STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* E.M. and A.M.-1**

No. 20-0373 (Summers County 19-JA-5 and 19-JA-6)

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

MEMORANDUM DECISION

Petitioner Mother A.M.-2, by counsel Adam D. Taylor, appeals the Circuit Court of Summers County's March 17, 2020, order terminating her parental and custodial rights to E.M. and A.M.-1.[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"), Leigh M. Boggs Lefler, filed a response on behalf of the children in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in terminating her parental and custodial rights because she successfully completed the requirements of her case plan and was fit to regain custody of the children.

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 2019, the DHHR filed an abuse and neglect petition based on petitioner's refusal to care for her children E.M., then age nine, and A.M.-1, then age one. According to the DHHR, in February of 2018 petitioner left the children in the care of their maternal grandmother, who suffered from alcohol use disorder and did not properly care for the children. Over the next year, the children moved from home to home, ending up in the care of K.R. in September of 2018, at which point petitioner and the children's father told K.R. they would pay her to care for the

[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). Additionally, because one child and petitioner share the same initials, we will refer to them as A.M.-1 and A.M.-2, respectively, throughout this memorandum decision.

children. Around that time, the mother and father (collectively referred to as "the parents") also removed E.M. from school and expressed an intention to homeschool him. However, the DHHR alleged that the child's education became K.R.'s responsibility. After K.R. expressed an inability to maintain E.M.'s focus on his education and recommended re-enrolling the child in school, the parents refused. After having custody of the children for approximately four months, K.R. filed a petition for guardianship of them in January of 2019. At that point, the children's father took the children away from K.R. and moved them into the room he stayed in at a friend's home. Ultimately, the DHHR received a referral in April of 2019 asserting that the father and the children lacked stable housing as they moved frequently. Further, the father provided the children with no supervision, leaving them alone at night when he worked and sleeping during the day to the point that "the children are not able to wake him up." According to the DHHR, the father "tries to leave his kids with whoever will take them." The petition further alleged that the father is a registered sex offender.

Upon investigating the allegations, another child who lived in the home where the father resided disclosed that the father was physically abusive to his children, drank frequently, allowed the children to have poor hygiene and lice, and failed to properly manage E.M.'s learning disabilities. The child also indicated that E.M. did not attend school or otherwise participate in homeschooling. Finally, the child indicated that the father would often lock E.M. and A.M.-1 in his room for hours at a time, at one point resulting in E.M. urinating in his pants. Some of these allegations were corroborated by the children's guardian ad litem, who visited the home prior to the abuse and neglect petition's filing[2] and found the children alone and locked in the room on one visit and on another visit found the father asleep in the room with the children locked in with him. The DHHR also confirmed the children's lack of hygiene, including the presence of body rashes. Based on this conduct, the DHHR alleged that the parents abused and neglected the children. Further, the DHHR alleged that petitioner abandoned the children by leaving them in the care of others for over one year and failing to maintain regular contact with them or provide support for them. Following the petition's filing, petitioner waived her preliminary hearing. The children were eventually placed in the care of K.R. ("foster parent"), where they currently remain.

Early in the proceedings, both petitioner and E.M. underwent psychological evaluations. E.M.'s evaluation included a diagnosis of post-traumatic stress disorder based on a reported history of trauma from abuse by the father and a significant history of neglect. The child was also diagnosed with disruptive mood dysregulation disorder and attention-deficit/hyperactive disorder. The evaluator recommended that E.M. would benefit from remaining in his foster parent's care and work slowly on visitation with petitioner, although the psychologist stressed that it was important to monitor the child for signs of distress associated with the visits. The psychologist also recommended therapy, both individual and with petitioner, among other recommendations. Petitioner's evaluation concluded that she demonstrated a "long-standing inability . . . to adequately care for her children and minimization of the same." In regard to the allegations against her in the instant matter, petitioner "denied the referral allegations and indicated that her children '[were] being manipulated to say things' by [their foster parent]." The evaluation also detailed the

[2]According to the record, this case began in family court as a proceeding on K.R.'s guardianship petition and was later transferred to the circuit court upon allegations of abuse and neglect.

fact that petitioner allowed E.M. to reside with his current foster parent without providing the foster parent the child's medication or permitting her to enroll the child in school. It was only after the foster parent filed for legal guardianship to obtain medical care for him and enroll him in school that petitioner took an interest in the children. Accordingly, the psychologist concluded that petitioner's prognosis for attaining minimally adequate parenting within a typical timeframe was poor, "[g]iven that failure to acknowledge past child maltreatment is always a significant risk factor for future child maltreatment." Other factors that contributed to this prognosis were petitioner's lengthy history of an inability to care for the children and concerns over her lack of attachment to the children. This was underscored by the fact that petitioner allowed an older child to be adopted "after she was unable to care for him due to her 'work schedule.'" Not only did petitioner fail to care for these children for an extended period, but the psychologist noted her "attempt[] to thwart their guardian's attempts to adequately care for them." One of the recommendations directed that petitioner demonstrate an attachment to the children and that visitation was not recommended until she consistently demonstrated progress in treatment of her attachment issues.

In May of 2019, petitioner stipulated at the adjudicatory hearing to failing to protect the children from educational neglect and inappropriate housing. The circuit court accepted the stipulation, adjudicated petitioner of abuse and neglect, and granted her motion for a post-adjudicatory improvement period.

Prior to disposition, the guardian filed an answer to the petition that included updated information on petitioner's progress in the case, including her visits with the children. According to the guardian, E.M. suffered "severe physical reactions . . . following visits with [petitioner]," including behavioral problems and encopresis. As a result of these issues, petitioner's visits were suspended so that therapeutic services could be incorporated. Once resumed, the visits were conducted in short sessions monitored by the child's counselor as directed by the psychologist who evaluated E.M. Further, the DHHR accommodated additional visits by conducting them on Fridays to minimize the child's behavioral issues at school, as requested by both E.M.'s counselor and his teacher. According to the guardian, petitioner consistently asserted that E.M.'s behavioral issues were the result of constipation requiring medical attention, as opposed to symptoms of the abuse and neglect that he endured as a result of petitioner's abandonment. While a medical examination did reveal constipation, the child's counselor nonetheless opined that the child's issues resulted from his abuse and neglect. The guardian described that E.M.'s numerous developmental delays were the result of the abuse and neglect he endured and opined that E.M. would require ongoing counseling. In fact, E.M.'s counselor made frequent trips to the child's school to help him cope with his school day. The guardian summarized discussions with the child regarding petitioner, during which the child indicated that he would be upset if he had to live with her and "exhibit[ed] uncontrollable violent, scratching, wiggling movement around the room." E.M. informed the guardian that he would continue to visit petitioner, but would prefer that it be less frequent than it had previously been scheduled. The guardian's report contained little information regarding A.M., given her young age, but indicated that she was small for her age and was working with Birth to Three due to developmental deficits. The guardian concluded that although petitioner was cooperative with services, "years of allowing her children to remain with several different caregivers (some abusive or neglectful) and different homes has taken a severe toll on the

children." Based on the foregoing, the guardian recommended that the children not be returned to petitioner's care and that their foster parent be permitted to adopt them.

In February and March of 2020, the circuit court held dispositional hearings in regard to petitioner. Petitioner attempted to consent to a legal guardianship for the children, but the DHHR opposed this resolution because it sought a more permanent placement for the children in the form of adoption. The circuit court considered petitioner's motion for a post-dispositional improvement period, but found that "additional time would not correct or change the parent/child relationship and lack of bond between the children and [petitioner]." While recognizing that petitioner mostly complied with the terms and conditions of her family case plan, it relied heavily on testimony from E.M.'s therapist in reaching its decision. According to the therapist, she reviewed petitioner's psychological report, E.M.'s psychological report, and reports on visitation between petitioner and the children. The therapist also testified to having used condition trauma-focused cognitive play therapy during services and to conducting individual sessions with petitioner and also group sessions between petitioner and E.M. As recommended by the psychological evaluations, the therapist focused the services on re-establishing attachment and facilitating bonding between petitioner and E.M. However, petitioner resisted accepting responsibility for her parenting techniques. Further, E.M. avoided attachment, touch, and affection with petitioner during visits and displayed dysregulation in his behavior following visits. Finally, the therapist testified that E.M. expressed fear and anxiety about returning to petitioner's custody. According to the witness, she did not believe that a bond could be formed between petitioner and the child and that if one were established, it would take years to form.

The child's demeanor during visits was corroborated by a DHHR service provider who stated that E.M. was physically aggressive during his first visit with petitioner and refused to communicate. The child displayed similar behavior during the second visit. According to the provider, E.M. "showed no attitude or affection towards [petitioner]" during all other visits. The provider also confirmed that petitioner failed to accept responsibility for her parenting and for having created the lack of attachment to the child. According to the provider, petitioner focused more on the children not remaining with the foster parent than she did on the children. A second service provider testified that petitioner complied with most of the terms and conditions of her family case plan, but that the DHHR opposed legal guardianship because the children deserved the permanency of adoption. According to one provider, the DHHR supported adoption over a legal guardianship because petitioner could not later disrupt adoption. This was important, according to the provider, because the children had already had their bond with their parents severed due to the abuse and neglect they suffered; severing the bond with their foster parent at a later date would have a severely detrimental effect on the children. One provider also testified that, although E.M. indicated that he wished to have some visitation with petitioner, he nonetheless wished to remain in the custody of his foster parent. According to this provider, E.M. was not bonded with or attached to petitioner because of her abandonment of the children to individuals who abused them. A provider also testified that if petitioner had visited the children when they lived with the father, as she claimed, that she should have recognized the signs of their abuse and neglect, such as E.M. being covered in sores and extremely underweight and A.M.-1 having "regressed from being able to talk in sentences to babbling."

Ultimately, the court found that the case "present[ed] an unusual set of circumstances, that [petitioner] complied with most of the terms and conditions of the family case treatment plan, however the issue and problem present is the relationship between [petitioner] and child." The court found that petitioner's abandonment of the children harmed their health and welfare and further that petitioner was not involved until the children's foster parent requested legal guardianship due to that abandonment. Based on these facts, the court expressed concern that petitioner would repeat her past behaviors that necessitated the petition's filing, in addition to "the continual lack of bond between the child, [E.M.], and [petitioner] despite services." The court noted that services had been in place for almost one year, yet the situation had not improved and otherwise could not be corrected in the near future. The court additionally found that the children required permanency and stability in their lives that necessitated termination of petitioner's parental and custodial rights. The court did find, however, that it was in the children's best interests to continue visitation with petitioner, as long as such visits were determined to be appropriate and beneficial by the children's therapist. As such, the court terminated petitioner's parental and custodial rights.[3] It is from the dispositional order that petitioner 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).

On appeal, petitioner argues that the circuit court erred in terminating her parental and custodial rights because she was a fit parent who was fully compliant with her family case plan. In support of this assignment of error, petitioner first asserts that her "uncontested fitness and compliance should have been determinative of the result of this case." This is simply not an accurate statement of the various considerations necessary for the resolution of abuse and neglect proceedings. On the contrary, this Court has held that "[i]n making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period *is just one factor to be considered*. The controlling standard that governs any dispositional decision remains the best interests of the child." Syl. Pt. 4, *In re B.H.*, 233 W.

[3]The father's parental and custodial rights were also terminated below. The permanency plan for the children is adoption in the current foster home.

Va. 57, 754 S.E.2d 743 (2014) (emphasis added). Contrary to petitioner's assertion that her compliance mandated the return of the children to her custody, we have repeatedly stressed that "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948)." Syl. Pt. 3, *In re S.W.*, 233 W. Va. 91, 755 S.E.2d 8 (2014). Here, the evidence overwhelmingly supported a finding that a return to petitioner's custody was not in the children's best interests.

Setting aside petitioner's compliance with most of the terms and conditions of her case plan below, the evidence shows that the oldest child, E.M., suffered tremendously after simply visiting with petitioner. Initially, the child's reaction to petitioner was so extreme that he exhibited violent aggression during visits. While this response subsided, the record shows that the child remained unengaged with petitioner and fearful of the possibility that he would be returned to her custody. Moreover, visits with petitioner had a profoundly negative lasting effect on E.M., causing him to suffer from encopresis and anxiety so severe that both his therapist and his teacher recommended visits occur only on Fridays to provide the child with more time to recuperate before having to return to school, where he suffered additional stress.

Further, petitioner fails to recognize that the circuit court was presented with testimony about her failure to acknowledge her role in the abuse and neglect the children suffered. According to the record, petitioner had difficulty accepting responsibility for her deficient parenting and the lack of attachment and affection that resulted. Additionally, one service provider testified that petitioner was less focused on attaining proper parenting than she was on ensuring that the children not remain with their foster parent. The Court has addressed situations such as this by explaining that

> we have recognized that "'it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting." *W.Va. Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990).'" *In re Jonathan Michael D.*, 194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995). Moreover, "'[t]he assessment of the overall success of the improvement period lies within the discretion of the circuit court . . . "regardless of whether . . . the individual has completed all suggestions or goals set forth in family case plans."' *In Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991)." *In re Jonathan Michael D.*, 194 W.Va. at 27, 459 S.E.2d at 138.

In re B.H., 233 W. Va. 57, 65, 754 S.E.2d 743, 751 (2014). It is undisputed that petitioner showed compliance with her case plan, but petitioner is incorrect in asserting that this compliance precluded the termination of her parental and custodial rights. The circuit court retained discretion to resolve the matter in light of petitioner's failure to improve her overall attitude and approach to parenting. As the circuit court found at disposition, petitioner's failure to fully acknowledge the conditions of abuse and neglect, her focus on preventing the foster parent from obtaining full legal custody of the children, and the lack of a bond between her and E.M. created concern that petitioner did not truly resolve the conditions of abuse and neglect and would lead to repetition of past

behaviors. Upon our review, we find that this was not an abuse of discretion, given the overwhelming evidence in support of this finding.

Petitioner further argues that there was no credible testimony that she was unfit at the time of disposition, an assertion that is unsupported by the record. Petitioner is correct that this Court has recognized that "[a] parent has the natural right to the custody of his or her infant child . . . unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty." Syl. Pt. 4, in part, *In re Haylea G.*, 231 W. Va. 494, 745 S.E.2d 532 (2013) (citation omitted). What petitioner fails to recognize, however, is that she was found to be unfit at adjudication in this matter. Because the circuit court found that petitioner abused and neglected the children, petitioner was required to fully correct these conditions in order to regain her fitness to care for the children. While it is true that a DHHR employee testified that she did not have a reason to declare petitioner an unfit parent as of the dispositional hearing, this testimony is not dispositive. First, petitioner's citation to this testimony ignores conflicting testimony from E.M.'s therapist that, following the improvement period, she believed petitioner to be unfit based on petitioner's lack of a plan to safely care for the children. Second, petitioner's argument ignores the fact that it was the circuit court that was required to make the legal determination as to her fitness in deciding what disposition was appropriate for the case. As noted above, petitioner had difficulty accepting her role in the children's abuse and neglect, and this Court has routinely held 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 . . . , results in making the problem untreatable." *In re Timber M.*, 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted). Again, it is undisputed that petitioner complied with many of the terms of her family case plan and was able to greatly improve her position during the proceedings relative to when the petition was filed. That said, it is erroneous for petitioner to assert her fitness to care for the children, given that the circuit court found that there was no reasonable likelihood the conditions of abuse and neglect could be substantially corrected in the near future based, in part, upon her failure to fully acknowledge the abuse and neglect to which she subjected the children.

Petitioner also asserts that the lack of bonding between her and the children was a problem that the DHHR created and exacerbated and that the circuit court should have established a "phase-in" process to transition custody of the children to her slowly in order to foster her bond with them. The Court refuses to accept petitioner's assertion that the DHHR created or exacerbated her lack of bond with the children. While it may be true that the children did not have trouble identifying petitioner as their mother at the inception of the case, petitioner ignores the fact that identification does not equate to bonding. She further ignores the fact that upon his first two visits with petitioner, E.M. responded in an aggressively violent fashion and continued to exhibit negative reactions to visits throughout the proceedings. Contrary to petitioenr's argument on appeal, the record shows that it was, in fact, petitioner who was responsible for the lack of bonding with the children by virtue of her abandonment of them to the care of others for approximately one year prior to the petition's filing. Additionally, the impact of her actions resulted in her inability to have increased visitation with the children in the interest of minimizing the negative effects of visits. That petitioner requested additional visits with the children only underscores her disregard of the children's best interests, as the visitation schedule was dictated by recommendations from a therapist, a psychologist, personnel from E.M.'s school, and the children's responses to the visits themselves. Based upon the overwhelming evidence, it is clear that the visitation schedule was

formulated appropriately and the DHHR in no way exacerbated petitioner's lack of attachment to and bonding with the children. Further, petitioner's reliance on *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989), for the proposition that the children should have been gradually returned to her care is misplaced. In *Honaker*, the father to whom the children were returned was never alleged to have abused or neglected his child; rather, his ex-wife was given primary custody of the child, and, after her death, the lower court ordered that the child be slowly transitioned to the father's custody over a six-month period, a decision with which this Court agreed. *Id*. at 450, 388 S.E.2d at 323-24. Given that *Honaker* concerned only custody, rather than involving substantiated allegations of abuse and neglect, it does not entitle petitioner to relief.

Finally, the Court finds no error in the termination of petitioner's parental and custodial rights. According to petitioner, termination was unnecessarily harsh, given that she did not oppose the granting of a legal guardianship to the children's current foster parent. The record, however, does not support this position. While it is true that petitioner testified that she did not oppose a legal guardianship for the children, petitioner also accused the children's foster parent of lying to the DHHR and negatively impacting her relationship with the children. Specifically, petitioner testified that the foster parent was "the root of all the problems in this case" and that "if the kids weren't at [the foster parent's home] and they were left with my cousin, I know that things would have been a lot different." Given that this foster parent sought legal guardianship of the children in order to obtain appropriate medical care and education for them, it is striking that petitioner believed, as late as the dispositional hearing, that the foster parent was somehow to blame for her estrangement from the children. Petitioner then asserted that she desired for her children to be permanently placed with her cousin, not their foster parent. The closest petitioner came to consenting to guardianship with the foster parent was when she stated that she felt like she did not have a choice as to whether the foster parent should have permanent custody because she did not want to lose her parental rights entirely. Based on the foregoing, it is disingenuous of petitioner to argue on appeal that she consented to the children's continued placement in the most stable home they had resided in, given her extensive testimony expressing distrust of the foster parent and blaming her for issues that, in reality, petitioner's abuse and neglect caused.

Petitioner next argues that termination of her parental and custodial rights went against E.M.'s wishes of continued contact with her, while ignoring the fact that the circuit court honored these wishes by granting petitioner post-termination visitation with the children. While petitioner asserts that she now has no enforceable right to visitation because it was left to the discretion of the children's therapist, this argument again only underscores petitioner's refusal to accept what is in the children's best interests. The circuit court clearly gave the children's best interests paramount consideration in reaching this decision, while petitioner would prefer that she be permitted to visit the children, even if it were detrimental to them. Based on the totality of the evidence, we agree with the circuit court that termination of petitioner's parental and custodial rights was in their best interest, as that dispositional alternative will permit the children to achieve the permanency of adoption in their current foster home. As this Court has stressed,

> [i]n determining the appropriate permanent out-of-home placement of a child under W.Va. Code § [49-4-604(c)(6)], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that

> adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home [cannot] be found.

Syl. Pt. 3, *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998). Rather than constituting an impermissible consideration of whether the foster parent could provide the children a better home or better care as petitioner alleges, the circuit court's termination of petitioner's parental and custodial rights was instead predicated on the findings required by West Virginia Code § 49-4-604(c)(6) that there was no reasonable likelihood the conditions of abuse and neglect could be substantially corrected in the near future and that termination was necessary for the children's welfare. As this Court has held,

> "[t]ermination of parental 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). Accordingly, we find no error in the circuit court's termination of petitioner's parental and custodial rights.

For the foregoing reasons, we find no error in the decision of the circuit court, and its March 17, 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