STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: B.H.:

No. 11-1263 (Mason County 11-JA-13)

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 Mason County, wherein Petitioner Mother's parental rights were terminated. This appeal was timely perfected by her counsel Nic Dalton, with an appendix accompanying Petitioner Mother's petition. The child's guardian ad litem Tanya Hunt Handley has filed a response, with attached documents, supporting the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, also filed a response in support of termination.

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.

"'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 filed against Petitioner Mother was based on her bipolar disorder and other mental illnesses which led her to report having thoughts of hurting herself; her unborn baby[1]; and the subject baby, who is a year old. Among these thoughts were Petitioner Mother's visualizations of seeing her baby killed and put in a dumpster. Petitioner Mother was involved in a prior abuse and neglect case regarding her two older children where, following revocation of her

[1] After the initiation of these proceedings, Petitioner Mother gave birth to another baby who is the subject of a separate abuse and neglect case.

post-adjudicatory improvement period, she voluntarily relinquished her parental rights to them. At the preliminary hearing in the instant case, the circuit court reviewed Petitioner Mother's mental health history and her past history of inconsistently taking her medication to treat these health issues. The circuit court further recapped Petitioner Mother's expression of thoughts to hurt herself and her children.

At adjudication in May of 2011, Petitioner Mother voluntarily admitted to the allegations of her thoughts to hurt herself and the subject baby. Petitioner Mother thereafter voluntarily waived her rights to an adjudicatory hearing. The circuit court made findings that Petitioner Mother voluntarily relinquished her parental rights to two older children; that prior evidence has indicated that despite the Children First program's work with Petitioner Mother in her home, Petitioner Mother has continued to express thoughts of hurting herself; that Petitioner Mother reported to her caseworkers that she scared the subject child when she once screamed and cussed at the subject child before throwing her plate against the wall because the subject child was not eating her food; and that Petitioner Mother has "exposed [the subject child] to danger to her physical health and emotional well being." The circuit court ordered the Multi-Disciplinary Team ("MDT") to meet and the case was scheduled for disposition.

At the July 1, 2011, dispositional hearing, the circuit court considered reports from MDT meetings and the history of Petitioner Mother's involvement with DHHR. The MDT last met on June 27, 2011, and a number of people who had worked with Petitioner Mother in various capacities provided their opinions on Petitioner Mother's progress. Petitioner Mother opposed her physician's recommendation of needing an intensive daily Assertive Community Treatment ("ACT") program. Her physician opined that nothing less would help Petitioner Mother because she needs "lifetime support for chronic mental illness." Petitioner Mother has also failed to acknowledge her need for such treatment. Her physician further expressed that although Petitioner Mother has good intentions, her reactions are not predictable. A psychologist at the Partial Hospitalization Program with Prestera reported that Petitioner Mother was initially doing well in the program until a domestic violence incident occurred between herself and a man named W.H. Petitioner Mother took over a month to file a Domestic Violence Petition against him and then later reported to the MDT that W.H. would continue to be a part of her life and her children's lives. At the dispositional hearing, the circuit court incorporated its findings from adjudication and further found that Petitioner Mother continues to have mental health issues and feelings of helplessness despite years of services in her home. The circuit court reiterated Petitioner Mother's thoughts of hurting herself and her children. On the record, the circuit court stated that "[t]here's no reason to believe at all that a post adjudicatory [improvement period]" would be of any benefit in resolving the mental illness as suffered by [Petitioner Mother.]" Consequently, the circuit court found that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future. Accordingly, the circuit court terminated Petitioner Mother's parental rights. It is from this order that Petitioner Mother appeals.

On appeal, Petitioner Mother argues that the circuit court erred in terminating her parental rights because there were less restrictive alternatives available, pursuant to West Virginia Code § 49-

6-5, given the unexplored potential for enrollment in a long-term care program such as ACT. She asserts that accordingly, the circuit court should have granted her a post-adjudicatory improvement period rather than terminate her parental rights at disposition. In support, she asserts that DHHR did not investigate the ACT program she could have enrolled in as part of such improvement period. She also asserts that the child's guardian ad litem indicated that the ACT program be further explored.

DHHR and the guardian ad litem for the child respond, contending that the circuit court did not err in terminating Petitioner Mother's parental rights. They assert that the circuit court was correct in finding that an improvement period was not proper given Petitioner Mother's history of receiving services for years with no change in her progress. They further argue that Petitioner Mother's assertion that the child's guardian ad litem supported exploration of the ACT is misleading and that further, the circuit court did not err in not considering Petitioner Mother's possible participation in the ACT program as this program was voluntary and Petitioner Mother was in denial of needing help for her mental health issues. They cite *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011), where the Court held as follows:

> "[C]ourts 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). In further support, they argue that it is appropriate for a circuit court to move to termination if it finds compelling circumstances to deny an improvement period. *In re Joseph A.*, 199 W.Va. 438, 444, 485 S.E.2d 176, 182 (1997) (quoting Syllabus Point 2, *Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989)). Moreover, they assert that the Court has held that termination is appropriate when a parent refuses to acknowledge a mental illness harmful to the child or to seek or cooperate in treatment for his or her mental illness. *In the Matter of Abuse and Neglect of R.O.*, 180 W.Va. 190, 194, 375 S.E.2d 823, 827 (1988).

The Court finds no abuse of discretion by the circuit court in its order terminating Petitioner Mother's parental rights without an improvement period and without consideration of the ACT program. A review of the appendix indicates that it was actually Petitioner Mother's guardian ad litem, not the guardian ad litem for the child, who wanted to explore the ACT program. The appendix also reflects that the circuit court laid out its reasons behind denying Petitioner Mother an improvement period in its findings on the record and in its orders. Pursuant to West Virginia Code § 49-6-12, a circuit court is not required to grant an improvement period. Rather, the subject parent has the burden of demonstrating by clear and convincing evidence that he or she is likely to fully participate in an improvement period. The circuit court thereafter has the discretion to grant it or deny it. The circuit court found that due to Petitioner Mother's mental health issues and lack of

improvement despite services in her home the last several years, the "only disposition available in this case is termination of parental rights. There's no reason to believe at all that a post adjudicatory [improvement period] would be of any benefit in resolving the mental illness as suffered by [Petitioner Mother]." Given the subject child's tender age and the unchanged status of the circumstances that led to the filing of this petition, including Petitioner Mother's failure to acknowledge needing help for her mental health, the circuit court did not abuse its discretion. Accordingly, the Court finds no error in the circuit court's decision denying Petitioner Mother an improvement period and consequently, the Court also finds no error in the circuit court's termination of Petitioner Mother's parental rights.

This Court reminds the circuit court of its duty to establish permanency for B.H. 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 B.H. within eighteen months of the date of the disposition order.[2] 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 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).

[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 entered after January 3, 2012.

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: 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