

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

In Re: P.N., J.N., and M.N.

No. 12-0158 (Wayne County 09-JA-089 - 092)

FILED

June 25, 2012

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

MEMORANDUM DECISION

Petitioner Parents' appeal, by counsel Edward L. Bullman, arises from the Circuit Court of Wayne County, wherein their parental rights to their three children were terminated by order entered on December 16, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Chad D. Barry, 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 against petitioners, the mother and father of the children at issue, after their youngest child had to be hospitalized for a drug overdose due to ingesting prescription pain medication. The initial abuse and neglect petition alleged that neither parent could provide a reasonable explanation as to how the child, then less than two years old, had ingested oxycodone. At the adjudicatory hearing, the circuit court determined the children were neglected due to the overdose and also petitioners' history of substance abuse and prescription medication abuse. According to the appendix, petitioners traveled to Florida on a regular basis to undergo pain management treatments, which continued throughout the proceedings below. A dispositional hearing was held on February 5, 2010, and the circuit court granted petitioners dispositional improvement periods. Petitioners were found to have been compliant to varying degrees for several months, such that the circuit court continued their improvement periods on multiple occasions. In December of 2010, the circuit court found that Petitioner Father was minimally compliant with the terms of the improvement period and that Petitioner Mother was moderately compliant, and set the matter for disposition.

However, at the dispositional hearing in February of 2011, the circuit court granted petitioners a three-month dispositional improvement period which included the following terms, among others: that petitioners remain drug free; that petitioners submit to three drug screens weekly for three months; and, that any failure by petitioners to meet the terms of the improvement period would result in the matter being set for final disposition. However, the circuit court eventually

terminated petitioners' improvement periods and also terminated their parental rights to their three children due to their relapsing into drug abuse.¹

On appeal, petitioners allege that the circuit court erred in terminating their parental rights instead of ordering a permanent guardianship with the children's maternal grandmother. According to petitioners, the circuit court could have achieved permanency for the children by ordering a permanent guardianship with the grandmother while allowing visitation with petitioners. Petitioners argue that this disposition would have allowed for modification of disposition should they be able to control their addiction to prescription medications. Petitioners note that the children were already in a relative placement with the maternal grandmother, and argue that the DHHR has the discretion to not file an abuse and neglect petition when a child has been placed with a relative. Petitioners argue that the circuit court's termination could result in situations in which the children are adopted by a non-relative, and argue that a permanent guardianship with the grandmother would have allowed for the parents to remain in contact with the children as was ordered below. Further, petitioners argue that a permanent guardianship would not have required the children to create new attachments to foster parents, so the children's permanency would not have been disrupted by a later modification to petitioners' parental rights.

The guardian ad litem responds and argues that the circuit court did not err in terminating petitioners' parental rights. The guardian argues that petitioners failed to cooperate with substance abuse assessments and treatment, and also failed to submit to treatment by a local, reputable physician for reasonable pain management. The guardian also argues that petitioners failed to provide credible evidence of legitimate financial support for the family, and posed a risk to the children by continuing to abuse prescription medication and present themselves in an intoxicated state. According to the guardian, these facts clearly support the circuit court's finding that petitioners could not substantially correct the conditions of neglect in the near future. Despite having two improvement periods, the guardian argues that petitioners simply could not correct their substance abuse and took no steps to seek treatment for the same.

The DHHR responds and also argues in support of the circuit court's termination. According to the DHHR, petitioners have a significant history with the DHHR, dating back to an investigation into allegations of drug abuse, neglect, and emotional abuse perpetrated against another child in 2001. According to the DHHR, petitioners have subsequently been investigated on at least two other occasions. The DHHR notes that petitioners' psychological and psychiatric evaluations concluded that they abuse drugs, yet both petitioners refused to accept either the severity of the abuse or that they suffered from addiction. The DHHR also argues that petitioners repeatedly exposed their

¹A fourth child, T.N., who was a half-sibling to the children at issue, was originally the subject of the proceedings below. Due to the child reaching the age of eighteen shortly after disposition below, Petitioner Father's parental rights to this child were not terminated, and the circuit court ordered that T.N.'s maternal grandparents would have permanent guardianship of that child. Petitioners do not address the circuit court's decision in relation to this child, and she is therefore not the subject of this memorandum decision.

children to unsuitable persons associated with the local drug culture. In short, the DHHR argues that termination was appropriate because petitioners failed to control and minimize their prescription drug abuse, despite their child's overdose and the repeated opportunities over eighteen months to cure the conditions of abuse and neglect. The DHHR argues that a permanent guardianship would not have been in the children's best interest, and that petitioners are simply seeking to have continued access to their children while they put on the facade of attempting to comply with services. According to the DHHR, the circuit court's finding that there was no reasonable likelihood that the conditions of neglect could be substantially corrected was supported by petitioners' lack of cooperation and failure to take steps to remedy their substance abuse. Lastly, the DHHR argues that this finding supports the circuit court's termination of petitioners' parental 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 our review of this matter, the Court finds no error in the circuit court's decision to terminate petitioners' parental rights instead of granting a permanent guardianship at disposition. The appendix shows that the circuit court granted petitioners multiple improvement periods in an attempt to rectify the conditions of neglect that necessitated the children's removal. In its order terminating parental rights, the circuit court noted that an independent medical evaluation of petitioners diagnosed them both with a prescription drug abuse and dependency problem. Despite this diagnosis, the circuit court found that petitioners failed “to recognize a substance abuse problem and fail[ed] to deal with the substance abuse problem.” The circuit court also found that petitioners eventually stopped cooperating with the DHHR, going so far as to cease communication with their social worker and attorney. Further, the petitioners continued to test positive for high levels of prescription medication throughout the proceedings below, and even missed several drug screens. Most importantly, however, the circuit court found that petitioners “failed to be involved in substance abuse treatment and . . . failed to obtain medical treatment from a more local treating physician without any reasonable justification,” and also noted that petitioners repeatedly appeared in court in an intoxicated condition.

Based upon this evidence, the circuit court found that the parents “failed to correct the circumstances of a destructive lifestyle that pose a risk of harm to the children,” and further found that there was no reasonable likelihood that the conditions of neglect could be 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.

Upon our review of the appendix, it is clear that the circuit court’s finding in this regard is supported by the evidence. As such, the circuit court was correct to terminate petitioners’ parental rights pursuant to West Virginia Code § 49-6-5(a)(6). Termination is further supported by our prior holding that “‘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. . . .’ 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). Petitioners, in effect, are asking for an indefinite improvement period by placing the children in a permanent guardianship until such time as petitioners have remedied their substance abuse issues. The Court, however, agrees with the circuit court that the children need stability and permanency, and that termination was the appropriate method to achieve these goals. As such, we find no error in the circuit court’s termination of petitioners’ parental 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 eighteen months of the date of the disposition order.² 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

² 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.

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 petitioners’ parental 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