STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: P.D. and A.D.

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-0979 (Marion County 09-JA-96 & 97, 10-JA-88 & 89)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Marion County, wherein Petitioner Mother's parental rights to her child, P.D., were terminated.[1] The appeal was timely perfected by counsel, Katica Ribel, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by Katherine M. Bond, has filed its response. The guardian ad litem, Frances C. Whiteman, has filed her response on behalf of the children.

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 is appropriate under Rule 21 of the Revised Rules.

On December 18, 2009, both of petitioner's children were removed when P.D. disclosed that petitioner hit him with a stick. This abuse resulted in abuse and neglect proceedings against petitioner in Marion County Circuit Court Case Nos. 09-JA-96 and 09-JA-97. Following her adjudication as an abusive parent in those matters, petitioner was granted a post-adjudicatory improvement period and participated in parenting and adult life skills classes. Because petitioner appeared to be making progress in these proceedings, the multidisciplinary team ("MDT") decided to gradually attempt reunification with petitioner and her children, returning A.D. to her home. As part of this process, the MDT agreed for P.D., who suffers from autism and ADHD, to have an overnight visit with petitioner the weekend of October 15, 2010. However, after the visit, the child disclosed that petitioner sexually abused him, which resulted in the filing of an additional abuse and neglect petition in Marion County Circuit Court Case Nos. 10-JA-88, 10-JA-89. Ultimately, petitioner was adjudicated as having sexually abused P.D., and her parental rights to that child were terminated.

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[1]Petitioner's rights to the other child, A.D., were not terminated, based upon his age and specific request that petitioner's parental rights remain intact. A.D. was, however, ordered to remain in the legal and physical custody of the DHHR. However, petitioner does not raise any assignments of error related to A.D.'s disposition, and as such, the circuit court's decision regarding his permanency is not addressed herein.

On appeal, petitioner alleges the following assignments of error: (1) that the circuit court erred in accepting into evidence the interview of P.D. at the Marion County Child Advocacy Center as proof of the allegations due to the severe Autism of the child and the qualifications of the interviewers; (2) that the circuit court erred in not granting petitioner either a post-adjudicatory or post-dispositional improvement period based upon her insistence that she did not have inappropriate sexual contact with the child; (3) that the circuit court erred in accepting into evidence the state's expert witness's statement that "a child with Autism cannot lie" as weight towards the state's allegations; (4) that the circuit court erred in failing to considering petitioner's testimony regarding the allegations as it relates to the adjudication and disposition in this matter; (5) that the circuit court erred in adjudicating petitioner of having sexually abused P. D. in that the circuit court did not hear clear and convincing evidence and testimony as to the adjudication; and, (6) that the guardian ad litem for the child failed to fulfill her duties and made recommendations without taking the children's best interests into consideration, specifically by failing to confer with the children regarding the allegations, nor discussing with the children their wishes for permanency. Each of these specific assignments of error, as well as the respondents' rebuttals, are addressed below in turn.

"'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.' Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

To begin, petitioner argues that it was error for the circuit court to accept the interview of her child, P.D., by the Marion County Child Advocacy Center "as weight of proof of the allegations due to the severe autism of the child and the lack of qualifications of the interviewers." In support, petitioner states that the child is nine years old, but has the intellectual functioning of a three year old, and further that he is unable to form complete sentences. She also argues that Child Protective Services ("CPS") worker Jeff Majewski who conducted the interview, stated that his training in interviewing sexually abused children was not specific to children with autism. Petitioner cites no case law regarding this assignment of error, but instead alleges that the child's lone statement that "[petitioner] touch my wee-wee" was insufficient to substantiate the allegations of sexual abuse against her.

In response, the DHHR argues that Mr. Majewski did have training in speaking to children with special needs about sexual abuse, and further that the child's communication skills progressed throughout the pendency of the action below. This ability to communicate was also testified to by

Dr. Bean, who stated that the child was able to follow a conversation. The DHHR also asserts that the petitioner is misrepresenting the content of the interview, which included additional comments about petitioner touching him, and also instances of him touching petitioner. Petitioner also fails to address the child's sexual behaviors during the interview. Because the evidence showed that the child could communicate, the DHHR argues that the circuit court was correct to allow the interview into evidence, and nothing in the appendix indicates that it was given inappropriate weight by the circuit court. The guardian ad litem concurs in her response, arguing that Mr. Majewski did not need specific training for interviewing children with autism because the child's statements and actions during the interview made it clear that petitioner sexually abused him. According to the guardian, the interview constitutes clear and convincing evidence of this abuse.

Upon review of the appendix, it is clear that the interview was properly admitted into evidence. First, the interviewer, Jeff Majewski, testified as to the training he received to be qualified to conduct forensic interviews at the Child Advocacy Center. Mr. Majewski was trained in interviewing children who have been the victims of sexual abuse or severe physical abuse. And while his training was not specific to children with autism, Mr. Majewski testified that his nationally accredited training included dealing with "children that have disabilities of any shape or form." Second, Mr. Majewski testified as to P.D.'s improved communication skills, recounting the information the child was able to provide throughout the interview. Lastly, upon review of the appendix, the Court finds that the circuit court did not improperly weigh this evidence, but considered it appropriately during the proceedings below.

As to petitioner's second assignment of error, she alleges that the circuit court should have granted her either a post-adjudicatory or post-dispositional improvement period based upon her insistence that she did not have inappropriate sexual contact with the child. Petitioner's arguments on this issue all relate to the progress petitioner made during an improvement period in a prior abuse and neglect proceeding related to physical abuse of the child. She again cites no case law in support of her argument, and also fails to address any facts related to the matter against her for sexual abuse that would entitle her to an improvement period. In response, the DHHR argues that while it is true that the MDT sought to reunify petitioner and her children in the prior matter, it is also true that petitioner sexually abused her child on the first overnight visit of that improvement period. Both the DHHR and the guardian argue that petitioner was not benefitting from services, and further that she refused to acknowledge the conditions of abuse.

Improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. Further, this Court has held that "'in 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.' *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996)." *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Clear from the appendix is the fact that petitioner failed to acknowledge the underlying problem, i.e. her sexual

abuse of P.D. As such, the Court declines to find that denial of an improvement period below constitutes an abuse of discretion.

Petitioner next argues that the circuit court erred in accepting expert witness Dr. Adrienne Bean's statement that a "child with autism cannot lie," and in "giving that statement more weight towards the state's allegations." Petitioner again cites no case law in support of this assignment of error, but instead argues that the expert should have been precluded from offering this expert opinion because she "met with [the child] once for approximately a couple hours," and then did not meet with the child afterward for any follow up services or therapy. Petitioner argues that this expert testified that she does not have the credentials to give an opinion as to whether the child lied about the sexual abuse at issue. The DHHR argues in response that all parties agreed to stipulate to Dr. Bean's qualifications as an expert in the field of clinical psychology with a focus on children with autistic needs. Both the DHHR and the guardian cite the expert's testimony concerning the nature of autistic children and their lack of imagination causing such children to lack the creativity to lie. Both respondents argue that the opinion was appropriate, given the expert's qualifications, and further that the circuit court did not improperly weigh this evidence.

On review of the appendix, the Court finds that the expert's opinion was properly admitted. As noted above, all parties stipulated to Dr. Bean testifying as an expert in the field of clinical psychology with a focus on children with autistic needs. As such, Dr. Bean was allowed to provide opinion testimony related to her area of expertise pursuant to West Virginia Rule of Evidence 702. The Court declines to find that it was error to allow the witness to state her opinions as to children with autism lacking the imagination or creativity to lie, and further that such children lack the foresight to see a benefit to lying. Further, based upon her expertise and application of Rule of Evidence 704, the Court finds no error in the witness applying these opinions to the specific child in this case. Lastly, the Court finds nothing in the appendix to substantiate petitioner's claim that the witness lacked the credentials to give these opinions. For these reasons, the Court declines to find an abuse of discretion in allowing the expert to testify as to these issues, and further finds no error in the manner the circuit court weighed the testimony presented.

Petitioner next alleges that the circuit court erred in not considering her testimony regarding the allegations as they relate to adjudication and disposition, arguing that her refusal to remain silent as to the allegations "should have been weighed against an inference of guilt from silence." Petitioner cites Syllabus Point 2 of *In Re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002), arguing that this Court has held that in abuse and neglect cases, "a lower court may properly consider [an] individual's silence as affirmative evidence of that individual's culpability." Petitioner alleges that the DHHR, MDT, and CPS worker made minimal efforts to speak with her concerning the allegations or include her in the investigation. Both the DHHR and guardian have responded that simply because the circuit court did not rule in petitioner's favor did not mean that it did not consider her testimony. Further, the circuit court was not required to accept petitioner's testimony as true simply because she did not remain silent. This Court has held that "[t]he circuit court is in the best position to judge a witness's credibility. . .," and we find nothing in the appendix to indicate that the circuit court did not consider the petitioner's testimony on these issues. *In re Jonathan Michael D.*,

194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995). As such, we decline to find that the circuit court abused its discretion in considering the petitioner's testimony.

As to petitioner's fifth assignment of error, she argues that she should not have been adjudicated of having sexually abused P.D. because the circuit court did not hear clear and convincing evidence on the issue. Specifically, she argues that the only allegation against her was the child's statement that "[petitioner] touch my wee-wee," and that this statement was solicited by the interviewer. Further, she argues that there were no allegations that the child told his foster parents about any sexual abuse, and also that no physical sexual abuse evaluation or psychological sexual abuse evaluation was ever conducted. Petitioner also alleges that the child made other troublesome comments about someone named "Pappy," but that no further investigation was made to discover who this individual is or what sexual abuse he may have perpetrated.

The DHHR argues in response that the circuit court heard testimony from three different witnesses concerning the child's sexual behaviors and disclosure of sexual abuse by petitioner. Further, the circuit court reviewed the interview with the child, during which he displayed sexual behavior and disclosed the abuse. The circuit court also heard Dr. Bean's expert testimony about autistic children and their general lack of creativity necessary to fabricate lies. In response to her argument that a sexual abuse evaluation was never performed, the DHHR argues that there is no one in the area qualified to perform such an evaluation. However, this inability does not negate the clear and convincing evidence presented. This Court has held that "'W.Va. Code [§] 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syl. pt. 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981)." Syl. Pt. 5, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). As noted above, three different witnesses testified as to the child's disclosure and sexual behavior, and the second petition was filed after the child disclosed the sexual abuse to his foster mother. Upon review of the appendix, we find that the circuit court did not err in adjudicating petitioner as having sexually abused the child, based upon the evidence presented.

Lastly, petitioner alleges that the guardian ad litem did not fulfill her duties to the children and made recommendations without taking the children's best interests into consideration. Specifically, she alleges that the guardian did not confer with the children regarding the allegations, nor did she discuss the children's wishes for permanency. Petitioner cites to standards for guardians as set forth by the American Bar Association, and also this Court's discussion of West Virginia's guidelines as addressed in *In re Jeffery R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993). She alleges that the guardian did not ensure that the child received services for his special needs, and further that the guardian ignored her requests for such. She argues that had such steps been taken, the resolution of the case would have been significantly different.

In response, the guardian argues that there is absolutely no evidence that either she or the prior guardian, Lee Niezgoda, did not fulfill their duties to the children. To begin, Ms. Niezgoda was present with the child during his interview at the Child Advocacy Center to confer about the allegations. Further, it was not necessary to ask the child about the allegations or his wishes for permanency because he functions on a three-year-old psychological level. Additionally, given that she was appointed less than one month prior to disposition, it would have been impossible for the guardian to establish and maintain a relationship with the child, or to know that petitioner allegedly requested a sexual abuse evaluation. Furthermore, neither guardian even had a responsibility to ask the child his preference due to his age. The DHHR responds by arguing that the guardians fully participated in the proceedings below, and further put A.D.'s wishes regarding permanency on the record, as reflected by the fact that petitioner's parental rights to that child were not terminated per his request. The DHHR further argues that, while it is true that P.D. did not receive a sexual abuse evaluation, he did receive services to help with his autism. Because the allegations against petitioner were proven by clear and convincing evidence at adjudication, and because petitioner continually failed to acknowledge the sexual abuse, the DHHR argues that petitioner's assertion that the outcome of this matter would have been different is simply untrue.

West Virginia Code § 49-6-5(a)(6)(C) governing disposition of abused and/or neglected children states in relevant part that "the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." Based upon review of the appendix, it is clear that P.D. was neither fourteen years of age at disposition, nor was he otherwise of an age of discretion, based upon his intellectual functioning issues. This Court finds petitioner's argument on this issue to be without merit, as a review of the appendix indicates that both guardians fulfilled their duties to the children.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within eighteen months of the date of the disposition order. As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings[2] for permanent placement of an abused and neglected child following the final

[2]Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders

dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that "[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va. Code* § 49-6-5(a)(6) [1996], 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 can not be found." Syl. Pt. 3, *State v. Michael M.,* 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard ,* 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court to deny petitioner an improvement period, and the termination of petitioners's parental rights is hereby affirmed.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:
Justice Margaret L. Workman

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entered after January 3, 2012.