STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.T. and A.P.

No. 12-0054 (Mercer County 11-JA-137-OA & 11-JA-138-OA)

FILED
June 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Natalie N. Hager, arises from the Circuit Court of Mercer County, wherein her parental, custodial, and guardianship rights to her two children were terminated by order entered on January 9, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, John Earl Williams Jr., has filed his response on behalf of the children.

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.

The abuse and neglect proceedings below were initiated in the circuit court in July of 2011, based upon petitioner's substance abuse and subsequent inability to properly care for the children or provide for their basic needs. At the adjudicatory hearing, petitioner sought the return of the children and the circuit court reserved ruling on adjudication as to petitioner at that time. Per petitioner's testimony at the adjudicatory hearing, she was living with her boyfriend, J.B., at the time. The circuit court granted petitioner a pre-adjudicatory improvement period and ordered the DHHR to return custody of the children to petitioner by September 16, 2011. On that date, however, the circuit court held an emergency hearing on Respondent Father J.T.'s request to stay placement of the children with petitioner. J.T. based this request on accusations that petitioner's boyfriend was not honest during his voluntary testimony at the adjudicatory hearing concerning his criminal history and past involvement with Child Protective Services ("CPS"). Respondent Father D.P. and the DHHR both joined in this motion, and the circuit court held that J.B.'s history with CPS needed to be explored before returning the children to petitioner while she lived with this individual.

On September 22, 2011, the circuit court held another hearing on its order staying the return of the children to petitioner. In its order, the circuit court noted that J.B. had subsequently informed the DHHR that he would not cooperate with the substance abuse screening process and that the DHHR would not be allowed in his home. Based upon this refusal to cooperate, as well as his past CPS history, the circuit court ordered petitioner to move out of J.B.'s residence and into a shelter that day so that the children could be returned to her. However, petitioner delayed moving out of J.B.'s

residence, and eventually left the shelter after a short stay. As such, the children were not returned to her. The circuit court thereafter revoked petitioner's pre-adjudicatory improvement period, ordered her to have no contact with J.B., adjudicated her as an abusing parent due to her neglect of the children, and granted her a post-adjudicatory improvement period. After an extension to petitioner's post-adjudicatory improvement period, the DHHR eventually moved to terminate the improvement period because of petitioner's continued contact with J.B., who was alleged to have sexually abused one of his children in California. As further grounds for termination, the DHHR also asserted J.B.'s attempts to threaten and/or intimidate DHHR employees and parties to the action, and also petitioner's failure to follow through with the reasonable family case plan. The circuit court granted the motion and proceeded to the dispositional hearing, during which it terminated petitioner's parental, custodial, and guardianship rights to the two children.

On appeal, petitioner asserts that the circuit court erred in terminating her parental, custodial, and guardianship rights. In support, petitioner argues that the circuit court lacked authority to order her to stay away from her boyfriend, J.B.; that the order to cease all contact with her boyfriend was repugnant to public policy; that the circuit court erred in refusing to appoint counsel to the boyfriend as a potential custodian of the children; and that she closely followed the requirements of the family case plan. To begin, petitioner argues that terminating her parental rights based upon her continued contact with her boyfriend was not in the children's best interest. According to petitioner, the circuit court should have ordered supervised visitations between J.B. and the children if it had concerns about the boyfriend. Additionally, petitioner argues that the circuit court could have ordered that she always supervise the children around J.B. Petitioner cites to our prior holding in *DiMagno v. DiMagno*, 192 W.Va. 313, 452 S.E.2d 404 (1994) to argue that the circuit court's decision to terminate her parental rights was extreme given that there were no allegations of abuse or neglect against J.B. as to her children. As such, she argues that her relationship with J.B. alone was insufficient to warrant termination. She further argues that J.B.'s testimony concerning his criminal and CPS histories was not sufficient to warrant the circuit court's decision. Because J.B. did not have his own counsel, petitioner argues that J.B. was unable to clarify his testimony and appeared to have lied under oath.

Petitioner further argues that the order to cease all contact with J.B. was repugnant to public policy since the basic right to choose one's partner "goes back to the beginning of time." According to petitioner, had J.B. been afforded an attorney, he would have cooperated with the DHHR. Petitioner argues that the order to cease contact with J.B. was based upon his allegedly untruthful testimony and not on any allegations that he may be dangerous to the children. Petitioner also argues that because J.B. was a potential custodian for the children, he was entitled to an attorney pursuant to West Virginia Code § 49-6-2(a). Lastly, petitioner argues that she substantially complied with all the terms of the family case plan, including obtaining a job and a home, staying drug free, and faithfully attending parenting classes and visitations with the children. Petitioner further argues that at the dispositional hearing, she testified that she had ceased contact with J.B. and provided another witness to corroborate this assertion. However, the circuit court erred in terminating her parental rights at this point, as petitioner argues she should have been entitled to continue her post-adjudicatory improvement period.

The guardian at litem responds and argues in favor of the termination of petitioner's parental rights. According to the guardian, *DiMagno* is inapplicable because that case concerned a divorce action regarding custody of a child, and the DHHR could not substantiate abuse or neglect. According to the guardian, the only alleged faults of the mother in that case were her method of discipline and the fact that her boyfriend had been arrested for indecent exposure. Conversely, the guardian argues that the mother herein failed to acknowledge that J.B.'s character traits were at risk of harming the children. According to the guardian, petitioner placed her interest in J.B. over the best interest of her children throughout the case below. The guardian argues that petitioner continued to have contact with J.B. throughout the proceedings, and also that she never grasped that his negative characteristics, such as substance abuse, domestic violence, prior criminal history, and threatening social workers and parties to the case, put the children at risk.

According to the guardian, the circuit court found J.B. to be a violent substance abuser who may have sexually abused one of his own children, but that the abuse allegation could not be corroborated because of J.B.'s refusal to cooperate with the DHHR. The guardian further argues that J.B. was not entitled to an attorney because he was not a named party to the action, and notes that West Virginia Code § 49-6-2(a) only provides for appointment of attorneys for persons accused of abuse or neglect. The guardian concludes by arguing that once probable cause had been found against petitioner as to neglect, the children's living arrangements were imperative to their safety, and anyone living in the household was expected to pass inquiry in regard to their fitness. For these reasons, the guardian argues that the circuit court did not err in terminating petitioner's parental, custodial, and guardianship rights.

The DHHR also responds and argues in support of termination below. The DHHR argues that the best interests of the children involved are controlling in abuse and neglect proceedings, and that there is absolutely no right to choose a friend, associate, or even mate in contravention of the children's best interests. See *In re: Randy H.*, 220 W.Va. 122, 640 S.E.2d 185 (2006). According to the DHHR, petitioner had a duty to protect the children from potential hazards, such as J.B. Further, the DHHR argues that there was a legitimate finding that petitioner was an abusing parent and that the children were abused and/or neglected. As such, this finding triggers the circuit court's analysis of its disposition options pursuant to West Virginia Code § 49-6-5(a). According to the DHHR, the circuit court was correct to proceed to termination because circumstances existed to deny petitioner additional time on an improvement period because there was no reasonable likelihood that she could substantially correct the conditions of neglect or abuse. The DHHR states that petitioner simply refused to comply with the directive to cease all contact with J.B. As to petitioner's argument that J.B. should have been afforded counsel, the DHHR states that her boyfriend was not entitled to counsel under West Virginia law, and that petitioner does not have standing to raise the circuit court's denial of counsel on appeal. For these reasons, the DHHR argues that the circuit court did not err in terminating petitioner's parental, custodial, and guardianship rights.

The Court has previously established the following standard of review:

> "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).

Upon review of the appendix in this matter, the Court finds no error in the circuit court's decision to terminate petitioner's parental rights. To begin, we find no merit in petitioner's arguments related to the circuit court's authority to order her to cease contact with her boyfriend, J.B. The Court agrees with the guardian that *DiMagno* is not applicable. In that decision, we ultimately found that a mother involved in a custody dispute was a fit parent and overturned the circuit court's findings in regard to her fitness. However, in that opinion, the Court noted that "we agree with the part of the circuit court's order prohibiting the child to be unsupervised when she is in the presence of T.A.P., Mrs. DiMagno's boyfriend." *DiMagno v. DiMagno*, 192 W.Va. 313, 314, 452 S.E.2d 404, 405 (1994). The fundamental difference between that decision and the instant matter is that the mother in *DiMagno* was found to be a fit parent, while petitioner herein was found to be an abusing parent due to her neglect of the children at issue. As such, the circuit court was within its right to order that petitioner cease her relationship with her boyfriend, since it could not rely on petitioner to provide proper supervision of the children in his presence.

Further, as noted in the circuit court's dispositional order, there were serious concerns about the boyfriend's presence in the children's home. According to the circuit court, petitioner's own witness established that the boyfriend, J.B., "is a drunk and a violent person, and possibly even a child molester." In fact, J.B. himself testified to his prior affiliation with a motorcycle gang and that gang's intention to kill him as reprisal for ending his tenure in the gang just three months prior to the preliminary hearing. J.B. testified that, shortly before the preliminary hearing, he had been living in a homeless shelter as a means of protecting himself from retaliation by the gang. The circuit court's finding is further supported by evidence that J.B. intimidated and/or threatened service providers and one of the Respondent Fathers during the proceedings below. In its October 5, 2011, order, the circuit court noted that J.B. had told the DHHR that he refused to cooperate with the substance abuse screening process, that he would not allow the DHHR in his home, and that he would not comply with any direction associated with these abuse and neglect proceedings. As such, the circuit court was left with little choice but to order that, in the best interest of the children, petitioner cease her relationship with her boyfriend, J.B. We specifically find that the circuit court

had the authority to make termination of that relationship a prerequisite to reunification of petitioner with her children. Such an order is not repugnant to public policy.

As to petitioner's argument that the circuit court erred in denying J.B. appointed counsel, we find no merit in that argument either. To begin, it is clear that petitioner lacks standing to assert this assignment of error. However, even reviewed on the merits, petitioner's argument fails through a simple application of the statute upon which she bases her argument. West Virginia Code § 49-6-2(a) states, in pertinent part, that in abuse and neglect proceedings

> the child, his or her or parents and his or her legally established custodian or other persons standing in loco parentis to him or her shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed.

Petitioner's boyfriend was neither a parent to the children, not was he a custodian or a person standing in loco parentis to the children. Simply put, review of this statute provides for appointment of counsel only to indigents that are named parties to abuse and neglect proceedings. The statute contemplates appointment of counsel for people that do not qualify as a parent or custodian of the children, but it again requires such person seeking counsel to be a party to the action and to also specifically request that counsel be appointed. Because the petitioner's boyfriend was not a party to the abuse and neglect proceedings below, nor does the record reflect a formal request for counsel, J.B. was not entitled to appointment of counsel pursuant to West Virginia Code § 49-6-2(a).

Lastly, petitioner alleges that the circuit court erred in terminating her parental rights, arguing that the circuit court should have used a less restrictive dispositional option, such as continuing her improvement period. However, based upon petitioner's refusal to comply with the terms of the family case plan, the circuit court found that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. West Virginia Code § 49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where

> [t]he abusing parent . . . [has] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child.

As noted above, the family case plan specifically required petitioner to end her relationship and cease contact with J.B. because of the concerns over his fitness to be in contact with the children. However, the evidence established that petitioner repeatedly had contact with her boyfriend, even as recently as four days prior to the dispositional hearing. As such, the circuit court did not err in terminating petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

Further, the fact that petitioner was successful in other aspects of her improvement period is insufficient to establish that the circuit court erred in terminating her parental rights. This Court has previously held as follows:

> 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 Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996).

In re Kaitlyn P., 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). In this matter, the petitioner refused to acknowledge that her continued association with an inappropriate individual constitutes a failure on her part to properly care for her children's safety and well-being. In fact, her arguments on appeal highlight her continued refusal to acknowledge that her actions endangered her children. Based upon petitioner's refusal to comply with the terms of the family case plan and to acknowledge the basic allegations regarding her association with J.B., the circuit court did not err in terminating petitioner's parental, custodial, and guardianship 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 twelve months of the date of the disposition order. As this Court has stated, "[t]he [twelve-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 circuit court's order, and the termination of petitioner's parental, custodial, and guardianship rights is hereby affirmed.

Affirmed.

ISSUED: June 25, 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