STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In Re: **D.T.**

No. 12-0257 (Harrison County 11-JA-56-1)

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Betsy Griffith, arises from the Circuit Court of Harrison County, wherein Petitioner Mother's parental rights were terminated by order entered on January 4, 2012. The child's guardian ad litem, Julie Garvin, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of the circuit court's order.

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 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 circuit court previously terminated Petitioner Mother's parental rights to three other children in March of 2010. These three other children sustained multiple traumatic physical injuries caused by their father, Petitioner Mother's husband. Both parents pled guilty to child neglect resulting in serious bodily injury. Consequently, Petitioner Mother was sentenced in February of 2011 to serve one to ten years imprisonment. While incarcerated, she gave birth to subject child D.T. on May 29, 2011. Upon his birth, DHHR filed the petition in the instant case, alleging aggravated circumstances. Shortly after this petition was filed, Petitioner Mother waived her preliminary hearing. At the adjudicatory hearing in July of 2011, the circuit court took judicial notice of all evidence presented in Petitioner Mother's prior abuse and neglect cases and of Petitioner Mother's criminal case. At the dispositional hearing in August of 2011, D.T.'s biological father moved to become a party in interest in this case, which the circuit court granted. Also at disposition, Petitioner Mother filed for a post-adjudicatory improvement period or, in the alternative, for disposition under West Virginia Code § 49-6-5(a)(5), both of which the circuit court denied. The circuit court heard testimony from Petitioner Mother, who testified that she did not plan to reunite with her three older children's father after her release from incarceration, but admitted that she never separated from him at any point during the prior case even when her three older children were placed in foster care. Petitioner Mother also testified that she has attended domestic violence counseling sessions with Hope Incorporated Domestic Violence Center and claimed that she was a victim of domestic violence in her relationship with the three older children's father even though she never identified herself as a domestic violence victim before this hearing, including at any point during the prior abuse and neglect proceedings. Following the dispositional hearing, the circuit court entered its order terminating Petitioner

Mother's parental rights to D.T. Petitioner Mother appeals this decision, arguing one assignment of error.

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).

On appeal, Petitioner Mother argues that the circuit court erred by denying her a disposition in accordance with West Virginia Code § 49-6-5(a)(5) after the August 22, 2011, dispositional hearing. She argues DHHR did not meet its burden to prove that she would not likely substantially comply with terms of an improvement period. She further argues that the Court has held that in order to remedy an abuse and neglect problem, the problem must first be acknowledged and failure to acknowledge the existence of a problem results in making the problem untreatable and makes 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*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). Petitioner Mother argues that here, she took responsibility for failing to protect her three older children from her husband's physical abuse by pleading guilty to the felony offense of child neglect resulting in serious bodily injury and by separating from her husband in March of 2010. She acknowledged her deficiencies in her own parenting and identified the perpetrator at the August of 2011 dispositional hearing. Moreover, Petitioner Mother argues that "'[a] biological parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.' Syl. Pt. 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970)." Syl. Pt. 2, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Petitioner Mother asserts here that although she made mistakes in the prior abuse and neglect proceedings, the record shows that Petitioner Mother is making immediate efforts to correct the conditions of abuse and neglect for which she was adjudicated. Petitioner Mother raises that pursuant to Rule 43 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, permanency for a child must be achieved within eighteen months of disposition. She argues that with her eligibility for parole in January of 2012, she would have ample time to substantially correct the conditions of abuse and neglect, given that she has already taken steps to remedy these conditions. Petitioner Mother accordingly argues that the circuit court failed to choose the

least restrictive alternative when it denied her motion for a disposition in accordance with West Virginia Code § 49-6-5(a)(5).

The guardian ad litem and DHHR respond, contending that the circuit court did not abuse its discretion in terminating Petitioner Mother's parental rights. The guardian asserts that at Petitioner Mother's prior adjudicatory hearing for her other three children, licensed psychologist Dr. Traci Berry-Harris testified that Petitioner Mother is high risk for practicing known abusive parenting practices; that testing indicated that Petitioner Mother viewed children with power as threatening; and that Petitioner Mother lacked empathy for children, nurturing skills, and the ability to handle parenting stresses. Both the guardian and DHHR argue that pursuant to West Virginia Code § 49-6-12, the circuit court has the discretion to grant or deny a parent an improvement period. Pursuant to this Code section, the parent must prove by clear and convincing evidence that he or she will likely substantially comply with the terms of an improvement period. Here, the guardian and DHHR argue that Petitioner Mother failed to meet this burden. They assert she had only minimal participation in services, denied the physical abuse of her three older children throughout their case, and continued to stay with her husband throughout those proceedings. Moreover, although Petitioner Mother argues that an alternative disposition under West Virginia Code § 49-6-5(a)(5) would have been in the best interests of the child, she presented no support for this argument other than that the child's best interests would be served by having a relationship with his mother who has "taken appropriate steps to correct her behavior." To the contrary, the guardian and DHHR argue, Petitioner Mother has done little to nothing to correct the issues that threaten the child's safety. Even though services and classes were available to her throughout her last case and after her incarceration, she only attended two to three counseling sessions and only began to attend classes geared toward parenting or anger management while incarcerated. The guardian and DHHR further argue that *Cecil T.* directs that although incarceration itself may not be the sole basis for termination of parental rights, it may be used as a factor of consideration in doing so. *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

In response to Petitioner Mother's argument concerning the time frame possible for reunification after her parole, the guardian and DHHR assert that Petitioner Mother did not indicate as to whether she was granted parole. The guardian asserts that she was actually denied parole in January of 2012 and will not be eligible for parole again until January of 2013. Furthermore, the requisite time period for permanency has been amended and reduced from eighteen months to twelve months. Accordingly, permanency with Petitioner Mother could not be achieved in a timely manner.

The Court finds that the circuit court did not err in terminating Petitioner Mother's parental rights. The 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). Further, the Court has also held that "'the welfare of the child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 304[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). Here, Petitioner Mother testified at the dispositional hearing, admitting that she never separated from the other three children's father in the prior case and that she always supported him. She admitted to never having brought up domestic violence issues before or previously claiming to be a battered woman. Petitioner Mother responded with, "Their father, [J.][B.]" when asked, "Who was the main perpetrator of that abuse to the children?" But she also admitted that she had told her friends on the day of disposition in the prior proceedings that she believed J.B. had not done anything to the children. Moreover, Petitioner Mother testified that her separation from J.B. was due to their mutual incarcerations. The circuit court's termination order laid out the details of Petitioner Mother's prior abuse and neglect proceedings, including Dr. Berry-Harris's testimony in Petitioner Mother's prior case. The circuit court also noted Petitioner Mother's repeated denials of child abuse and placement of blame on the oldest of her three other children, who was only three years old. The circuit court further noted Petitioner Mother's decision to remain with her children's abuser. In her petition for appeal, Petitioner Mother presents nothing to refute the documents provided in the record to indicate that the circuit court abused its discretion in its decision to deny her motion for a post-adjudicatory improvement period or in its ruling to terminate her parental rights. Based upon a review of the record provided and the circumstances of this case, including the subject child's infant age, the Court finds no error in the termination of Petitioner Mother's parental rights.

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 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
Justice Thomas E. McHugh