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: A.B. Jr., D.B., & B.B.

No. 14-0576 (Cabell County 12-JA-158 through 12-JA-160)

MEMORANDUM DECISION

Petitioner Father, by counsel Randall D. Wall, and Petitioner Mother, by counsel Jacquelyn S. Biddle, appeal the May 12, 2014, order of the Circuit Court of Cabell County that terminated their parental rights to five-year-old A.B. Jr., four-year-old D.B., and two-year-old B.B. The children's guardian ad litem, Robert E. Wilkinson, filed a response that supported the circuit court's order terminating petitioners' parental rights. The Department of Health and Human Resources ("DHHR"), by counsel William P. Jones, also filed a response in support of the circuit court's order. On appeal, petitioners argue that the circuit court erred in finding that there was clear and convincing evidence that they abused B.B., in denying their improvement period, in terminating their parental rights, and in placing the children in foster care instead of with a relative.

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.

On November 9, 2012, the DHHR filed an abuse and neglect petition against petitioners. The petition alleged that, in October of 2012, Child Protective Services ("CPS") received a referral that B.B. had been brought to the hospital by Petitioner Mother, who claimed that he was constipated and was having difficulty breathing. When asked if B.B. had been injured, Petitioner Mother stated that she was unsure, but then provided different scenarios to explain B.B.'s condition. For instance, Petitioner Mother mentioned that one of the older children or the family's pet might have injured B.B. B.B.'s treating physicians found that B.B. had a bulging and firm fontanel; suffered from seizures, hematomas, and hemorrhages; and had other symptoms consistent with shaken baby syndrome. B.B.'s condition required surgery and he was admitted to the hospital.

At an adjudicatory hearing in April of 2013, B.B.'s treating physicians testified about their treatment of B.B., as contained in the DHHR's abuse and neglect petition. The police officer who investigated B.B.'s injuries testified that neither parent could explain the cause of his injuries and that both refused to take a lie detector test. The circuit court found that, based on the physicians' medical evidence and petitioners' lack of rebuttal to this evidence, the DHHR had proved by clear and convincing evidence that petitioners were abusing parents. In June of 2013, Petitioner Father testified, as did the children's grandmothers and aunts. The children's paternal

grandmother testified that she did not complete a home study with the DHHR because of her health issues. Petitioner Father and his sister both testified that they suspected that Petitioner Father's stepbrother from Florida had shaken B.B. and caused B.B.'s injuries. Petitioners both moved for an improvement period. The circuit court found Petitioner Father's new explanation on B.B.'s cause of injuries incredible and reiterated that both parents had failed to protect their children. Accordingly, the circuit court denied the parents' motion for an improvement period and set the case for a dispositional hearing.

No new evidence was presented at the dispositional hearing held in July of 2013. The circuit court found that neither parent had acknowledged B.B.'s abuse even though he was seriously injured while in their care. The circuit court further found that the conditions that led to the filing of the abuse and neglect petition could not be corrected because the parents failed to acknowledge these issues. Based on these findings, the circuit court found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected and that termination was in the children's best interests. The circuit court entered its order terminating both parents' parental rights in May of 2014, from which petitioners now bring this appeal.

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 at adjudication. We have held that "in the context of abuse and neglect proceedings, the circuit court is the entity charged with weighting the credibility of witnesses and rendering findings of fact." *In re Emily*, 208 W.Va. 325, 329, 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)). "Implicit in the definition of an abused child under *West Virginia Code* § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." Syl. Pt. 1, *W.Va. Dept. of Health and Human Res v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). We also bear in mind the following:

> Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

Syl. Pt. 2, *W.Va. Dept. of Health and Human Res v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). Three of B.B.'s treating physicians testified that B.B.'s symptoms were consistent with non-accidental shaken baby syndrome and that when Petitioner Mother brought B.B. to the hospital, her statement regarding the cause of B.B.'s condition was inconsistent with B.B.'s injuries. In addition, neither parent testified or offered any evidence regarding the cause of the injuries at the adjudicatory hearing. The record supports the circuit court's findings that the DHHR proved B.B.'s abuse by his parents through clear and convincing evidence. Accordingly, we find no error in this regard.

With regard to petitioners' motion for an improvement period, pursuant to West Virginia Code § 49-6-12(a), a circuit court may grant respondent parents an improvement period if they demonstrate by clear and convincing evidence that they will fully participate in the improvement period. However, we have also previously directed that

> [f]ailure 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. Dept. of Health and Human Res. v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). We also bear in mind the following:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In Re: R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.* The record shows that neither parent accepted responsibility for two-year-old B.B.'s injuries and, thereby, failed to demonstrate that they would fully participate in improvement period services to improve the conditions of abuse and neglect alleged in the petition. Accordingly, we do not find that the circuit court's denial of an improvement period was in error.

Lastly, our review of the record reveals no error by the circuit court in terminating petitioners' parental rights and in placing the children in foster care rather than a relative placement. The record does not indicate that any relative placements were available for the children. Additionally, respondents provide that all three children have been together in the same

foster home for over a year now where adoption is anticipated. We find no error with the children's placement. With regard to termination, we consider the following:

> Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49–6–1 to 49–6–10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49–6–1 to 49–6–10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991). As discussed, B.B.'s treating physicians testified that B.B. was the victim of shaken baby syndrome. The officer who investigated the matter testified that neither parent provided an explanation to him about B.B.'s injuries, nor did the parents initially suggest that Petitioner Father's stepbrother could have caused B.B.'s injuries. This evidence supports the circuit court's findings of fact and conclusions of law that there was no reasonable likelihood that the conditions of abuse and/or neglect could be substantially corrected and that termination was in the children's best interests. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon such findings.

For the foregoing reasons, we affirm the circuit court's May 12, 2014, order terminating petitioners' parental rights.

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