

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

In Re: B.B. and J.B.

No. 12-0460 (Hampshire County 11-JA-18, 19)

FILED

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

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel, Brian J. Vance on behalf of Petitioner Mother, arises from the order of the Circuit Court of Hampshire County entered on March 15, 2012, wherein Petitioner Mother's parental rights were terminated. The children's guardian ad litem, Joyce E. Stewart, filed a response on behalf of the children 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 supporting the circuit court's termination 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 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.

In December of 2011, DHHR filed the petition in the instant case after Petitioner Mother called Child Protective Services ("CPS") to report that her live-in boyfriend had physically abused her older child, B.B., who was two years old at the time. CPS worker Kimberly Smith and West Virginia State Police Trooper Spence investigated the allegations and found B.B. with bruises on his face and ribs and a cut above his right eye. These injuries were inflicted on December 16, 2011, and December 18, 2011. On December 16, 2011, Petitioner Mother's boyfriend allowed her younger son, J.B., who was eighteen months old at the time, to hit B.B. in the face with a toy. Petitioner Mother expressed to CPS that she felt that her boyfriend was likely guiding J.B.'s hand because she did not believe he would have been able to hit B.B. hard enough to leave bruises. Petitioner Mother did not intervene during this incident. On December 18, 2011, Petitioner Mother reported that her boyfriend saw the two children putting things in their mouths and, after her boyfriend told them to stop twice, she heard him hit B.B. two to three times and then heard B.B. crying "like he was being murdered." Despite hearing all of this, Petitioner Mother did not go check on B.B., and B.B. came out of the room ten to fifteen minutes later with a red mark on one cheek. Petitioner Mother further reported that she "let things go" until later that evening when she and her boyfriend got into a physical altercation where he choked her. Also from this investigation, Trooper Spence found drug paraphernalia in the home, which Petitioner Mother claimed belonged to her boyfriend. Upon drug testing, however, Petitioner Mother tested positive for oxycodone, saboxone, and tetrahydrocannabinol ("THC"). DHHR's petition also discussed that the home was in a deplorable condition; that Petitioner Mother has two older children who are not subject children in this case and live elsewhere; and that in

November of 2011, it was substantiated that Petitioner Mother and her boyfriend had been locking the children in their bedroom.

At the adjudicatory hearing, the circuit court denied Petitioner Mother's motion for an improvement period and found that Petitioner Mother failed to protect her children from her boyfriend's abuse and neglected her children by allowing accessible drug paraphernalia and deplorable conditions in the home. At the dispositional hearing in February of 2012, the circuit court terminated Petitioner Mother's parental rights to her children and denied her motions for an improvement period and post-termination visitation. The circuit court based its decisions on its prior findings at the adjudicatory hearing and also on Petitioner Mother's substance abuse issues, lack of accepting responsibility for her two older children, lack of a stable home, lack of employment, and failure to fully participate in Multi-Disciplinary Team ("MDT") meetings and visitations. Petitioner Mother appeals the circuit court's termination order.

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 abused its discretion and erred in terminating her parental rights to B.B. and J.B. because the circuit court's ruling was unsupported by substantial evidence and was made against the great weight of the evidence. Petitioner Mother argues that in Syllabus Point 3 of *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988), this Court stated that the "termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Petitioner Mother asserts that she did not know of any abuse against her children until the incidents in December of 2011, after which she reported to the police. She further argues that although there were issues with drugs, the most serious issues concerned her boyfriend's abuse.

The guardian ad litem and DHHR assert that Petitioner Mother took no action during either incident in which her boyfriend was physically abusing her children and that termination was properly based on the physical abuse; Petitioner Mother's drug use, which continued

throughout the proceedings; the deplorable conditions of the home; and the failure of Petitioner Mother to appear for visitations and MDT meetings.

The Court finds no error by the circuit court in finding that Petitioner Mother failed to protect her children from her boyfriend and no error in the termination of Petitioner Mother's parental rights. Pursuant to West Virginia Code § 49-6-5(b)(7), a lack of a reasonable likelihood that conditions of abuse or neglect can be substantially corrected exists when "[t]he battered parent's parenting skills have been seriously impaired and said person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan or has not adequately responded to or followed through with the recommended and appropriate treatment plan." A review of the record supports the circuit court's findings concerning Petitioner Mother's drug use, her failure to protect her children, and the deplorable condition of the home.

Petitioner Mother also argues that the circuit court erred in denying her an improvement period, relying on *In re Edward B.*, 210 W.Va. 621, 634, 558 S.E.2d 620, 633 (2001), and *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). Petitioner Mother argues that she sought help for her drug problems; that she contacted the police to report the abuse; and that it is a mockery of the referral system to punish her for calling CPS by terminating her parental rights for failing to protect her children. In response, the guardian ad litem and DHHR contend that the circuit court did not err in denying Petitioner Mother an improvement period because she did not meet her burden to show that she would substantially comply with one. She continued to use drugs throughout the proceedings; continued in her failure to contact or provide financial support to her two older children who do not live with her; and failed to consistently attend visitations and MDT meetings.

The circuit court has the discretion to grant or deny an improvement period under West Virginia Code § 49-6-12 after considering whether the parent has proven that he or she will substantially comply with an improvement period. Moreover, "[i]n a contest involving the custody of an infant 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. 302[, 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). We have also 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). A review of the record supports the circuit court's findings in its termination order. Given the circumstances of this case,

including the children's young ages, we find no error by the circuit court in its termination order, including its denial of an improvement period.

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 parental rights is hereby affirmed.

Affirmed.

ISSUED: September 24, 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