STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

August 29, 2014

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

In Re: J.F.

No. 14-0091 (Jackson County 13-JA-29)

MEMORANDUM DECISION

Petitioner Mother, by counsel Teresa C. Monk, appeals the Circuit Court of Jackson County's November 7, 2013, order terminating her parental rights to J.F. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William P. Jones, filed its response in support of the circuit court's order. The guardian ad litem, Laurence W. Hancock, filed a response on behalf of the child supporting the circuit court's order. On appeal, petitioner alleges that her prior counsel erred in failing to file a motion for an improvement period below and that the circuit court violated her due process rights by denying her notice of the dispositional hearing and allowing her counsel to waive her rights without express permission.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In May of 2013, the DHHR filed an abuse and neglect petition alleging that petitioner could not provide her child with necessary food, clothing, shelter, supervision, medical care, or education because of her drug abuse. Further, the petition alleged that petitioner had recently been charged with child concealment and was arrested for operating a methamphetamine lab, exposing the child to the lab's operation, and transferring and/or receiving stolen property. The circuit court held a preliminary hearing on May 17, 2013, which petitioner did not attend. The circuit court directed that an amended petition be filed to include J.F.'s stepfather as an adult respondent and continued the matter.[1] Ultimately, petitioner waived her right to a preliminary hearing on May 24, 2013, and the circuit court ordered that she submit to drug screens.

In June of 2013, the circuit court held an adjudicatory hearing during which petitioner admitted to having been arrested for manufacturing methamphetamine and that her substance abuse was so severe that it impaired her parenting abilities. Petitioner further admitted that her drug addiction harmed or threatened the child's mental and/or physical health. The circuit court also noted that petitioner failed a drug screen, having tested positive for amphetamines. At the

[1]The amended petition was filed on May 24, 2013. A second amended petition was filed on July 31, 2013, adding J.F.'s biological father as an adult respondent.

conclusion of the adjudicatory hearing, the circuit court set the next hearing for July 29, 2013, though that hearing was later rescheduled for September 9, 2013.

According to the record, petitioner failed to attend the September 9, 2013 hearing. During that hearing, the DHHR submitted its disposition report, which included the fact that petitioner "had no communication with [the DHHR] since July." The report added that the DHHR had no accurate contact information for petitioner and that attempts to contact her through her attorney were unsuccessful. As such, no case plan was ever developed. Petitioner's counsel requested the matter be continued, and the circuit court granted this request. Thereafter, the circuit court held a dispositional hearing on October 28, 2013. Again, petitioner did not attend this hearing. The circuit court proceeded to take testimony from DHHR employees concerning petitioner's lack of participation, which provided the basis for the circuit court's finding that petitioner "abandoned these proceedings." Ultimately, the circuit court terminated petitioner's parental rights. It is from the dispositional order that petitioner now appeals.

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 circuit court terminating petitioner's parental rights to J.F., and we also find no violation of petitioner's due process rights.

On appeal, petitioner alleges error by her prior counsel in the abuse and neglect proceeding for failure to file a motion for an improvement period. However, the Court notes that we have never recognized claims of ineffective assistance of counsel in the context of abuse and neglect proceedings. Though, even if such a claim were recognized, it is clear that petitioner's prior counsel did not err in failing to file a motion for an improvement period because petitioner could not have satisfied the necessary burden of proof. Pursuant to West Virginia Code § 49-6-12, a circuit court may grant a parent an improvement period only after the parent "demonstrates, by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period. . . ." The record shows that petitioner could not satisfy this burden, as she failed to comply with the circuit court's direction prior to the adjudicatory hearing, as evidenced by a failed drug screen, and abandoned the proceedings shortly thereafter.

Further, the Court finds no merit to petitioner's argument regarding her alleged lack of notice for the dispositional hearing. The record is clear that petitioner failed to communicate with her attorney, the DHHR, and otherwise attend hearings and participate in this matter. In support of her argument, petitioner asserts that communication issues were so prevalent below that the circuit court's August 15, 2013, "ORDER RE-SCHEDULING HEARING" contained the additional requirement that the circuit clerk forward copies of that order to the adult respondents individually. However, that order scheduled the next hearing for September 9, 2013, and despite the additional requirement that the order be forwarded to petitioner, she failed to attend the September 9, 2013, hearing. It is therefore disingenuous of petitioner to argue that had she been mailed additional orders rescheduling the dispositional hearing for October of 2013, she would have attended. The record is clear that petitioner was represented by counsel throughout the proceedings below and that counsel received proper notice of all hearings. As such, the Court finds no error in regard to an alleged lack of notice to petitioner in regard to the dispositional hearing.

Finally, the Court finds no error in regard to the circuit court proceeding to disposition absent a properly filed child case plan, especially in light of petitioner's refusal to assist in the formulation of the same. Pursuant to West Virginia Code § 49-6-5(a), "[c]opies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing." While it is true that the DHHR did not send copies of a child case plan to either petitioner or her counsel five days prior to the dispositional hearing, the Court finds that this error was caused, at least in part, by petitioner's own lack of participation in the proceedings below. We have previously held that

> "[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Syl. Pt. 6, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005). Upon our review, the Court finds that the circuit court's failure to require the DHHR to serve a copy of the child's case plan on petitioner and her attorney five days prior to the dispositional hearing does not warrant vacation of the subsequent dispositional order, especially in light of petitioner's actions in this regard.

The circuit court specifically found that petitioner "failed to cooperate in the development of a plan" meant to remedy the conditions of abuse and neglect in the home. This was supported by testimony at the dispositional hearing that no one from the DHHR had contact with petitioner after July of 2013. Further, the DHHR employees who testified specifically stated that petitioner had done nothing to alleviate the conditions of abuse and neglect in the home, including a failure to participate in services of any kind, attend visitation with her son, or undergo rehabilitation for her substance abuse issues.

Testimony from one DHHR employee established that her only contact with petitioner came during an attempt to hold a multi-disciplinary team ("MDT") meeting. According to that testimony, petitioner became angry when she had to wait for the MDT meeting to commence, ultimately leaving prior to the meeting beginning. Petitioner provided her phone number and indicated she would participate by phone, but failed to answer when the DHHR attempted to contact her. This constitutes petitioner's sole attempt to cooperate in the development of a case plan.

Pursuant to West Virginia Code § 49-6-5(b)(2), a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes one in which "[t]he abusing parent . . . [has] willfully refused or [is] presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control." It is clear that the circuit court had ample evidence upon which to find that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect and that termination of her parental rights was necessary for the child's welfare. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon these findings.

For the foregoing reasons, we find no error in the decision of the circuit court and its November 7, 2013, order is hereby affirmed.

Affirmed.

ISSUED: August 29, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II