STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: H.B.

No. 12-0111 (Randolph County10-JA-17)

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Lori Gray, appeals the Circuit Court of Randolph County's November 17, 2011, order terminating her parental rights to H.B. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Richard W. Shryock Jr., has filed his response on behalf of the child.

Having reviewed the appendix 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 appendix 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.' 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).

The petition in this case was first initiated due to Petitioner Mother's prior termination of her parental rights to her older child, C.J.H., after Petitioner Mother's boyfriend, who is not C.J.H.'s father but is H.B's father, severely and repeatedly physically abused C.J.H., including physical beatings leaving cuts and bruises, holding him under water in a bathtub to the point of unconsciousness, and hanging him from a hook. C.J.H. was three years old at the time. Both Petitioner Mother and H.B.'s father pled guilty to felony child neglect resulting in injury and both served prison sentences. They reunited upon their subsequent releases from prison and conceived

H.B., the child in the present case. H.B. was removed within weeks of her birth, prior to suffering any abuse. Petitioner Mother was homeless at the time. H.B.'s father was adjudicated as an abusive parent due to his prior abuse of H.B.'s half-brother, C.J.H., although he claims not to have abused C.J.H. and states that he merely "disciplined" him. H.B.'s father requested an improvement period, but said improvement period was denied due to his continuous claims that he had no parenting issues to resolve and his denial of the prior abuse, and because he failed to complete the domestic violence perpetrator program he was offered. The circuit court terminated H.B.'s father's parental rights.

Petitioner Mother stipulated to the allegations in the petition and was adjudicated as a neglectful parent. The circuit court granted Petitioner Mother's request for an improvement period and gave her numerous written requirements for her improvement period, including finding suitable housing and having no direct or indirect contact with H.B.'s father. The DHHR then moved to terminate Petitioner Mother's improvement period, noting that in-home visitation cannot be achieved as Petitioner Mother has yet to secure proper housing, even over six months after her improvement period began. Further, the DHHR noted that Petitioner Mother's progress in services has been slow, as she refuses to accept responsibility for her actions. After hearings on the motion, Petitioner Mother stipulated to ending her improvement period unsuccessfully and requested disposition of the case and a dispositional improvement period. She admitted that she has lived in H.B.'s paternal grandmother's home, where H.B.'s father often stayed, but denies that she is in a relationship with H.B.'s father.

At disposition, the circuit court terminated Petitioner Mother's parental rights and found that she "continues to make poor decisions and has failed to demonstrate an appropriate understanding in therapy of how to keep herself and [H.B.] safe from potentially abusive relationships." Further, the circuit court found that she failed to remedy the conditions leading to abuse and neglect in the sixteen months the child was out of the home and had not shown that she is likely to fully participate in a dispositional improvement period. The circuit court found that she had likewise not shown a substantial change in circumstances that would lead to full participation in another improvement period.

On appeal, Petitioner Mother first argues that the circuit court erred by terminating her parental rights prematurely, prior to all reasonable efforts being exhausted to preserve and reunify the family. Petitioner argues that she participated in her improvement period by attending counseling, attempting to find housing, attending visitation, and securing a job. She admits that it took her until September of 2011 to find housing, but states that she greatly improved her situation and progressed throughout the improvement period and thereafter. Petitioner Mother argues that any remaining deficiencies had been "practically" remedied at the time of the dispositional hearing and, thus, termination was unwarranted.

In response, the DHHR argues that although petitioner was granted an improvement period, she failed to demonstrate any meaningful change in spite of sixteen months of services. Petitioner

admitted violations of the requirements of her improvement period, and her psychological assessment showed that her progress had been very slow. The DHHR further argues that the testimony of the caseworker showed that petitioner had been having contact with H.B.'s father, against court orders, and that petitioner had been getting assistance in finding her own housing but had failed to apply for approval for subsidized housing. The DHHR argues that petitioner did not demonstrate an overall change in attitude and in her approach to parenting to allow reunification. The termination was not premature, as H.B. had been in foster care for sixteen straight months. West Virginia Code § 49-6-5b states that the DHHR is required to seek termination when a child has been in foster care for fifteen months of the last twenty-two month period.

The guardian argues that the circuit court properly denied petitioner's motion for another improvement period and properly terminated her parental rights based on her lack of progress in therapy and her continued contact with H.B.'s father, who was the perpetrator of the severe and systematic abuse of her older child. The guardian argues that petitioner failed to show improvement, and continued to engage in a relationship with H.B.'s father, who severely beat and abused Petitioner Mother's older child. The guardian argues that continued contact with H.B.'s father, against court orders, shows her lack of improvement, which made termination proper.

Petitioner had one improvement period in this case, which she stipulated was unsuccessful. Importantly, this Court has held as follows:

> As we explained in *West Virginia Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990), it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting." Thus, a judgment regarding the success of an improvement period is within the court's discretion regardless of whether or not the individual has completed all suggestions or goals set forth in family case plans.
>
> The improvement period is granted to allow the parent an opportunity to remedy the existing problems. The case plan simply provides an approach to solving them. As is clear from the language of the statute, . . . the ultimate goal is restoration of a stable family environment, not simply meeting the requirements of the case plan. *Carlita B.*, 185 W.Va. [613], 626, 408 S.E.2d [365], 378 [1991](quoting, in part, *Peggy F.*, 184 W.Va. at 64, 399 S.E.2d at 464).

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 258-59, 470 S.E.2d 205, 212 -13(1996). Thus, even though petitioner participated in services, this is not the only goal. Petitioner Mother failed to show actual improvement in this matter, and she violated perhaps the most important portion of her improvement period, which was to avoid contact with H.B.'s father.

With regard to the termination of Petitioner Mother's parental rights, this Court has held as follows:

> "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights 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 . " Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). The child in this matter was only weeks old upon her removal, and at the time of disposition, had been in foster care for sixteen months. Thus, pursuant to West Virginia Code § 49-6-5b, the DHHR was compelled to seek termination. Given the evidence in this matter, and the petitioner's inability to fully comply with the terms of her improvement period, this Court finds no error in the termination of Petitioner Mother's parental rights.

Petitioner Mother next argues that the circuit court erred in denying her a dispositional improvement period. She argues that she "substantially complied" with the terms of her initial improvement period and made improvements in therapy and in recognizing unsafe environments for her daughter. Petitioner Mother argues that another three months would not adversely affect her child, as the child has remained with the same foster family since her removal, and permanency would not be affected. Petitioner Mother argues that a dispositional improvement period would have allowed all efforts at reunification to be exhausted.

In response, the DHHR argues that a circuit judge has discretion in granting an improvement period, and that petitioner was granted the opportunity to participate in an improvement period but failed to demonstrate meaningful change. The DHHR argues that petitioner's argument for additional time violates this Court's reasoning in *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), in that unwarranted improvement periods are not in children's best interests. In the present case, the DHHR argues that petitioner admits she failed her prior improvement period, and there is no evidence that an additional improvement period would promote H.B.'s interests.

The guardian responds that the denial of another improvement period was proper, as petitioner never showed a substantial change in circumstances warranting another improvement period. Further, the guardian argues that another improvement period was not in the best interests of the child. Petitioner did not progress in therapy and had continued contact with H.B.'s father, which was a direct violation of her initial improvement period. The guardian argues that in the two most important portions of the improvement period, which were to stay away from H.B.'s father and to make progress in counseling, petitioner failed.

"We have held that the granting of an improvement period is within the circuit court's discretion." *In re Tonjia M.*, 212 W.Va. 443, 448, 573 S.E.2d 354, 359 (2002). Moreover, as stated above, courts do not have to exhaust every speculative possibility of parental improvement. In the present matter, petitioner was given an improvement period, and stipulated to her failure to successfully complete the same. Thus, we find no error in the circuit court's refusal to grant a dispositional improvement period.

Finally, Petitioner Mother argues that the circuit court erred in permitting witness testimony on the DHHR's motion to end Petitioner Mother's improvement period, when said motion was not noticed for hearing. Counsel for Petitioner Mother objected to allowing a DHHR employee to testify at the hearing, which was set as a status hearing. Petitioner argues that this is a violation of her due process rights as her counsel was unprepared to properly cross examine the DHHR employee due to the DHHR's failure to notice the motion for hearing.

The DHHR argues that no harm resulted from allowing the testimony of the DHHR employee, who was about to give birth to a child and could not attend later hearings. Moreover, the circuit court reserved to petitioner the right to re-examine the employee on the issue before it ruled on it. Moreover, the DHHR notes that the testimony was mooted by petitioner's admission via stipulation that she did not successfully complete the initial improvement period.

The guardian responds and argues that petitioner stipulated that she did not successfully complete her improvement period, and that she had ample opportunity to cross-examine the DHHR employee. The guardian argues that even though the motion was not noticed for hearing, petitioner's rights were not violated. Further, the guardian argues that petitioner could have deposed the DHHR employee if she had chosen to do so, but chose instead to stipulate to her failure to complete the improvement period successfully.

While the motion to terminate Petitioner Mother's improvement period was not noticed for hearing, after lengthy arguments by counsel, the circuit court allowed one DHHR employee to testify on the issue, as that employee would be unavailable for later testimony due to the impending birth of her child. The circuit court reserved petitioner's right to recall the DHHR employee, if necessary, at a later date. However, instead of recalling the employee, petitioner chose to stipulate that she did not successfully complete her improvement period. Thus, we find no reversible error in the circuit court allowing the DHHR employee to testify.

This Court reminds the circuit court of its duty to establish permanency for the child. 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: May 29, 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

[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.