corrected in a reasonable time, including the following: petitioner's failure to obtain consistent employment as required by the family case plan; petitioner's arrest on drug-related criminal charges, still pending at the time of disposition; petitioner's failure to complete the court-ordered substance abuse treatment; and petitioner's inability to apply the parenting skills learned from DHHR services.

The circuit court noted that it found petitioner's rare visitations with her children to be the most troubling factor, due to the fact that petitioner had both the time and means to take advantage of her liberal visitation privileges. In fact, the record reflects that petitioner even informed one child she would be visiting and then failed to attend, which caused psychological trauma to the child. This Court has noted that "the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent's custody is a significant factor in determining the parent's potential to improve sufficiently and achieve minimum standards to parent the child." *In re Katie S.*, 198 W.Va. 79, 90 FN 14, 479 S.E.2d 589, 600 (1996). Further, this Court has held that "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children... may be employed without the use of intervening less restrictive

alternatives when it is found that there is no reasonable likelihood... that conditions of neglect or abuse can be substantially corrected." Syl. pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). The record clearly supports the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in a reasonable time.

This Court reminds the circuit court of its duty to establish permanency for J.D., C.M., A.M., and M.L. pursuant to Rules 36a, 39, 41 and 42 of the West Virginia Rules of Procedure for Child Abuse and Neglect. Further, this Court reminds the circuit court of its duty pursuant to Rule 43 to find permanent placement for the children within eighteen months of the date of the disposition order. 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.*, 2011 WL 864950 (W.Va.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 of West Virginia v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998).

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights to J.D., C.M., A.M., and M.L., and the circuit court's order is hereby affirmed.

Affirmed.

ISSUED: June 27, 2011

CONCURRED IN BY:

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