STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: D.L., Z.L. and T.L..:

No. 11-0506 (Randolph County 10-JA-28, 29 and 30)

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

MEMORANDUM DECISION

Petitioner Mother appeals the termination of her parental rights to D.L., Z.L. and T.L. 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 child. 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).

The petition in this matter alleges that Petitioner Mother kept T.L. locked in a room with only a mattress and boarded up windows, that he was often tied in a chair, that at times Z.L. was also locked in the room, that D.L. was forced to beg neighbors for food and money, that D.L. had been given marijuana more than once, and that Petitioner Mother used drugs and kept a filthy home. The petition also notes a prior removal of the children in 2006, at

which time extensive services were provided to Petitioner Mother.

The day before the abuse and neglect referral initiating the current proceeding was received, Petitioner Mother took her children to their father, giving him temporary custody. Approximately two weeks later, Petitioner Mother was arrested on charges of child neglect. Petitioner Mother moved to dismiss the petition for abuse and neglect, asserting that since she did not have custody of the children on the date the petition was filed, that the conditions of abuse and neglect were not present and therefore, the petition was improper.

The motion to dismiss was denied. Petitioner Mother was adjudicated as neglectful and abusive, after she refused to testify at the adjudicatory hearing. Petitioner Mother had previously moved for an improvement period, which was denied in this disposition order which terminated her parental rights. The circuit court found that the burden was on Petitioner Mother to show that she was entitled to an improvement period. The circuit court found that the conditions of abuse and neglect established by clear and convincing evidence in this matter were so severe that there was no reasonable likelihood that they could be remedied. Further, the circuit court indicates that "even if [Petitioner] Mother had made admissions to the allegations contained within the Petition in an effort to be granted an Improvement Period, the Court would have most likely found that the circumstances of abuse and neglect could not be remedied in a reasonable amount of time." Petitioner Mother also moved for an alternate disposition as opposed to termination, because the children are currently placed with their biological father, and thus their permanency would not be affected. The circuit court declined to order an alternate disposition and terminated her parental rights.

On appeal, Petitioner Mother argues that the circuit court erred in denying her motion to dismiss the petition, because the conditions alleged in the petition did not exist at the time the petition was filed, as Petitioner Mother had given temporary custody of her children to their father prior to the filing of the petition. "W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syl. Pt. 1, *In Interest of: S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981). In the present case, Petitioner Mother took her children to their father the day before DHHR received a referral alleging her abuse and neglect of the three children. Testimony shows that Petitioner Mother had made comments that she was attempting to avoid DHHR intervention. Petitioner Mother was arrested for child neglect approximately two weeks after taking the children to their father. DHHR investigated the allegations, and filed the instant petition approximately one month after the initial referral. DHHR contends in its argument that upon release from incarceration, there was nothing to prevent Petitioner Mother from regaining custody of the children and subjecting them to the same abuse. Under the facts of this case, this Court finds

that the circuit court did not err in rejecting Petitioner Mother's argument that the conditions of abuse and neglect no longer existed and properly denied the motion to dismiss.

Petitioner Mother next argues that the circuit court erred in permitting hearsay testimony by a Children's Protective Services ("CPS") worker based on the disclosures the children made regarding the abuse and neglect, rather than requiring the children to testify. Rule 8 of the Rules of Procedure for Child Abuse and Neglect Proceedings states:

> (a) Restrictions on the Testimony of Children. Notwithstanding any limitation on the ability to testify imposed by this rule, all children remain competent to testify in any proceeding before the presiding judicial officer as determined by the Rules of Evidence and the Rules of Civil Procedure. However, there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the presiding judicial officer shall exclude this testimony if the potential psychological harm to the child outweighs the necessity of the child's testimony. Further, the judicial officer may exclude the child's testimony if (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.

Rule 8 clearly states that the rebuttable presumption is that the harm to the child or children outweighs the necessity of the child's testimony. The guardian ad litem strongly opposed forcing the children to testify in this matter, citing the extreme emotional trauma the children have endured, and would endure should they be forced to testify. In the present case, Petitioner Mother failed to rebut this presumption. Her only argument is that the children could have been "coached" or may not have been truthful. However, upon a review of the record, the circuit court clearly concluded that the children were not coached and that their allegations of abuse were substantiated by other evidence. Therefore, this Court finds no error in the circuit court's decision to allow the CPS worker, as well as the father of the children, to testify in lieu of the children.

Petitioner Mother finally argues that the circuit court erred in denying her an improvement period. Pursuant to West Virginia Code §49-6-12(b), before a circuit court can grant a post-adjudicatory improvement period, the court must first find that the parent is likely to fully participate in the improvement period. However, 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). West Virginia Code § 49-6-5(a)(7)(A)

describes various situations wherein the DHHR is not required to make reasonable efforts to preserve the family, including situations where chronic abuse has occurred. Pursuant to West Virginia Code §49-6-5(b)(5), there is no reasonable likelihood that the conditions of abuse and neglect can be corrected when a parent has repeatedly or seriously injured a child physically or emotionally and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child. In the present case, Petitioner Mother, through a prior referral, had already received extensive services from the DHHR and its service providers. The adjudicatory findings show that Petitioner Mother had inflicted extreme emotional abuse upon the children through her actions. Importantly, Petitioner Mother chose not to testify in this matter. This Court has held that, "...in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. 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 Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). Because petitioner refused to acknowledge the circumstances of the abuse and neglect, the circuit court did not err in its finding that there was no reasonable likelihood that petitioner could remedy these circumstances, or in denying a post-adjudicatory improvement period. Both the DHHR and the guardian ad litem argue in support of the termination of Petitioner Mother's parental rights.

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights, 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