STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: L.G.

No. 14-0462 (Jackson County 13-JA-50)

FILED
October 20, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Jenny Evans, appeals the May 30, 2014, order of the Circuit Court of Jackson County that terminated her custodial rights to L.G. L.G.'s guardian ad litem, Erica Brannon Gunn, filed a response in support of the circuit court's order.[1] The Department of Health and Human Resources ("DHHR"), by its counsel S.L. Evans, also filed a response in support of the circuit court's order. Petitioner thereafter filed a reply. On appeal, petitioner argues that (1) the circuit court erroneously considered evidence that was not presented in the case; (2) the circuit court's findings of abuse and neglect were not supported by clear and convincing evidence; (3) the circuit court improperly removed L.G. and L.G.'s daughter, S.G., from petitioner's care without finding that there was imminent danger to them, pursuant to West Virginia Code § 49-6-3; (4) the circuit court erred by not requiring the DHHR to prepare a family case plan five days prior to the dispositional hearing, pursuant to West Virginia Code § 49-6-5(a); (5) the guardian ad litem did not fulfill her statutory duties and violated her ethical duties by representing all of the infant children involved in the case below; (6) petitioner's first attorney provided ineffective assistance of counsel; (7) the circuit court failed to consider testimony that petitioner should have had custody over L.G.; and (8) the circuit court's findings infringed upon petitioner's constitutional rights of association.

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 October of 2013, petitioner's sixteen-year-old biological daughter, L.G., and L.G.'s daughter, S.G., were living with petitioner and petitioner's boyfriend, T.C., when the DHHR filed an abuse and neglect petition against petitioner and T.C. The petition alleged that T.C. had sexually abused his daughter, seven-year-old M.C., on at least two occasions, while M.C. and T.C.'s other daughter, K.S., had visitation with him at home. When M.C. reported this abuse to petitioner, petitioner subsequently instructed M.C. and K.S. to confront T.C. about these allegations. The petition alleged that petitioner inflicted emotional injury on M.C. and K.S. by telling M.C. that she "must tell the truth and that [T.C.] could go to jail if [M.C.] told of her allegations." The petition also alleged that petitioner questioned both girls in T.C.'s presence

[1] There were other children involved in the proceedings below, but L.G. was the only biological child of petitioner and is the only one subject to petitioner's appeal.

about these allegations that same day which caused the children to become upset and cry. The petition also alleged that T.C. sexually abused another girl, eleven-year-old A.O., who was a neighbor.

In November of 2013, M.C. and A.O. testified in an in-camera hearing. M.C. testified that T.C. put his penis in her mouth while she was in petitioner's bedroom. A.O. testified of an incident in which T.C. touched her inappropriately at A.O.'s grandmother's home. Thereafter, the circuit court found that T.C. had a lustful disposition towards children. T.C. chose not to testify at his adjudicatory hearing. The circuit court subsequently found that T.C. abused and neglected M.C., K.S., L.G., and S.G. through his sexual abuse of M.C. At petitioner's adjudicatory hearing in December of 2013, petitioner testified that she did not believe M.C.'s allegations against T.C.; she also testified that although she did make M.C. and K.S. confront T.C. with these allegations, she regrets that she "probably did pressure" M.C. in doing so. M.C.'s mother testified that when petitioner and M.C. later told her about the abuse, she called the police, and shortly after the incident, M.C. began acting out and had to begin counseling.

Following these hearings, the circuit court adjudicated petitioner as an abusing parent due to her knowing infliction of substantial emotional abuse, which threatened to harm the health and welfare of M.C. and K.S., when she forced them to confront T.C. with M.C.'s allegations of sexual abuse. In its January of 2014 order, the circuit court found that petitioner had a clear custodial relationship with the children given T.C.'s visitation with M.C. and K.S. in T.C. and petitioner's home. Among other findings, the circuit court found that petitioner testified that she was aware of previous sexual offense charges against T.C., that she maintained he was innocent of the instant allegations, and that she intended for him to return home once he was released from incarceration. In February of 2014, the circuit court changed the placement of L.G. and S.G. from petitioner's home to L.G.'s biological father's home, at L.G.'s request. L.G. was sixteen years old at the time. The circuit court also granted petitioner's motion for reconsideration of her adjudicatory hearing and allowed petitioner to present additional evidence.

The circuit court terminated T.C.'s parental rights to M.C. and K.S. in March of 2014. Within this order, the circuit court also made a finding that petitioner continued to deny that there was a problem in the home and to assert that the sexual abuse allegations against T.C. were untrue. The day after this order was entered, petitioner submitted an affidavit stating that she would no longer allow T.C. to her home and would no longer allow children to be left with him unsupervised.

By a dispositional order entered in April of 2014, the circuit court terminated petitioner's custodial rights to L.G. and any custodial rights she may have had to S.G. L.G., who was at least sixteen years old during the course of these proceedings, had previously expressed that she did not want petitioner's parental rights to be terminated, but that she would like to live with her daughter, S.G., at her biological father's home. The circuit court based termination of petitioner's custodial rights on her ongoing relationship with T.C. and on her failure to recognize the harm she inflicted on M.C. and K.S., the danger that T.C. posed to children, and the seriousness of petitioner's actions that led to the abuse and neglect petition. Petitioner now appeals.

This 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 of the record, we find no error by the circuit court. First, with regard to petitioner's arguments concerning the circuit court's findings, we find that the circuit court properly based its findings on clear and convincing evidence found in the record. We have held that "in the context of abuse and neglect proceedings, the circuit court is the entity charged with weighing the credibility of witnesses and rendering findings of fact." *In re Emily*, 208 W.Va. 325, 339, 540 S.E.2d 542, 556 (2000) (citing Syl. Pt. 1, in part, *In re Travis W.*, 206 W.Va. 478, 525 S.E.2d 669 (1999)). Under West Virginia Code § 49-1-3(1)(A), an "abused child" is one "whose health or welfare is harmed or threatened by [] [a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home." We also bear in mind the following:

> The term "knowingly" as used in West Virginia Code § 49–1–3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred.

Syl. Pt. 7, *W.Va. Dept. of Health and Human Res. v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). Our review of the record reveals that petitioner had knowledge of previous sexual offense allegations against T.C. The record also shows that, instead of initially speaking to M.C.'s mother, the police, or Child Protective Services ("CPS") about M.C.'s allegations, petitioner forced M.C. and her sister to confront T.C. about these allegations at home and during a thirty-minute car ride together with T.C. Further, it was not until the last month of the case that petitioner stated, through an affidavit, that she would no longer allow the children to be left with T.C. unsupervised or allow T.C. in the home. Even at that point, however, petitioner failed to recognize the circuit court's adjudication of T.C. as an abusing parent based on T.C.'s sexual abuse. This evidence supported the circuit court's findings of abuse, as provided by West Virginia Code § 49-1-3 and Syllabus Point Seven of *Doris S.*

Our review of the record also indicates no error by the circuit court in removing L.G. and S.G. from petitioner's custody. Pursuant to Rule 16(c) of the Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court may place a child into the custody of the DHHR or another responsible person, in accordance with the provisions of West Virginia Code § 49-6-3(b), at any time during the pendency of the child abuse and/or neglect proceedings if the circuit court determines that the child is in imminent danger, as defined by West Virginia Code § 49-1-3(8). West Virginia Code § 49-1-3(8) directs that imminent danger exists when "there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited." West Virginia Code § 49-1-3(8)(F) further directs that imminent danger exists when there is reasonable cause to believe the health or life of any child in the home is threatened by substantial emotional injury inflicted by a parent, guardian or custodian. Here, the record shows that at the February 25, 2014, hearing on this matter, the circuit court referenced its prior orders that adjudicated petitioner and T.C. as abusing parents to the children. With regard to petitioner, the circuit court found that she was an abusing parent through her failure to protect the children and because she knowingly inflicted substantial emotional abuse to the children. Pursuant to the relevant court rules and statutes, these findings supported the circuit court's removal of L.G. and S.G. from petitioner's home and into the home of L.G.'s non-offending, biological father who was available and willing to take custody of them.

We also find no merit with petitioner's arguments that the circuit court's decision should be reversed based on the lack of a family case plan filed five days prior to the dispositional hearing. This Court has held as follows:

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings . . . 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. 6, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005) (internal citation omitted). Although we find that the DHHR did not timely file a family case plan prior to the dispositional hearing, this inaction did not substantially frustrate the purpose of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 2 of those rules provides that "[t]hese rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants. These rules are not to be applied or enforced in any manner which will endanger or harm a child[.]" The record is clear that prior to petitioner's dispositional hearing, L.G. and S.G. were placed with L.G.'s biological father, the family had a Child Protective Services ("CPS") worker working with them during the case, and the reasons upon which the DHHR sought termination of petitioner's parental rights were clear in its motion for the same.

Nor does the record indicate any error with the guardian ad litem's representation of all the children in this matter. "In a proceeding to terminate parental rights pursuant to *W.Va.Code,* 49–6–1 to 49–6–10, as amended, a guardian *ad litem,* appointed pursuant to *W.Va.Code,* 49–6–2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children." Syl. Pt. 3, in part, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991). The record shows that no motions were made for a separate guardian ad litem

to be appointed for each child and that the appointed guardian ad litem was adequately involved with each child as she worked toward each child's best interests. The fact that the guardian represented all children does not, in and of itself, present a conflict of interest.

We also find no reversible error from the record with regard to petitioner's first attorney's representation. Petitioner argues that she received ineffective assistance of counsel because her first attorney met with her for only a few minutes before each hearing, denying her a meaningful opportunity to be heard. We have not recognized a claim of ineffective assistance of counsel in the context of abuse and neglect proceedings and decline to do so in the instant matter. Pursuant to West Virginia Code § 49-6-2(c), "[i]n any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." In this case, there is no evidence in the record that petitioner was deprived of her rights under West Virginia Code § 49-6-2(c) or that petitioner complained of such during the proceedings below. Even if there was a deficiency, it was cured by the circuit court when it granted petitioner's motion to reconsider the adjudicatory hearing. Upon granting this motion, the circuit court gave petitioner an opportunity to present additional evidence for the circuit court's consideration.

Lastly, we find no error by the circuit court in terminating petitioner's parental rights. "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syl. Pt. 2, *In re Timber M.*, 231 W.Va. 44, 743 S.E.2d 352 (2013). Petitioner argues that the circuit court did not consider testimony by her witnesses in support of her ability to adequately care for the children and that the circuit court's findings infringed upon her constitutional rights of associating with T.C. However, the record shows that the circuit court did consider petitioner's witnesses' testimony, including testimony from L.G.'s biological father, when it found in its dispositional order that, with regard to returning custody of L.G. and S.G. to petitioner, these "witnesses miss[ed] the point, and clearly [did] not understand the seriousness of her actions that led to the filing of the abuse and neglect petition and to her subsequent adjudication." As for petitioner's continued association with T.C., the DHHR and the guardian ad litem assert that petitioner was free to associate with T.C., but in doing so, she placed L.G. and S.G. at risk. We agree and we recognize the following:

> W.Va.Code, 49–1–3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, 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.

Syl. Pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is

> not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49–1–3(a) (1994).

Syl. Pt. 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). The record shows that the circuit court found that petitioner was a custodian of M.C. and K.S., that she maintained contact with T.C. during the case, and that she was not clear as to whether she would maintain distance from him upon his release from incarceration or that she recognized the seriousness of the circumstances that gave rise to the abuse and neglect petition.

Our review of the evidence supports the circuit court's findings of fact and conclusions of law that petitioner inflicted substantial emotional injury on M.C. and K.S. by forcing them to confront the perpetrator with his sexual abuse, "no doubt for the purpose of having the children recant allegations of sexual assault"; that she continued to engage in a relationship with T.C.; and that, accordingly, there was no reasonable likelihood that the conditions of abuse and/or neglect could be substantially corrected in the near future and termination of petitioner's custodial rights was in L.G.'s best interests. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental, custodial, and guardianship rights upon such findings. If the subject child is at least fourteen years old, however, the circuit court shall give consideration to the child's wishes, with regard to permanent termination of parental rights, pursuant to West Virginia Code 49-6-5(a)(6)(C). Accordingly, the circuit court properly considered L.G.'s request for the circuit court to not terminate petitioner's parental rights to her.

For the foregoing reasons, we affirm.

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