STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

October 20, 2014

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

In Re: D.M., A.M., & L.C.

No. 14-0461 (Mercer County 11-JA-248, 11-JA-249, & 12-JA-009)

MEMORANDUM DECISION

Petitioner Mother, by counsel Gerald R. Linkous, appeals the order of the Circuit Court of Mercer County, entered on April 16, 2014, terminating her parental rights to D.M., A.M.-1, and L.C.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed its response in support of the circuit court's order. The guardian ad litem ("GAL"), Thomas Lynn Fuda, filed a response on behalf of the children that also supports the circuit court's order. On appeal, petitioner alleges that the circuit court erred in terminating her parental rights because she could have been granted more time for improvement—a less restrictive alternative than termination—and termination was not in the children's best interests.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision that affirms the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

On November 30, 2011, the DHHR filed an abuse and neglect petition against petitioner and A.M.-2, the biological father of D.M. and A.M.-1. The petition alleged, inter alia, domestic violence between the parents. The DHHR amended the petition on January 27, 2012.[2] At the March 5, 2012, adjudicatory hearing, petitioner stipulated to the neglect of her children by "exposing [her] children to recurring domestic violence." The circuit court granted petitioner a post-adjudicatory improvement period. The record reflects that from March of 2012 until approximately December of 2013, the circuit court granted petitioner three separate improvement periods and three extensions of those improvement periods.

On approximately January 8, 2014, the DHHR filed another amended petition, which alleged, inter alia, that on January 2, 2014, petitioner filed a domestic violence petition ("DVP")

[1]Because one of the children and her biological father have the same initials, we have distinguished them as numbers 1 and 2. We refer to the child as A.M.-1 and her biological father as A.M.-2.

[2]The appendix does not include this amended petition. However, it appears that the amended petition included L.C. in these proceedings.

against C.B., her then-husband and the children's stepfather. As alleged in the petition, petitioner stated in the DVP that C.B. attempted to stab petitioner in the face and prevented she and the children from leaving their residence. C.B. denied the accusations in the DVP and maintained that, to the contrary, petitioner had harmed him in the incident. C.B. also claimed that in late December of 2013 petitioner showed the children ten Lortab pills and stated, "this is what your daddy [C.B.] wants." The amended petition further alleged that the children had been truant from school.

At a hearing on the amended petition held on February 3, 2014, the circuit court heard from several witnesses. The Child Protective Services ("CPS") worker testified that petitioner had been involved in three domestic violence incidents during the pendency of these proceedings. The attendance director for Mercer County schools testified that A.M.-1 had twenty-four unexcused absences and L.C. had sixteen unexcused absences for the 2013-2014 school year, while under petitioner's care. Petitioner did not deny many of the allegations. She admitted that she had attempted suicide in front of the children and that the children had been truant, although she contested the number of total number of truant days. Importantly, petitioner admitted that she had been involved in the recent domestic violence incident alleged in the January 8 amended petition. Further, she did not deny that in the incident her then-husband C.B. had "smeared feces all through the house." The circuit court again adjudicated the children as neglected and set the matter for disposition. The circuit court noted that "the kids are the ones that are in the middle of it. They've seen their mother try to kill herself. They've seen domestic violence. This [case] has dragged on for two years, plus."

On April 7, 2014, the circuit court held a dispositional hearing. Phyllis Hasty, a child counselor, testified that A.M.-1 revealed to her that petitioner "took a bunch of pills and told all the girls [the children] goodbye that I'm going to die. . . . recently, she's mentioned it again to me that . . . she's worried her mom will hurt herself." Given petitioner's continued domestic violence issues, Ms. Hasty recommended that petitioner should not have unsupervised visitation with her children. Dr. David Clayman, licensed psychologist, testified that petitioner could potentially overcome her parenting problems if granted more time. However, Dr. Clayman admitted that he only assessed the parents' fitness to parent, not the children or their interests, and that he did not know upon what grounds the DHHR moved for termination or the statutory timeframes for abuse and neglect proceedings. Dr. Clayman testified that "there's no way in the world right now that I can say that [petitioner] would be safely and effectively be [sic] able to parent her children full-time even though she was previously." The circuit court terminated petitioner's parental rights to all three children, but allowed post-termination visitation supervised by the DHHR. The circuit court entered an order to this effect on April 16, 2014. This appeal followed.

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 first claims the circuit court incorrectly based its termination on the conclusion that petitioner was "out of time" for parental improvement. West Virginia Code §§ 49-6-12 and 49-6-5(c) provide circuit courts discretion in granting a parent an improvement period upon the parent's demonstration by clear and convincing evidence that he or she is likely to fully participate in the same. Under West Virginia Code § 49-6-12(c)(4), if the parent demonstrates that he or she has experienced a substantial change in circumstances since the initial improvement period, circuit courts have the discretion to grant an additional improvement period as a disposition not to exceed six months. Our review of the record shows that petitioner did not meet her burden of proof to warrant additional time for parental improvement. The record reflects that the circuit court granted petitioner three improvement periods and three extensions thereof from March of 2012 to approximately December of 2013. However, she continued to entangle her children in situations of domestic violence, which culminated in the circuit court removing the children because of the domestic incident in approximately December of 2013. Moreover, petitioner threatened to commit suicide in front of the children, and the children were truant while under her care. Even Dr. Clayman, upon whose testimony petitioner now relies, testified that petitioner could not safely parent at that time. Further, while petitioner maintains that the circuit court should have granted her additional time for parental improvement, we have previously held that "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . ." Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011) (quoting Syl. Pt. 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E. 114 (1980)). The circuit court did not err in denying petitioner more time for improvement prior to termination.

Petitioner also asserts that termination of her parental rights was not the least restrictive alternative under West Virginia Code § 49-6-5, and termination was not in the children's best interests. "Termination . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood . . . that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 7, in part, *In re Katie S.*, 198 W.Va. 79, 82, 479 S.E.2d 589, 592 (1996); *see also* West Virginia Code §§ 49-6-5(a)(6) (circuit courts shall terminate the parental, custodial, and guardianship rights and responsibilities of the abusing parent upon a finding that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future and when necessary for the welfare of the child) and 49-6-5(b)(3) (a situation in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future includes one in which "[t]he abusing parent . . . [has] not responded to or followed through with a reasonable

family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child. . . .”). It is clear that the circuit court did not err in terminating petitioner’s parental rights as the evidence here constitutes a circumstance in which there is no reasonable likelihood that petitioner could have substantially corrected the conditions of abuse or neglect in the near future. The record before this Court clearly demonstrates that petitioner continually inflicted emotional harm on these children and placed them in potentially physically dangerous situations. In addition to Dr. Clayman’s concerns cited above, the child psychologist testified that petitioner should not be provided unsupervised visitation. Due to these concerns, the circuit court concluded that the children’s welfare and need for permanency necessitated termination of petitioner’s parental rights. The Court finds that the circuit court did not abuse its discretion or otherwise err in its decision that termination was in the best interests of the children.

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

Affirmed.

ISSUED: October 20, 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