STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.O. and I.O.:

No. 11-1227 (Mingo County. 11-JA-31 & 32)

FILED
January 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother appeals the termination of her parental rights to her children J.O. and I.O. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response joining in the response of the guardian ad litem.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

"'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 instant petition is the second petition filed regarding these children, with the first being filed in 2008. The DHHR has been involved with this family since 2005. Both the prior petition and the instant petition allege domestic violence in the home and substance abuse issues. The most recent petition was initiated after Petitioner Mother, her boyfriend,

and the father of the children were involved in a domestic altercation in the middle of the night, and the children climbed out a window to run to a neighbor's house for help. Although Petitioner Mother was only granted supervised visitation in the prior case, she and her boyfriend were living with the father, who had custody, at the time the altercation occurred. Further, Petitioner Mother had allowed her older daughter to babysit the children, although she had prior terminations of her own parental rights. Petitioner Mother was adjudicated as neglectful. The circuit court terminated Petitioner Mother's parental rights, finding that there was no reasonable likelihood that the conditions of abuse and neglect would be substantially corrected in the near future. Petitioner Mother was initially denied post-termination visitation, but at a recent hearing has been granted visitation.

Petitioner Mother first argues that the circuit court erred in finding by clear and convincing proof that there is no reasonable likelihood that the circumstances of the parents "will" be substantially corrected in the near future. Petitioner Mother contends that West Virginia Code § 49-6-5(b) mandates that when a court considers whether or not to terminate parental rights, the finding must be that there is no reasonable likelihood that the conditions of abuse or neglect "can" be corrected as opposed to whether the conditions "will" be corrected. Although the circuit court used the term "will" rather than "can," this Court finds no error in the conclusion based on the fact that this is the second petition filed within three years, based on the same conduct. Petitioner Mother has had numerous services, to no avail, as the neglectful conduct has continued.

Petitioner Mother also argues that the circuit court erred by making its findings and conclusions based on erroneous testimony by DHHR employees. Petitioner Mother states that the DHHR employees testified that Petitioner Mother and her boyfriend leased a home to Father Ralph O., but the lease was actually between the father and a third party. While this particular statement is erroneous, it is undisputed that Petitioner Mother was living with her boyfriend, the children's father Ralph O., and the children, against the circuit court's prior order denying her custody of the children. She admits that she knew this conduct was wrong, but she continued to expose the children to domestic violence in the home and continued to allow the children to be around inappropriate individuals. This Court finds no merit in this assignment of error.

Petitioner Mother next argues that the circuit court erred in finding that it was in the best interests of the children to terminate her parental rights. Regarding the termination in this matter, this Court has stated that "when a parent cannot demonstrate that he/she will be able to correct the conditions of abuse and/or neglect with which he/she has been charged, an improvement period need not be awarded before the circuit court may terminate the offending parent's parental rights." *In re Emily*, 208 W.Va. 325, 336, 540 S.E.2d 542, 553

(2000). Moreover, termination is proper when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child . . . ." W.Va. Code § 49-6-5(a)(6). In the present case, although the children have a strong bond with their mother, reunification is not in their best interests. It is clear that the same issues have been ongoing for at least three years, and the children continued to be exposed to domestic violence and substance abuse. Petitioner Mother has recently been granted post-termination visitation, placing her in the same position she was in following the first abuse and neglect proceeding.

Petitioner Mother then argues that the circuit court and the DHHR punished Petitioner Mother because she had supervised visitation but violated the circuit court's dispositional order by not notifying the DHHR that the father, Ralph O. could not parent due to continuing health issues. Petitioner Mother claims that she had to allow Ralph O. to move in with her against court orders, as he could not care for the children alone. Petitioner Mother, in her petition, gives no indication as to how this failure was held against her by the DHHR, or the circuit court. However, it is clear that she did not notify the DHHR of the father's health issues and his inability to parent the children, but instead chose to violate the circuit court's orders. This Court finds no reversible error.

Petitioner Mother argues that the circuit court erred in not granting a post-dispositional improvement period. In order to receive an improvement period, the parent must demonstrate, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. *See* W.Va. Code § 49-6-12. In the present case, Petitioner Mother has been given a myriad of services, to no avail, as the same conditions that caused the 2008 abuse and neglect petition to be filed caused the 2011 petition to be filed. This Court finds no error in the failure to grant an improvement period.

Finally, Petitioner Mother argues that she should have been granted post-termination visitation. However, the guardian ad litem notes that Petitioner Mother was granted visitation by court order entered on October 20, 2011. Thus, this assignment of error is moot.

This Court reminds the circuit court of its duty to establish permanency for J.O. and I.O. 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 Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for J.O. and I.O. 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 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 of West Virginia 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 and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: January 18, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh