STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: A.L., K.R., & B.L.**

No. 12-0336 (Mercer County 11-JA-175, 11-JA-176 & 11-JA-177)

FILED
September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Gerald R. Linkous, arises from the Circuit Court of Mercer County, wherein her parental rights to the children, A.L., K.R., and B.L., were terminated by order entered on February 13, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Michael Cook, has filed a 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 abuse and neglect proceedings below were initiated after law enforcement and a Child Protective Services ("CPS") worker responded to petitioner's home to find her unconscious in bed with her roommate, both covered in blood, while the children were sleeping in a separate bedroom. According to the petition, it took approximately one hour to wake petitioner, who appeared intoxicated. The children stated that they witnessed petitioner strike a man with whom she had been drinking, and the man had responded with physical violence. According to the parties, petitioner was on parole for drug trafficking in Ohio, though she had been allowed to return to West Virginia and have her parole monitored by law enforcement here. Following the petition's filing, no one was able to locate petitioner and she did not participate in the proceedings below, though hearings were rescheduled in an attempt to locate petitioner or afford her additional time to participate. According to the record, petitioner went back to Ohio and left the children in the DHHR's custody. The circuit court ultimately found the children to be neglected by virtue of petitioner's drug abuse, her abandonment of the children, and because of their exposure to domestic violence. At the dispositional hearing, the circuit court was first presented with information that petitioner had been incarcerated in Ohio since approximately the end of December of 2011 because of her prior parole issues, and that she would not potentially be released from custody until 2013. Without taking any additional evidence, the circuit court terminated petitioner's parental rights.

On appeal, petitioner argues that the circuit court erred in terminating her parental rights without taking additional evidence at disposition. Further, petitioner argues that the circuit court

should have analyzed her situation under our prior holding from *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011), including the reason for her incarceration, the nature of the offense, and the terms of the confinement. Lastly, petitioner argues that she could have achieved reunification within the statutorily allowed eighteen-month time period for such matters. By failing to take evidence at the dispositional hearing, petitioner argues that the circuit court failed to require the DHHR to prove that termination of parental rights was the correct disposition.

The DHHR responds and argues in support of the circuit court's termination of petitioner's parental rights. According to the DHHR, the circuit court's adjudicatory findings of substance abuse, abandonment, and domestic violence are not clearly erroneous and therefore properly served as the basis for termination. The DHHR further argues that the circuit court considered the appropriate factors in deciding to terminate petitioner's parental rights, and also considered her chronic drug abuse, her propensity to place her children in danger due to her intoxication and domestic violence issues, and the fact that she wholly failed to participate in these proceedings during the initial three months when she was not incarcerated. The guardian ad litem also responds and argues in support of the circuit court's termination of petitioner's parental rights because petitioner neglected the children through her own drug abuse and domestic violence. The guardian further argues that petitioner basically abandoned the children and failed to communicate with the DHHR while failing to participate in services.

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). Based upon our review of the record, the Court finds no error in the circuit court's decision to terminate petitioner's parental rights. We have previously held that

> "W.Va.Code, 49–6–2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of

> Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. Pt. 1, *In re Joseph A.*, 199 W.Va. 438, 485 S.E.2d 176 (1997) (internal citations omitted). Pursuant to West Virginia Code § 49-6-5(a), after the circuit court has adjudicated the children as abused or neglected, there is no requirement that a circuit court must take additional testimony or evidence. That statute does, however, require that petitioner and any respondents have an opportunity to be heard at disposition. A review of the record clearly shows that the DHHR met the applicable burden at adjudication. At disposition, the DHHR chose to rest on the circuit court's findings from adjudication to support its position, while petitioner's counsel chose not to present any evidence or testimony on his client's behalf. For these reasons, the circuit court did not err in proceeding to termination of parental rights without hearing any additional evidence.

Further, pursuant to West Virginia Code § 49-6-5(b)(2), the circuit court was clearly presented with sufficient evidence upon which to base termination of petitioner's parental rights because petitioner willfully refused or was unwilling to cooperate in the development of a reasonable family case plan. Specifically, petitioner was not incarcerated until approximately December 30, 2011, which is almost four months after the initial petition was filed below. Further, the circuit court found that termination was necessary for the welfare of the infant children. When these finding have been made, West Virginia Code § 49-6-5(a)(6) requires a circuit court to terminate the parent's parental rights. Based upon our review of the record, it is clear that petitioner failed to even minimally participate in the abuse and neglect proceedings below, even prior to her incarceration, and that the circuit court's findings were supported by the evidence presented.

As for petitioner's argument that the circuit court failed to properly apply our prior directions from *Cecil T.*, the Court finds no merit in this argument. Based upon our review of the record, we find that the circuit court was not required to apply the holding from Syllabus Point 3 of *Cecil T.* to the instant matter because it considered several factors other than petitioner's incarceration. These factors include the findings at adjudication related to petitioner's substance abuse, her decision to abandon the abuse and neglect proceedings and leave her children in DHHR custody, and the children's exposure to domestic violence. For these reasons, the circuit court did not err in terminating petitioner's 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 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 petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: September 24, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum