STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: D.S., C.B., A.B., and E.S.**

No. 12-0672 (Mercer County 11-JA-226, 227, 228 & 229)

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Natalie N. Hager, arises from the Circuit Court of Mercer County, wherein her parental rights to the children, D.S., C.B., A.B., and E.S., were terminated by order entered on May 24, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, John Earl Williams Jr., 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 proceedings below were initiated after E.S. was diagnosed with non-accidental head trauma and it was discovered that the child displayed both new and old injuries to his brain. Prior to the diagnosis, petitioner and respondent K.H. had been the child's only caretakers, though petitioner denied injuring the child and refused to acknowledge that K.H. could have injured him. At disposition, the circuit court found that petitioner failed to identify the perpetrator of the child's injuries and also that either petitioner or K.H. perpetrated a felonious assault on the child. For these reasons, the circuit court terminated petitioner's parental, custodial, and guardianship rights.

On appeal, petitioner argues that the circuit court erred in denying her an improvement period before terminating her parental rights, despite her full compliance with the services provided by the DHHR. Petitioner cites to the testimony of various service providers to support her argument that she was attentive and appropriate with her children, and argues that the providers had no concerns about her parenting. For these reasons, petitioner argues that she established that she would fully participate in a post-adjudicatory improvement period. According to petitioner, she chose not to stipulate to failure to protect the children from K.H. at adjudication because she did not believe he harmed E.S., and the DHHR subsequently punished her for exercising her right to an adjudicatory hearing by opposing her motion for an improvement period.

The DHHR supports the circuit court's termination below, arguing that petitioner was not entitled to an improvement period because they are remedial, and it was impossible to remedy the problem necessitating the petition's filing. Petitioner's only explanation for the injuries was shown to be implausible and contrary to medical evidence, so an improvement period would have been pointless because she refused to either accept responsibility or acknowledge that K.H. could have harmed the child. As such, the DHHR argues that petitioner failed to satisfy the burden of proving she would fully comply with the terms of an improvement period. Lastly, the DHHR argues that this Court has repeatedly refused to return a child to a home without identification of an abuser. The guardian mirrors the DHHR's response, arguing that petitioner's failure to either accept responsibility for E.S.'s injuries or acknowledge that K.H. could have caused them precluded her from being granted an improvement period. The guardian argues that this fact also supports the circuit court's decision to terminate petitioner's parental, custodial, and guardianship rights.

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 our review, the Court finds no error in the termination of petitioner's parental, custodial, and guardianship rights without first granting her a post-adjudicatory improvement period. We have previously held that

> in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

W.Va. Dep't of Health and Human Res. ex rel. Wright v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). Based upon this language, it is clear that the circuit court did not err in denying petitioner an improvement period due to her failure to acknowledge the existence of the problem necessitating the petition's filing. The only explanation for the child's injuries petitioner provided was that E.H.'s then three-year-old sister dropped him, which was contrary to the medical evidence. Despite this fact, petitioner refused to admit that she either perpetrated the

abuse herself or that K.H. could have injured the child. For these reasons, it is clear that the circuit court was correct to deny petitioner an improvement period. Further, the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be corrected in the near future, and that termination was necessary for the welfare of the children. Pursuant to West Virginia Code § 49-6-5(b)(3), termination was appropriate upon these findings because petitioner failed to follow through with the family case plan and other rehabilitative efforts by refusing to remedy the serious physical abuse that took place in the home.

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: October 22, 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