

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

In Re: K.D., A.D., and K.D.

No. 12-0622 (Nicholas County 11-JA-47, 48 & 49)

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel W. Brad Dorsey, arises from the Circuit Court of Nicholas County, wherein her parental rights to the children, K.D.-1¹, A.D., and K.D.-2, were terminated by order entered on April 20, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Cammie L. Chapman, has filed a response on behalf of the children. Petitioner has also filed a reply.

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.

On May 23, 2011, the DHHR filed its initial abuse and neglect petition, in which it alleged that petitioner was living with her three children and a paramour in a camper with no electricity or running water. The petition also alleged that petitioner and her paramour verbally degraded, threatened, and physically assaulted K.D.-1. At the adjudicatory hearing, petitioner stipulated to abuse and neglect due to failure to provide the children with safe and suitable housing. Petitioner was granted a ninety-day post-adjudicatory improvement period. The circuit court later found petitioner to be non-compliant with the terms thereof. At the first dispositional hearing, petitioner was granted a ninety-day extension to her improvement period, but the guardian ad litem later moved to revoke the same for non-compliance. At the second dispositional hearing held on March 8, 2012, the circuit court terminated petitioner's parental rights. On appeal, petitioner alleges four assignments of error, which are addressed in turn below.

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

¹ Because two of the children at issue in this appeal share the same initials, they will be referred to as K.D.-1 and K.D.-2 throughout the memorandum decision.

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). First, petitioner alleges that the circuit court erred in concluding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future and that it was error to terminate her parental rights instead of entering an alternative disposition. According to petitioner, the only conditions of abuse and neglect were the fact her home had no running water or electricity, and she corrected these problems by securing suitable housing. She further argues that the testimony of a DHHR employee established that she substantially complied with the terms of her improvement period.

The DHHR responds in support of the circuit court's termination of petitioner's parental rights and argues that petitioner refused to comply with the terms of her improvement period. The DHHR argues that the circuit court could have terminated petitioner's parental rights for several reasons, including drug abuse, domestic violence, failure to comply with services, and refusal to acknowledge the conditions of abuse and neglect. According to the DHHR, the circuit court's finding that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future was not error because it was supported by petitioner's failures to comply with services. The guardian ad litem also argues in support of the circuit court's termination and states that petitioner was not entitled to reunification simply because she obtained housing with running water and electricity. According to the guardian, petitioner agreed to the terms of the improvement period, yet failed to comply with the same even after being granted a second chance at compliance through an extension to the improvement period.

Upon review of the record, we find no error in either the circuit court's finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future or in its decision to terminate petitioner's parental rights. First, West Virginia Code § 49-6-5(b)(3) states, in pertinent part, that such conditions shall be considered to exist when the parent "[has] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts . . . designed to reduce or prevent the abuse or neglect of the child." In its dispositional order, the circuit court noted that petitioner failed to comply with the terms of her improvement period in the following ways, among others: sporadic cooperation with the DHHR, including participation in services at her own convenience and difficulty in scheduling services; failure to accept responsibility for the situation; lack of insight to properly parent the children; sporadic compliance with drug screens; and, failure to attend scheduled parenting sessions.

Notwithstanding petitioner's argument that she corrected the conditions of abuse and neglect by obtaining housing with running water and electricity, it is clear that the circuit court did not err in finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected due to petitioner's failure to comply with the terms of her improvement period, as supported by testimony from several witnesses. Further, West Virginia Code § 49-6-5(a)(6) directs that once such a finding has been made, and when necessary for the welfare of the child, a circuit court is to terminate the parent's parental rights. The circuit court noted that its decision to terminate petitioner's parental rights was necessary for the children's welfare and, based upon these findings, the Court finds no error in the circuit court's termination of petitioner's parental rights.

Petitioner next alleges that the circuit court erred in considering the fact that she was involved in a prior abuse and neglect proceeding because she successfully completed a pre-adjudicatory improvement period and the earlier case against her was dismissed. She further argues that her prior proceedings involved allegations of violence in the home, which is unrelated to the current matter. The DHHR argues that the circuit court was permitted to consider this information because it was relevant and relevant evidence is admissible. The guardian also argues that the circuit court was within its discretion to take judicial notice of prior court rulings and did not err in considering the petitioner's prior abuse and neglect proceedings. Upon a review of the record, we find no error in the circuit court's findings related to petitioner's involvement in a prior abuse and neglect proceeding as it was clearly relevant evidence under Rule 401 of the West Virginia Rules of Evidence. As such, the evidence was admissible pursuant to Rule 402 of the West Virginia Rules of Evidence.

Petitioner next alleges that the circuit court erred in relying on testimony from certain service providers in finding that she refused to take responsibility for the conditions of abuse and neglect. Petitioner argues this is error because it is undisputed that she sought help and admitted that she could not handle her daughter prior to the petition's filing, and that she further testified that the situation was her fault because she failed to obtain appropriate housing. The DHHR argues that the circuit court did not err in relying on the testimony of DHHR workers, and the guardian argues that these workers were credible because they had the most contact with petitioner and actually witnessed the interactions between her and the children. Because it is supported by the testimony below, the guardian argues that the circuit court's finding is not clearly erroneous.

Upon our review of the record, we find no error in the circuit court's finding that "[s]ervice providers . . . testified that [petitioner] never accepted responsibility" for the abuse and neglect proceedings against her. We have previously held that "[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997). Based upon this holding, we find no error in the circuit court's reliance on the testimony of certain witnesses in finding that petitioner refused to accept responsibility for the abuse and neglect proceedings against her.

Lastly, petitioner alleges that the circuit court erred in denying her attorney's motion to withdraw as counsel because the circuit court did not consider any factors that may have necessitated appointment of new counsel or attempt to ascertain the nature of the conflict between petitioner and her attorney. Petitioner argues that the circuit court abused its discretion by focusing on the additional cost to the State in appointing her new counsel instead of focusing on relevant factors. According to petitioner, there was a complete breakdown in communication with her attorney, as evidenced by the fact that he took no further action in the proceedings during the period in which his motion to withdraw was pending. Petitioner further argues that she had no choice but to continue to be represented by attorney Galford because the circuit court informed her that she would not be appointed a new attorney, especially in light of the fact that her intelligence level prevented her from representing herself and she had insufficient funds to retain private legal representation.

In response, the DHHR argues that this assignment of error is tantamount to an allegation of ineffective assistance of counsel and that such claims are not recognized in the context of abuse and neglect proceedings. Further, the DHHR argues that petitioner approved and participated in counsel's continued representation. The guardian also supports the circuit court's denial of the motion to withdraw and argues that petitioner was appointed a qualified attorney to represent her at all stages of the proceedings as required by West Virginia Code § 49-6-2. Further, the guardian argues that petitioner continued to use her attorney's services after his motion to withdraw was denied. According to the guardian, the disagreements between petitioner and her attorney did not constitute the required good cause for petitioner to reject the representation.

Upon our review, we find no error in the circuit court's denial of the motion to withdraw. West Virginia Code § 49-6-2(a) states, in relevant part, that

[i]n any proceeding under the provisions of this article, [a child's] parents . . . shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed.

Based upon our review of the record, it is clear that petitioner was represented at all stages of the proceedings below by her appointed attorney, Randall Galford. Further, even if the allegations in the motion to withdraw were taken as true, the Court notes that it was petitioner's lack of cooperation that caused the alleged communication issues. In fact, in its order denying the motion, the circuit court admonished petitioner to maintain contact with her attorney and follow his advice. As such, the Court finds that the circuit court did not err in denying counsel's motion to withdraw, as petitioner was afforded the representation that West Virginia Code § 49-6-2 requires.

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: November 19, 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