STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **F.J.**

FILED
November 4, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 20-0249 (Harrison County 19-JA-3)

MEMORANDUM DECISION

Petitioner Mother J.J., by counsel Allison S. McClure, appeals the Circuit Court of Harrison County's February 20, 2020, order terminating her parental, custodial, and guardianship rights to F.J.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Brandolyn N. Felton-Ernest, filed a response in support of the circuit court's order. The guardian ad litem ("guardian"), Jonathan Fittro, filed a response on behalf of the child in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying her motion for a post-dispositional improvement period, in terminating her parental, custodial, and guardianship rights rather than imposing a less-restrictive dispositional alternative, and in denying her motion for post-termination visitation.

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.

Following the filing of a child abuse and neglect petition in January of 2019, petitioner stipulated to allegations that she had a history of substance abuse and had abused methamphetamine and marijuana while pregnant with F.J. The circuit court accepted petitioner's stipulation and adjudicated her as an abusing parent. Petitioner moved for a post-adjudicatory improvement period and agreed to participate in a psychological evaluation, a drug and alcohol evaluation, random drug screening, parenting and adult life skills classes, and supervised

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

visitation. Petitioner also agreed to follow through with any recommendations made by therapists, service providers, or the DHHR. The circuit court granted petitioner's motion in April of 2019.

In October of 2019, petitioner's post-adjudicatory improvement period was extended for three months. However, the circuit court noted that petitioner had missed more than twenty random drug screenings since she was granted a post-adjudicatory improvement and cautioned her that the DHHR would file a motion to revoke her improvement period if she missed any additional drug screens. Petitioner failed to appear for a random drug screen in November of 2019, and the DHHR filed a motion to revoke her improvement period. In December of 2019, petitioner admitted that she failed to fully comply with the terms of her improvement period and consented to its revocation. Thereafter, petitioner filed a motion for a post-dispositional improvement period and stated that she had experienced a substantial change in circumstances since her post-adjudicatory improvement period.

In January of 2020, the circuit court held a dispositional hearing. The DHHR presented petitioner's drug screening results, which showed that she tested positive for methamphetamine and amphetamine twice since her improvement period was revoked and again on the day of the dispositional hearing. Additionally, petitioner tested positive for marijuana once and 7-aminclonzaepam on another occasion. The circuit court found that petitioner only submitted to twenty-five of the sixty required drug screens during the proceedings. Despite her positive drug screens, petitioner denied that she had a substance abuse problem and believed that she was able to stop using controlled substances on her own. Petitioner admitted that she had been using controlled substances—ranging from heroin, cocaine, and methamphetamine—for the last fourteen years. Petitioner testified that she last used methamphetamine on January 11, 2020. The circuit court found this testimony was not credible considering petitioner tested negative once since January 11, 2020, but was again positive for controlled substances on the day of the dispositional hearing. Petitioner also testified that the DHHR offered her assistance in acquiring substance abuse treatment, but that she declined treatment. The DHHR presented evidence that petitioner consistently visited with her child in October and November of 2019 but was often late to visits. However, in December of 2019, petitioner advised her service provider that she "needed to take a week off of everything" and skipped a visit with the child. Petitioner missed four other visits in December of 2019. In January of 2020, petitioner resumed regular visitation, but continued to be late to visits.

Following the presentation of evidence, the circuit court found that petitioner failed to demonstrate that she would fully participate in a post-dispositional improvement period due to her prior failure to comply with the terms and conditions of her post-adjudicatory improvement period. Additionally, the circuit court found that petitioner failed to demonstrate a substantial change in circumstances and noted that "she started using [m]ethampetamine but denied any substance abuse problem." Finally, the circuit court found that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect or abuse in the near future due to her failure to follow through with a reasonable family case plan and her failure to remedy her substance abuse on her own or with help. Accordingly, the circuit court concluded that termination of petitioner's

parental, custodial, and guardianship rights was in the child's best interests. The circuit court memorialized its decision by its February 20, 2020, order. Petitioner now appeals that order.[2]

The Court has previously held:

> "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 review, this Court finds no error in the proceedings below.

On appeal, petitioner argues that the circuit court erred in denying her motion for a post-dispositional improvement period. She avers that she proved by clear and convince evidence that she was likely to fully participate in a post-dispositional improvement period because she showed a change in circumstances since her post-adjudicatory improvement period. Specifically, petitioner asserts that she participated more regularly in random drug screening and completed her individualized parenting classes. Upon our review, we find petitioner is entitled to no relief.

In her argument on appeal, petitioner conflates her two distinct burdens. West Virginia Code § 49-4-610(3)(B) requires that petitioner "demonstrate[], by clear and convincing evidence, that [she was] likely to fully participate in the improvement period." Because petitioner was previously granted an improvement period, she was also required to "demonstrate[] that since the initial improvement period, [she] has experienced a substantial change in circumstances [and] . . . due to that change in circumstances, [she] is likely to fully participate in the improvement period." W. Va. Code § 49-4-610(3)(D). Further, "West Virginia law allows the circuit court discretion in deciding whether to grant a parent an improvement period." *In re M.M.*, 236 W. Va. 108, 115, 778 S.E.2d 338, 345 (2015). Here, petitioner failed to demonstrate that she was likely to fully participate in an improvement period. Following the revocation of her improvement period, petitioner continued to abuse controlled substances and, more concerning, denied that she had a substance abuse problem. This Court has consistently held that

[2]The father's parental, custodial, and guardianship rights were terminated below. According to the parties, the permanency plan for the child is adoption in her current foster placement.

> [i]n 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.

In re Timber M., 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted). Petitioner admitted that she had abused controlled substances for fourteen years. Yet, when offered help, she insisted that she did not have a substance abuse problem and refused treatment. Moreover, petitioner failed to demonstrate that she experienced a substantial change in circumstances. Simply participating in required services does not exhibit a change in circumstances, as petitioner purports. She also fails to identify any change in her behavior, other than participating in what she had agreed to do as part of her family case plan. Accordingly, we find no error in the circuit court's denial of petitioner's motion for a post-dispositional improvement period.

Petitioner also argues that the circuit court erred in terminating her parental rights rather than imposing a less-restrictive dispositional alternative, such as terminating her custodial rights only. She argues that the circuit court's finding that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected was in error because she improved her parenting skills and participated in services. Petitioner also argues that the circuit court erred in finding that termination of her parental rights was necessary for the welfare of the child. We disagree.

Petitioner's failure to complete the terms of her improvement period supports the circuit court's termination of her parental, custodial, and guardianship rights. Pursuant to West Virginia Code § 49-4-604(c)(6), a circuit court may terminate an abusing parent's parental, custodial, and guardianship rights upon finding that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that termination is necessary for the child's welfare. The circuit court may find that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" when

> [t]he abusing parent or parents have 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, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare, or life of the child.

W. Va. Code § 49-4-604(d)(3). In this case, petitioner failed to fully participate in the terms of her post-adjudicatory improvement period. Critically, petitioner's failure to acknowledge her substance abuse problem and her refusal to accept treatment for the same barred her potential to correct the conditions of neglect and abuse. Further, we note that F.J. was a newborn when this case began. We have previously held that

> "[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).

Cecil T., 228 W. Va. at 91, 717 S.E.2d at 875, syl. pt. 4. Based on petitioner's noncompliance with her post-adjudicatory improvement period, her continued substance abuse, and the tender age of F.J., we find no error in the circuit court's finding that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future. Additionally, it was necessary for the child's welfare to terminate petitioner's parental rights to protect the child from petitioner's continued substance abuse and provide the child with permanency.

Regarding petitioner's argument that the circuit court should have imposed a less-restrictive dispositional alternative, such as termination of her custodial rights only, we have held that

> "[t]ermination of parental[, custodial, and guardianship] rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] . . . that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). Because the circuit court's finding that there was no reasonable likelihood that the conditions of neglect and abuse could be corrected in the near future is fully supported by the record, a less-restrictive dispositional alternative was not warranted in this case. Therefore, we find no error in the circuit court's order terminating petitioner's parental, custodial, and guardianship rights.

Finally, petitioner argues that the circuit court erred in denying her motion for post-termination visitation with the child. She asserts that she shares a bond with F.J., which was confirmed by a service provider's testimony. According to petitioner, this Court should reverse the circuit court's order based on this evidence. We disagree.

Regarding post-termination visitation, we have held that

> "[w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 11, *In re Daniel D*., 211 W. Va. 79, 562 S.E.2d 147 (2002). Here, the evidence regarding the bond between petitioner and the child was not compelling. When petitioner's service provider was asked if petitioner and the child shared a bond, she simply responded, "yes, ma'am." Petitioner herself provided no details regarding a bond and, instead, testified that she could "just feel" the bond. Realistically, "a close emotional bond generally takes several years to develop." *In re Alyssa W*., 217 W. Va. 707, 711, 619 S.E.2d 220, 224 (2005). As the circuit court considered, F.J. was removed from petitioner's care five days after her birth and was one year old at the time petitioner's parental rights were terminated. Further, the circuit court heard evidence that petitioner continued to abuse controlled substances and denied that abuse. Accordingly, the circuit court did not err in denying petitioner's motion for post-termination visitation as such visitation was not in the child's best interest.

For the foregoing reasons, we find no error in the decision of the circuit court, and its February 20, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison