STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: N.W.

No. 11-1026 (Harrison County 11-JA-8-3)

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Harrison County, wherein Petitioner Mother's parental rights to her child, N.W., were terminated. The appeal was timely perfected by counsel, Perry B. Jones, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, has filed its response. The guardian ad litem, Dreama D. Sinkkanen has filed her response on behalf of the child.

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 appeal, petitioner argues that the circuit court erred in denying her motion for a post-adjudicatory improvement period because she proved by clear and convincing evidence that she was likely to fully participate as required byWest Virginia Code § 49-6-12. Petitioner argues that at no time during the pendency of the action below did she fail to cooperate with the DHHR or law enforcement in identifying the perpetrator of the abuse that caused the child at issue to suffer multiple skull fractures of differing ages. In fact, petitioner has continually denied that she caused the injuries to the child, which she argues is not the same thing as failing to acknowledge the conditions of abuse and neglect. Petitioner cites to the testimony of DHHR employee Joyce Anderson to illustrate her compliance with the services provided below. Additionally, petitioner argues that the circuit court erred in terminating her parental rights where less restrictive alternatives existed. Citing West Virginia Code § 49-6-5 and associated case law, petitioner argues that termination of parental rights is the most drastic remedy at disposition, and that the circuit court was required to employ a less drastic alternative in keeping with the overall goal of reunification in abuse and neglect proceedings.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. She argues that the circuit court clearly stated that petitioner failed to meet her burden of clear and convincing evidence that she was likely to fully participate in an improvement period. According to the guardian, petitioner offered no explanation, consistent with the medical evidence, for the fourteen-month old infant's non-accidental, intentionally inflicted skull fractures of differing

ages. As such, the circuit court was correct to deny petitioner an improvement period because she either inflicted the injuries herself, or failed to identify the perpetrator of the abuse. Secondly, the guardian argues that the circuit court was correct in terminating petitioner's parental rights because of the finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected based upon the evidence above.

The DHHR mirrors the guardian's response, arguing that every possible care giver for the child testified at the adjudicatory hearing and none of them admitted to inflicting the injuries. This leaves only one conclusion according to the DHHR; either petitioner is protecting a third-party abuser over her child's best interests, or she is the abuser. Either scenario gives the circuit court the authority to both deny petitioner an improvement period and terminate her parental rights. Additionally, the DHHR argues that this Court has specifically recognized that returning a child to a home where he suffered extensive injuries without any identification of his abuser places the child at serious risk of further harm. *See In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

"'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). The circuit court below terminated petitioner's parental rights after finding that petitioner had offered no explanation as to how the infant child received the multiple intentional skull fractures, and also failed to identify a possible perpetrator. As such, the circuit court found "that either [petitioner] inflicted the abuse to the infant child, or knows who did hurt her child." Therefore, the circuit court found that petitioner did not meet her burden to obtain a post-adjudicatory improvement period, and further that there was no reasonable likelihood that the conditions of neglect and/or abuse could be corrected in the near future.

The Court notes that improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. 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 record is the fact that petitioner failed to acknowledge the underlying problem, i.e., how the child suffered

the injury. While it is true that petitioner claims innocence and offered several excuses for how the child suffered its injuries, these claims are incongruent with the expert medical testimony presented below. As the circuit court correctly noted, petitioner either perpetrated the abuse or is protecting the individual who did. Therefore, the Court finds that petitioner has failed to acknowledge the existence of the problem necessitating her child's removal, and therefore failed to satisfy her burden of proof by clear and convincing evidence that she was likely to comply with an improvement period. As such, the circuit court's decision to deny her an improvement period does not constitute an abuse of discretion.

As to petitioner's second assignment of error, this Court has also held that "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights 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.' Syllabus point 1, *In re R.J.M.*,164 W. Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). The record shows that the child at issue was an infant at the time of the injuries and of the age that the above holding was intended to protect. Further, the circuit court correctly found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and/or neglect in the near future due to petitioner's failure to identify the perpetrator of the abuse. This Court has held that "'[p]arental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.' Syl. pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 5, *In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997). Therefore, we find that the circuit court's termination of petitioner's parental rights was proper.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 child 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[1] for permanent placement of an abused and neglected child following the final 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

[1]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 entered after January 3, 2012.