

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: J.W. and L.W.

No. 12-0057 (Jackson County 10-JA-4 & 10-JA-5)

FILED

September 7, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Susan A. Settle, appeals the Circuit Court of Jackson County's order entered on February 27, 2012, terminating her parental rights to J.W. and L.W. The guardian ad litem, Laurence W. Hancock, has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, 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 petition in this matter was instituted based on domestic violence in the home, a prior injury from a cigarette to L.W. that was left untreated and became infected, failure to properly supervise the children by leaving them home alone or not being at home when J.W. arrived home from school at the age of four, and medical neglect. At the time the petition was filed, the DHHR had already been involved with the family for at least a year. Petitioner Mother was granted a pre-adjudicatory improvement period, and she was only minimally compliant. An amended petition was filed after petitioner was arrested for domestic violence, and petitioner then stipulated to the allegations in the petition. She was granted a post-adjudicatory improvement period. However, the DHHR moved to terminate the post-adjudicatory improvement period after a series of events, including further domestic violence in the home and petitioner's arrest on charges of shoplifting and possession of controlled substances. The circuit court, after a series of hearings, granted the motion to terminate petitioner's post-adjudicatory improvement period. The circuit court then terminated Petitioner Mother's parental rights, after finding that there was continued domestic violence in the home, and that petitioner failed to improve. The circuit court notes that it is not permitted by statute to award another improvement period. Petitioner appeals from this order.

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 first argues that the circuit court erred in terminating her improvement period. Petitioner argues that her actions did not justify termination of the improvement period, and that it was her failure to have the proper medications that caused her not to comply fully in the improvement period.

The guardian responds, arguing that petitioner was unwilling or unable to comply with the pre-adjudicatory improvement period. However, she was granted a post-adjudicatory improvement period after agreeing to stipulate to the abuse and neglect allegations. Again, the guardian argues that petitioner failed to comply, as there was repeated domestic violence in the home and petitioner continued to consume alcohol, even taking one of the children to a bar. Moreover, the guardian points out that petitioner had pending criminal charges against her. The DHHR argues in favor of the termination of the improvement period as well.

West Virginia Code § 49-6-12(f) states as follows:

When any respondent is granted an improvement period pursuant to the provisions of this article, the department shall monitor the progress of such person in the improvement period. When the respondent fails to participate in any service mandated by the improvement period, the state department shall initiate action to inform the court of that failure. When the department demonstrates that the respondent has failed to participate in any provision of the improvement period, the court shall forthwith terminate the improvement period.

In the present matter, petitioner failed to fully participate in services. Moreover, she allowed the domestic violence to continue in her home, and she was arrested for shoplifting and possession of a controlled substance. This Court finds no error in the termination of Petitioner Mother's improvement period.

Petitioner Mother also argues that the circuit court erred both in terminating her parental rights, and in denying post-termination visitation. She argues that the parties were satisfied with her performance and progress up until termination. She also argues that she should have been granted visitation with her children due to her strong maternal bond with them.

The guardian responds in favor of termination, and also argues that post-termination visitation is not in the children's best interests. The guardian points out that visitation was actually suspended prior to termination due to petitioner's actions, and is likewise not in the children's best interests at this time. The DHHR argues that termination was necessary for the welfare of the children.

With regard to the termination of Petitioner Mother's parental rights, this Court notes that the least restrictive alternative is generally employed pursuant to West Virginia Code § 49-6-5. However, this Court has held as follows:

"[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . 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." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). In the present matter, Petitioner Mother showed that she was either unable or unwilling to improve. She was given two improvement periods, and was successful in neither; thus, the circuit court did not err in terminating her parental rights.

Regarding Petitioner Mother's post-termination visitation, this Court has found as follows:

"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). Upon a review of the record, the circuit court, pursuant to the recommendation of the multidisciplinary team, terminated visitation

prior to the termination of parental rights, finding it in the children's best interests to no longer see their mother. This Court finds that the circuit court did not abuse its discretion in failing to grant post-termination visitation.

Finally, petitioner argues that there was "a complete breakdown in communications" with her appointed counsel. The circuit court, however, refused to appoint new counsel, which petitioner argues prejudiced her case. The guardian argues that the circuit court was correct in not appointing new counsel, as there was no true conflict of interest. The DHHR also argues that the circuit court was correct in not appointing new counsel, as petitioner's only basis was that counsel missed a single multidisciplinary team meeting. The DHHR argues that petitioner, at all times, had competent and zealous counsel.

Upon a review of the record, it appears that petitioner requested new counsel one time, which was after her counsel missed the multidisciplinary team meeting due to a scheduling conflict. The circuit court carefully considered her request, and even ended the hearing, ordering the prior multidisciplinary team meeting to be rescheduled so that counsel would be present. Further, the record reflects zealous advocacy on Petitioner Mother's behalf. The request for new counsel was never repeated after that single hearing. Therefore, we find no error in the circuit court's refusal to grant petitioner new counsel.

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 decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

DISQUALIFIED:

Justice Thomas E. McHugh