STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: D.F. III, M.F., and K.D.

No. 12-0055 (Mineral County 11-JA-6, 7, & 8)

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Agnieszka Collins, appeals the Circuit Court of Mineral County's November 9, 2011, order terminating her parental rights to D.F. III, M.F., and K.D. The guardians ad litem, Kelley A. Kuhn and Meredith H. Haines, have filed their response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

This Court has considered the parties' briefs and the 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 record 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 children were removed from Petitioner Mother when DHHR discovered that D.F. III, then one year old, had sustained a significant burn injury to his lower back and had not been provided any medical care. Immediate inquiry was made as to the cause of the burn. Petitioner Mother's initial report to the DHHR worker was that "her man caused it" while she was away at bingo and that "she was dealing with it." DHHR also interviewed Mother's oldest child, then three and a half year old M.F., who indicated that he had been told by Petitioner Mother's boyfriend R.D. that R.D. had caused the burn. M.F. reported this same story to both his natural father and to the DHHR. Petitioner Mother later indicated that the DHHR worker had misunderstood what she said and that Mother had actually said that her man "did not do it." Mother also indicated that she had been cooking chicken and that D.F. III was accidently burned when he backed into the open stove door. Neither Mother nor her boyfriend R. D. testified at the adjudicatory hearing.

In reaching its adjudication that R.D. perpetrated the burn injury to D.F. III, the circuit court recognized the difficult nature of this case given the conflicting stories given by Petitioner Mother and the fact that some of the information was obtained from a three and a half year old child. The circuit court recognized that looking at the "totality of the circumstances," the clear and convincing proof established that D.F. III's burn was caused by R.D. The circuit court noted that the child's statements were corroborated by the mother's initial story that "her man did it." Further, the circuit court concluded that Petitioner Mother's later story of accidental injury was

suspect as "it appears extremely unlikely that these type of injuries could come from your typical stove door that's just down. The angle where these injuries are, it just seems to be not plausible that the child could have gotten the injuries the way [mother] is saying that it happened." The circuit court also believed that the failure of Petitioner Mother to take the child to the doctor supported its conclusion.

At disposition, a Child Protective Services ("CPS") worker testified that Petitioner Mother had contacted her at the time that the children were removed from the maternal grandmother and told her that R.D. had caused the burn and that mother had been away at bingo at the time. Maternal grandmother testified that Petitioner Mother had told her that she was afraid of R.D. and that he had threatened Petitioner Mother if she testified against him. Petitioner Mother testified at the dispositional hearing that R.D. did not burn D.F. III and that D.F. III was accidently burned on the stove while she was cooking. Mother admitted that she lied multiple times during the case. The circuit court terminated the Petitioner Mother's parental rights without an improvement period. In denying the motion for improvement period, the circuit court noted that Petitioner Mother had services in the past for a period which spanned two years. The circuit court denied post-termination visitation.

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." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

Petitioner Mother argues that there was insufficient evidence to support adjudication and that the circuit court erred in denying post-termination visitation. First, Mother argues that the statements of her three year old child M.F. as to what he was told by her boyfriend about the cause of the burns to D.F III should not have been found credible. Mother also disputes the testimony of the CPS supervisor who testified that Petitioner Mother told her that her boyfriend caused the burn. Further, while she admits that "the child did suffer a serious injury," she argues that even if the evidence was otherwise sufficient to support the circuit court's adjudication, the injury to D.F. III does not fall into a category of injury that is repetitive and is more likely to be one that is accidental in nature. Finally, she argues that the circuit court improperly relied upon its finding that she was not truthful to support adjudication.

The DHHR and guardians ad litem respond that the circuit court's adjudication and termination were proper, citing the conflicting explanations as to how the burn occurred and Petitioner Mother's lack of credibility. In reviewing their arguments, the Court notes that the Petitioner Mother admitted in her petition for appeal that she testified "that she would lie for her children if she had to." The DHHR specifically noted that the circuit court relied not only upon the statements of the child's sibling but also upon the "implausible and inconsistent stories offered by the petitioner" in reaching its conclusion on adjudication. In regard to Petitioner Mother's argument that the injury was not of the type that is abusive, the DHHR responds that the law does not require that abuse of a child be repetitive in nature in order to be actionable. Further, DHHR notes that in addition to the occurrence of the burn itself, that Petitioner Mother failed to obtain medical treatment for the child. The DHHR also notes that Petitioner Mother in fact does have "a long-standing history" of abuse and neglect which required prior services from DHHR. Having fully reviewed the record presented, the Court concludes that there was no error in either the circuit court's adjudicatory findings or in its decision to terminate Petitioner Mother's parental rights.

In regard to the circuit court's denial of post-termination visitation, Petitioner Mother argues that the circuit court erred in denying such visitation in light of her prior role as primary care-taker to the children. Petitioner Mother argues that post-termination visits should have been ordered as "it can be assumed that her children had a close bond with her and miss her."

This Court has recognized previously the following standard:

> "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl.Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E. 2d 692 (1995).

Syl.Pt. 11, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002).

The guardians ad litem argue that denial of such post-termination visitation was proper and note that the visitation supervisor testified at the dispositional hearing that Petitioner Mother ceased to cooperate with visits with the children despite the fact that transportation was provided to her. The guardians ad litem also indicate that the evidence of record establishes that continuing contact with Petitioner Mother would not be in the children's best interest. The Court concludes that there was no error in denying post-termination visitation.

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 child 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: September 7, 2012

[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.

CONCURRED IN BY:

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