

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

In Re: P.L. and K.L.

No. 12-0366 (Mercer County 10-JA-36-WS & 10-JA-37-WS)

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

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Michael Magann, arises from the Circuit Court of Mercer County, wherein her parental, custodial, and guardianship rights to her children were terminated by order entered on February 16, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Julie M. Lynch, has filed her 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.

According to the parties, the initial abuse and neglect petition was filed in the circuit court after Child Protective Service ("CPS") and law enforcement went to petitioner's home and found drug paraphernalia within reach of her child, P.L. This included multiple hypodermic needles with exposed plungers, straws used for snorting pills, and a dilaudid pill all on the floor, giving the child access to these items. Petitioner was pregnant with K.L. at the time P.L. was removed from her custody, and she was arrested in connection with these events. As a result of the conditions in the home, petitioner indicates that she was indicted criminally for child neglect with risk of injury, to which she pled guilty and was allowed to enter a detoxification program and long-term treatment as part of her probation. According to the parties, there was also an ongoing, high degree of domestic violence in the home. The parties indicate that petitioner stipulated to neglect and abuse of the children at adjudication, and that she was thereafter granted a post-adjudicatory improvement period. Petitioner appeared to be progressing with the terms of her improvement period, as evidenced by several review hearings, an extension to her post-adjudicatory improvement period, and the return of P.L. However, on February 18, 2011, an emergency custody hearing was held due to petitioner failing several drug screens around that time, and the children were both removed from petitioner's custody.

During a March 11, 2011, review hearing, the circuit court ordered that petitioner was to complete detoxification and long-term substance abuse treatment. She was thereafter granted a dispositional improvement period, which again appeared to have gone well for a time and resulted in a three-month extension in September of 2011. However, at a review hearing on

December 2, 2012, the circuit court was informed of a recent domestic altercation between petitioner and Respondent Father, as well as a recent drug screen in which petitioner tested positive for non-prescribed opiates and cocaine. Additionally, according to petitioner, she was charged with possession of a controlled substance on December 22, 2011, and further charged with the following crimes arising from incidents in early January 2012: burglary; petit larceny; transferring stolen property; conspiracy to commit breaking and entering; and, conspiracy to commit transfer of stolen property. The DHHR moved to terminate petitioner's parental rights, and the circuit court held a dispositional hearing on February 10, 2012, during which it terminated petitioner's parental, custodial, and guardianship rights to the children.

On appeal, petitioner alleges that the circuit court erred in denying her an extension to her dispositional improvement period, and that the circuit court erred in not allowing her to relinquish her custodial rights only so that the children could have been placed in a guardianship while her parental rights remained intact. In support of her first assignment of error, petitioner argues that while she did relapse into drug use, she had also secured readmission to the facility where she had previously undergone substance abuse treatment. Petitioner argues that she clearly demonstrated her ability to successfully complete a treatment program, and that she remained drug-free until she reunited with Respondent Father. Petitioner states that she intends to complete this program to reunite with her children, though completion is also a condition of her probation. Given her prior successful completion of this program, petitioner argues that there was no reason not to grant her an extension to the dispositional improvement period to allow her to complete the program again.

In support of her second assignment of error, petitioner argues that the children have been placed with individuals who played a role in raising her. One of the individuals even testified that she intends to allow petitioner to be a part of her life, as well as a part of the children's lives, if she can remain drug free and not cause a disruption to the children's lives. Petitioner further argues that the children recognize her as their mother, and that the familiarity will grow as she remains in the children's lives. Accordingly, petitioner argues that permanency for the children could have been achieved through the establishment of a guardianship where the children were under the exclusive care, custody, and control of their custodians. This would have allowed petitioner to seek restoration of her custodial rights by establishing a substantial change in circumstances, and, according to petitioner, would have been in the children's best interests.

The guardian responds and argues that the circuit court did not err in terminating petitioner's parental rights because petitioner was not entitled to an additional extension of her dispositional improvement period. Citing West Virginia Code § 49-6-12(g), the guardian argues that a parent's improvement period may not be extended beyond three months at the dispositional stage, and that petitioner was therefore not entitled to an additional extension. The guardian additionally cites *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), to argue that this Court has held that a dispositional improvement period is governed by the time limits and eligibility requirements of West Virginia Code § 49-6-12. Further, the guardian argues that petitioner violated the terms of her improvement period by reverting back to drug abuse and criminal endeavors. In short, the guardian argues that petitioner had already exhausted the

allowable time for a dispositional improvement period and failed to successfully complete the terms thereof.

In regard to petitioner's second assignment of error, the guardian argues that while a guardianship would have benefitted petitioner, it neither benefits the children nor serves their interests. The guardian cites to our prior holdings to argue that "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights." Syl. Pt. 1, in part, *In re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). According to the guardian, petitioner had already exhausted all of the statutory time available to achieve reunification, and the children deserve a permanent, stable environment provided by responsible sober caregivers. As such, termination was necessary to achieve this goal, and the circuit court did not err in denying a guardianship for the children.

The DHHR also responds and argues in support of termination below. The DHHR's argument mirrors that of the guardian by stating that the circuit court was not required to exhaust the speculative possibility of petitioner's improvement prior to terminating her parental rights. According to the DHHR, the circuit court was correct in terminating petitioner's parental rights because there was no reasonable likelihood that she could substantially correct the conditions of abuse and neglect in the near future. Citing West Virginia Code §§ 49-6-5(b)(1), (2), and (3), the DHHR argues that this is supported by petitioner's inadequate capacity to solve the problems of abuse and neglect on her own or with help, her continued addiction to drugs, and her failure to comply with services. Further, citing *West Virginia Department of Health and Human Resources ex rel. Mills v. Billy Lee C.*, 199 W.Va. 541, 485 S.E.2d 710 (1997), the DHHR argues that exposing a child to domestic violence can constitute sufficient grounds to terminate parental rights, and that such exposure occurred in this matter. As such, the DHHR argues that the circuit court was correct to terminate petitioner's parental rights, and did not err in declining to establish a guardianship for the children while leaving petitioner's parental rights intact.

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). Upon review of the record, the

Court finds no error in either the circuit court's decision to deny petitioner an additional extension to her dispositional improvement period or in terminating her parental, custodial, and guardianship rights. The record reflects that the circuit court granted petitioner multiple extensions to her improvement periods throughout the proceedings below, and that the statutorily allowed time for petitioner's dispositional improvement period had expired. As noted by the guardian above, West Virginia Code § 49-6-12(g) allows for an extension of only three months to a dispositional improvement period, and the record indicates that petitioner had already been awarded such an extension.

Further, that code section requires the circuit court to find that the parent seeking an extension has "substantially complied with the terms of the improvement period." The record is clear that petitioner failed to comply with the terms of her improvement period, having not only relapsed into drug abuse but having also engaged in criminal activity. The fact that petitioner had once again gained admittance to a substance abuse treatment facility is immaterial. The record clearly shows that per West Virginia statutory law, petitioner was not entitled to an extension of her improvement period. Further, she would not have been entitled to the same if additional time were available due to her non-compliance with the terms of her improvement period. For these reasons, the circuit court did not err in denying petitioner an extension to her dispositional improvement period.

As to petitioner's argument that the circuit court erred in terminating her parental, custodial, and guardianship rights, we find no merit in this assignment of error. Upon a review of the record, the Court finds that establishing a guardianship and leaving petitioner's parental rights intact would have been contrary to the best interests of the children at issue. We have previously held that "[T]he best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). *Napoleon S. v. Walker*, 217 W.Va. 254, 259, 617 S.E.2d 801, 806 (2005). Based upon this holding, it is clear that the circuit court did not err in denying petitioner's request for a guardianship. In its dispositional order, the circuit court noted that it was necessary for the children's welfare to terminate parental rights, and that "it is almost as if there has been no improvement whatsoever during the past twenty[-]three . . . months." The circuit court further found that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in the near future because of her continuing drug abuse.

West Virginia Code §49-6-5(b)(1) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future includes situations in which

"[t]he abusing parent . . . [has] habitually abused or [is] addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person . . . [has] not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning."

The circuit court specifically found that petitioner had “habitually abused and [is] addicted to controlled substances to the extent that [her] proper parenting skills have been impaired.” Further, despite reasonable efforts from the DHHR to achieve reunification, the circuit court found that petitioner “did not respond to such treatment . . . which could have improved [her] capacity for adequate parental functioning.” Based upon the circuit court’s findings in this regard, it was not error to terminate petitioner’s parental rights pursuant to West Virginia Code § 49-6-5(a)(6). Further, we have previously held that

“courts 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). Based upon all of the foregoing, the Court finds that the circuit court committed no error in terminating petitioner’s parental, custodial, and guardianship 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, custodial, and guardianship 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