

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

In Re: J.F. and A.F.

No. 12-0097 (Jackson County 11-JA-7 & 11-JA-8)

FILED

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

MEMORANDUM DECISION

Petitioner Mother’s appeal, by counsel Kennad L. Skeen II, arises from the Circuit Court of Jackson County, wherein her parental rights to her two children were terminated by order entered on December 21, 2011. The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Laurence W. Hancock, has filed his response on behalf of the children.

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 initial abuse and neglect petition below was filed upon allegations that petitioner made repeated false accusations that Respondent Father sexually abused their two children. According to the petition, petitioner had a long history of making such accusations, and she also subjected the children to repeated sexual abuse examinations and evaluations. The petition notes that in February of 2010, the Jackson County Family Court entered an order prohibiting petitioner from having either child undergo a sexual abuse examination or interview, but that petitioner thereafter violated that order on at least two occasions. After extensive testimony was taken during multiple adjudicatory hearings, the circuit court found that “[t]he evidence is compelling that [petitioner] made repeated false accusations that [Respondent Father] and [his mother] sexually abused [the children], and that [petitioner] made such accusations knowing that they were, in fact, false.” (Emphasis in original). In fact, petitioner was found to have frequently discussed the false allegations with the children, and with others in the children’s presence, despite being told that such behavior is harmful to the children and being ordered by the family court to stop such actions.

In its adjudicatory order, the circuit court found that petitioner “has severe mental health issues,” and that she “suffers from Factitious Disorder by Proxy,” which disorder may cause petitioner to directly, physically harm the children in order to manufacture evidence of sexual abuse. Based upon its review of the extensive evidence below, the circuit court further found that petitioner “has taken innocent acts and manipulated them into something dirty and wrong, and she has taken her innocent children and sexualized them beyond their ages.” As such, the circuit court adjudicated

petitioner as an abusive parent due to the substantial emotional abuse inflicted upon the children by her multiple allegations of sexual abuse, and her actions in repeatedly subjecting the children to related examinations.

In terminating petitioner's parental rights, the circuit court found that petitioner "has neither accepted responsibility for abusing her children, nor has genuinely admitted child abuse on her part." At disposition, the circuit court noted that petitioner admitted only that she was a victim of the DHHR and the courts, and that she still claimed that the children were sexually abused by Respondent Father. As such, the circuit court found that petitioner would be unwilling and unable to participate in an improvement period, and then terminated her parental rights based upon a finding that there was no reasonable likelihood that petitioner could correct the conditions of abuse or neglect in the near future. On appeal, petitioner alleges three assignments of error. These assignments of error, as well as the Respondents' arguments in support of the circuit court's termination, are addressed in turn below.

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 Cecil T.* 228 W.Va. 89, 717 S.E.2d 873(2011).

Petitioner's first assignment of error alleges that the circuit court erred in finding by clear and convincing evidence that petitioner was an abusing parent and that the children were abused and neglected. In support, petitioner argues that these findings are premised on testimony from two experts that petitioner suffers from Factitious Disorder by Proxy. According to petitioner, one expert, Dr. Lee, only amended his prior diagnosis to include Factitious Disorder by Proxy after he was presented with the DHHR's petition in the abuse and neglect proceedings below. Petitioner notes that the second expert, Dr. Saar, then reviewed Dr. Lee's diagnosis in reaching his own opinion. Petitioner argues that, prior to these diagnoses, she had only been diagnosed with attention deficit hyperactive disorder ("ADHD"); post-traumatic stress disorder ("PTSD"); anxiety disorder, not otherwise specified; and, personality disorder, not otherwise specified. According to petitioner, the petition contained only unsubstantiated allegations, and that for an expert to base a medical diagnosis

on mere allegations is absurd and greatly detrimental to the judicial process. Petitioner attacks the circuit court's reasoning that, because the DHHR sufficiently substantiated the claims in the petition at adjudication, the experts' opinions have a supported factual basis and should be considered valid. According to petitioner, this circuitous logic cannot support the circuit court's findings as to abuse in this matter.

In short, petitioner argues that her diagnosis is inconsistent with the evidence below that established the children were, in fact, sexually abused. Petitioner cites to the testimony of therapist and expert witness Susan McQuaide, and argues that this witness spent more time with the children discussing the allegations of sexual abuse by Respondent Father than anyone else. According to petitioner, it is unlikely that a professional such as Ms. McQuaide, who has twenty years of experience in her field and who spent over twenty-five hours with the children, could be fooled by a mother coaching her children into spontaneously acting in a manner that was entirely consistent with having been sexually abused. Petitioner argues that the circuit court placed too much emphasis on her diagnosis of Factitious Disorder by Proxy, and that the diagnosis should be questioned given the extensive evidence of sexual abuse. Lastly, petitioner argues that she did have the requisite parenting skills to effectively parent her children, as she acted as any concerned parent would in these circumstances. Therefore, petitioner argues that the circuit court's finding as to her ineffective ability to parent the children is inconsistent with the evidence.

In response, the DHHR argues that the testimony below established that while Dr. Lee relied upon the unadjudicated allegations in the petition in forming his diagnosis of Factitious Disorder by Proxy, it is clear that the petition was not the sole catalyst for his amended diagnosis. In fact, the DHHR cites to the transcript of the adjudicatory hearing in which the circuit court addresses this issue with the following discourse:

I'll save you some time here. Of course, I didn't know what the basis for the expert's opinion was, but it would appear that a significant basis, not the total basis, but a significant basis is [sic] the allegations of the petition, and the veracity of those allegations is something that's being determined here, today, in the course of this case. So his - - in terms of proof of the underlying allegations is that this evidence is not as helpful, as Counsel points out, as it might be at a disposition. . . .

According to the DHHR, it is clear that the circuit court both recognized and gave credence to petitioner's argument that in forming his diagnosis, Dr. Lee relied, in part, upon the allegations in the petition prior to adjudication. However, the DHHR argues that the record shows that Dr. Lee had ample support for such a diagnosis apart from the petition itself. Further, the DHHR argues that the record establishes that Dr. Saar relied upon more than just Dr. Lee's report in amending his diagnosis of petitioner as well. The DHHR argues that in spite of the presumptive use of the petition, the experts' opinions were consistent and sound.

Further, the DHHR argues that Ms. McQuaide testified only that the children were credible, which is consistent with Dr. Saar's testimony regarding the lengths to which someone suffering from

Factitious Disorder by Proxy may go to in order to secure validation of the allegations. The DHHR also argues that Ms. McQuaide's findings were not disregarded, as the record establishes that Dr. Saar lists her evaluation and report as part of the information he considered in making his diagnosis. Lastly, the DHHR argues that Ms. McQuaide relied heavily upon information provided by petitioner in reaching her conclusion regarding sexual abuse, but that Ms. McQuaide did not evaluate the petitioner and was therefore unaware of her condition and its relation to the allegations. For these reasons, the DHHR argues that the circuit court did not err in its findings at adjudication. In his summary response, the guardian cites to various testimony to support the circuit court's adjudicatory findings, arguing that it was not error to adjudicate petitioner as an abusing parent. Further, the guardian argues that petitioner's actions and repeated violations of various court orders in search of something to validate her allegations of sexual abuse provide compelling new evidence upon which to base the experts' final diagnoses of Factitious Disorder by Proxy.

Upon our review of the record, the Court finds no error in the circuit court's findings that petitioner was an abusing parent or that the children were abused and neglected. First, after extensive testimony from both lay and expert witnesses, the circuit court found that the allegations of sexual abuse against Respondent Father were not only false, but that petitioner had fabricated them. This includes testimony from multiple expert witnesses, including medical experts who performed sexual abuse examinations on the children at issue. Further, the circuit court addressed Ms. McQuaide's findings as to the children's credibility, and noted that "most of the reports of [J.F.'s] sexual acting out have come from the [petitioner]." As such, the circuit court found that "in order to give the reports of sexual acting out their full weight, one would have to take [petitioner's] reports of sexual abuse as true, which the court is unable to do." Based upon this evidence, it is clear that the circuit court did not err in finding that the petitioner's allegations of sexual abuse against the children were unfounded and were fabricated by petitioner.

Further, as noted above, the circuit court addressed the issue of Dr. Lee's reliance upon the allegations in the petition as part of his diagnosis, and appropriately determined that the petition formed only a partial basis for his diagnosis. As such, the Court finds that the overwhelming evidence at adjudication established that petitioner "subjected the girls to repeated sexual abuse interviews and physical examinations, in order to support her false allegations of sexual abuse," and "that the high volume of interviews and examinations were emotionally harmful" to the children. Accordingly, we find no error in the circuit court's reliance upon the diagnoses by either Dr. Lee or Dr. Saar in reaching its finding that petitioner is an abusing parent, because the record establishes that these diagnoses were based upon voluminous evidence and not solely upon the allegations in the petition.

Lastly, West Virginia Code § 49-1-3(1)(A) defines an "abused child" as one "whose health or welfare is harmed or threatened by. . . [a] parent . . . who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home." Based upon the evidence above, it is clear that petitioner abused her children emotionally in a variety of ways. This includes subjecting them to a high volume of interviews and examinations based upon her fabricated allegations of

sexual abuse, and also discussing these false accusations with the children and with others in the children's presence. The circuit court specifically found that through these actions, petitioner subjected the children to "severe mental and emotional injury" that harmed or threatened their welfare. For these reasons, the circuit court did not err in finding the children to be abused. Further, West Virginia Code § 49-1-3(2) defines an "abusing parent" as one "whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to constitute child abuse or neglect." Because petitioner's conduct was found to constitute abuse, the circuit court did not err in finding her to be an abusing parent.

In her second assignment of error, petitioner alleges that because the circuit court erred in adjudicating her as an abusing parent, it necessarily erred in terminating her parental rights. However, she also argues that the circuit court erred in failing to order a less restrictive alternative to termination at disposition. According to petitioner, she testified that she would be willing to undergo an independent psychiatric evaluation and commit to any and all treatment programs thereafter recommended. Petitioner further testified that her children's well-being was her ultimate concern, and that she would be willing to undergo supervised visitation if necessary. Citing testimony from a DHHR employee, petitioner argues that acknowledgment and acceptance of the possibility that one suffers from a disorder such as Factitious Disorder by Proxy is a step forward, and that success in dealing with this condition with treatment is a possibility.

In response, the DHHR argues that petitioner's own testimony was the best support for termination of her parental rights without a dispositional improvement period. According to the DHHR, petitioner has no insight into the very serious and dangerous psychological disorder from which she suffers. Further, the DHHR had even scheduled petitioner for an evaluation with a third unrelated expert in the field, but petitioner failed to appear for this appointment and provided no explanation for the decision not to appear. In light of the requirement that petitioner must prove by clear and convincing evidence that she was likely to fully participate in an improvement period, the DHHR argues that it was not error for the circuit court to terminate petitioner's parental rights without granting an improvement period. The guardian also responds, and argues that termination without an improvement period was proper because petitioner failed to acknowledge the underlying problems related to her disorder. Citing the circuit court's termination order, the guardian notes that petitioner exhibited an attitude that indicated she did not believe she had a problem or that she was capable of addressing the same.

Upon our review of the record, the Court finds no error in either the circuit court's denial of an improvement period or in its decision to terminate petitioner's parental rights. As noted above, in denying petitioner's motion for a post-adjudicatory improvement period, the circuit court found that petitioner neither accepted responsibility for abusing her children, nor genuinely admitted child abuse on her part. This was based upon petitioner's testimony that she believed an improvement period "should include counseling for herself and her daughters in regards [sic] to what they suffered when the children were 'illegally taken' from her custody." According to the circuit court, instead of accepting responsibility for abusing her children, petitioner "admitted only that she was a victim of the [DHHR] and the court," and further continued to claim that Respondent Father sexually

abused the children. This belief led petitioner to contact the offices of United States Senators for the State of West Virginia in an attempt to pursue a criminal investigation into the alleged sexual abuse. Most importantly, however, the circuit court noted that petitioner testified that if she obtained an improvement period, “she would like help learning how to communicate with her daughters about their sexual abuse.” Lastly, according to the dispositional order, petitioner testified that she would participate in another psychiatric examination that was “‘independent [and] untainted,’ and that if the new psychiatrist confirmed the [Factitious Disorder by Proxy] diagnosis. . . then [she] would ‘consider’ the ‘possibility’ that she needs help.”

This testimony establishes not only that petitioner was unlikely to participate in an improvement period, but that she planned to actively continue perpetrating the same abusive conduct against her children that necessitated their removal. Based upon all of the evidence presented below, it is clear that petitioner failed to establish that she was likely to fully participate in an improvement period as required by West Virginia Code § 49-6-12(a)(2). Further, this Court had 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.

W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). Based upon this holding and the evidence below, it is clear that the circuit court did not err in denying petitioner an improvement period.

Additionally, this same evidence supports the circuit court’s finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse in the near future. West Virginia Code § 49-6-5(b)(2) 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] willfully refused or [is] presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child’s return to their care, custody and control.” As noted above, petitioner continued to deny that she had engaged in any abuse of the children at issue, and continued to allege that Respondent Father sexually abused the children despite the circuit court’s finding that petitioner had fabricated those allegations. As such, the circuit court did not err in terminating petitioner’s parental rights pursuant to West Virginia Code § 49-6-5(a)(6) and its finding that petitioner could not substantially correct the conditions of abuse.

Lastly, petitioner argues that her due process rights were violated below. According to petitioner, she provided her counsel with pertinent information, documents, and video that her counsel failed to utilize and/or present to the circuit court. As such, petitioner argues that the circuit court was not presented with a complete picture of the case. According to petitioner, these documents include video she recorded of her daughters making accusations that the Respondent

Father touched them inappropriately and also behaving in a sexual manner. Petitioner further argues that she recorded video of DHHR visits which would have served to put some of their allegations against her into perspective, and would have served as rebuttal evidence below. Petitioner cites West Virginia Code § 49-6-2 to argue that her due process rights were violated because she was denied a meaningful opportunity to be heard as that statute requires. Petitioner further alleges that her right to testify and to present and cross-examine witnesses was effectively denied because her counsel failed to prepare petitioner's niece to testify, and that the niece was put on the stand "cold" without having more than a rudimentary knowledge of what questions would be asked.

In response, the DHHR argues that petitioner's counsel argued vociferously on her behalf, and the record establishes that the circuit court had to intervene in trying to reduce the number of objections that counsel made in attempting to zealously represent petitioner. The DHHR also argues that the video evidence petitioner sought to introduce was likely the same or similar to videos she attempted to show multiple witnesses, as addressed in their testimony below. According to the DHHR, Dr. Saar viewed at least one such video, and found the same to be staged. According to the DHHR, the videos are only further evidence that petitioner continued to violate repeated instructions not to discuss the false allegations of sexual abuse with the children. The DHHR also argues that in regard to petitioner's behavior during visitations, all evidence other than her videos shows that she acted inappropriately. In short, the DHHR argues that petitioner's refusal to accept her counsel's professional decision not to submit evidence which would likely have done further damage to her case is further evidence in support of her delusions and diagnosis of Factitious Disorder by Proxy. The DHHR also argues that petitioner's niece was asked straight-forward questions about a single visit to petitioner's home, yet she struggled to give basic information about the alleged discovery of physical evidence related to sexual abuse. As such, the DHHR argues that petitioner fails to explain how any additional preparation would have enhanced this witness's credibility. For these reasons, the DHHR argues that it is obvious that petitioner was not denied her right to due process below.

Upon a review of the record, the Court agrees that no violation of petitioner's due process rights occurred below. In effect, petitioner argues that she was denied effective assistance of counsel because of her attorney's decisions related to trial strategy. This Court has never recognized a claim for ineffective assistance of counsel in the context of abuse and neglect matters, and declines to do so in the instant matter. However, even reviewing the matter on the merits, it is clear that petitioner's counsel presented multiple witnesses and voluminous evidence on petitioner's behalf, and the decision against introducing specific videos that petitioner believes may have been beneficial to her position does not constitute a denial of petitioner's due process rights or her meaningful opportunity to be heard pursuant to West Virginia Code § 49-6-2. Further, no right of petitioner was violated by any alleged failure to more meaningfully prepare any witnesses below. For these reasons, we find no merit in petitioner's allegation that her due process rights were violated by her representation below.

For the foregoing reasons, we find no error in the decision of the circuit court, and the termination of petitioner's 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