STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: N.B. and Z.B.:

No. 11-1266 (Jackson County 10-JA-14 & 15)

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

MEMORANDUM DECISION

Petitioner Mother, by counsel Paul A. Montgomery, appeals the termination of her parental rights to her children N.B. and Z.B. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William Bands, has filed its response. The guardian ad litem, Shannon Baldwin, has filed her response on behalf of the child, joining in the response of the DHHR. The petitioner has filed a reply.

Having reviewed the appendix 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 appendix 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 petition in this matter was based upon five-year-old N.B.'s disclosure of sexual abuse by his biological father and his step-grandfather. N.B. also disclosed that these men had abused his little brother, Z.B. N.B.'s biological father is a convicted sex offender. Petitioner Mother allowed him to have unsupervised contact with both children. N.B. previously disclosed the abuse to his mother, but Petitioner Mother failed to report the alleged abuse. After the filing of the petition, Petitioner Mother was offered transportation to a local shelter so that she could remain with her children, but she refused, instead choosing to remain in the home with her mother and step-father,

stating that she was unsure that the step-father had indeed abused her sons, although N.B. had repeatedly disclosed such abuse. The children showed fear at any mention of the step-father. Petitioner Mother has a history of mental health issues, and has previously been hospitalized for suicidal thoughts.

Despite her initial protests, Petitioner Mother stipulated to her neglect in failing to protect the children by not reporting the sexual abuse allegations and not removing the children from the home with the step-father. She was adjudicated as abusive and/or neglectful, and was granted an improvement period. Although she had her own apartment, she continued to reside with her mother and her step-father, even after she was warned by two different DHHR workers that this could jeopardize reunification with her children. She later allowed her mother and step-father to move into her home. The DHHR then moved for termination of the improvement period, as Petitioner Mother was failing to comply by remaining in the home with the step-father. Furthermore, visitation was not going well, and Petitioner Mother had recanted her prior stipulation, now stating that she had no evidence that her step-father had molested her sons. The circuit court terminated the improvement period for failure to comply, and then terminated Petitioner Mother's parental rights. The circuit court found that petitioner did not follow through with the case plan and failed to improve in a manner that would protect her children from future abuse. She allowed her stepfather who was accused of sexually abusing her children to move into her home, and has shown that she is dependent on him and her mother.

On appeal, Petitioner Mother first argues that the circuit court erred in terminating her improvement period. She states that she was eventually living on her own, outside of the presence of her step-father, that she had obtained and maintained employment, and that she had made her children's safety a priority. Petitioner argues that the only violation of her case plan was allowing her mother and step-father to stay with her for a period of time, and therefore the termination of her improvement period was erroneous because she showed substantial compliance.

The DHHR responds in favor of termination of the improvement period, noting that Petitioner Mother essentially chose her step-father over her children by residing with him and allowing him to reside with her. Petitioner Mother refused to believe the allegations against her step-father, stating that she "owed" him for helping her. The guardian ad litem joins in the response of the DHHR.

Regarding the termination of a post-adjudicatory improvement period, this Court has held that:

> "Neither W.Va.Code § 49-6-2(b) nor W.Va.Code § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period before the

> twelve-month time frame has expired if the court is not satisfied that the defendant is making the necessary progress. The only minimum time period set forth in the statute is the three-month period granted in the pre-dispositional section, W.Va.Code § 49-6-2(b)." Syllabus Point 2, *In re Lacey P.,* 189 W.Va. 580, 433 S.E.2d 518 (1993).

Syl. Pt. 6, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). Moreover,

> "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, 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." 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 the present case, the most important part of the case plan was maintaining the safety of the children, which meant not exposing them to further sexual abuse. However, this is the very portion of the case plan that Petitioner Mother refused to comply in, and allowed the perpetrator of the abuse on her children to live in her home. This Court finds no error in the termination of Petitioner Mother's improvement period.

Petitioner Mother next argues that the circuit court erred by finding that Petitioner Mother was not making sufficient progress toward reunification and that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. Petitioner states that she loves her children, and that supervisors of the visitations testified that she showed the children affection. Petitioner also argues that there is no clear and convincing evidence that the children were put in any reasonable fear during the improvement period. Further, petitioner followed through on all other aspects of the case plan.

The DHHR responds, arguing that Petitioner Mother's denial that her step-father abused her children is not a condition which can be corrected. Petitioner Mother allowed the children to cohabitate with their abuser even after the court ordered such conduct to cease. The DHHR argues that the only option to preserve the safety of the children is termination. The guardian ad litem concurs in the DHHR's response.

This Court has stated that "'[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code [§] 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code [§] 49-6-5(b) (1977) 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). In the present

matter, petitioner was given many services and complied in most. However, it is clear that the most important condition in her improvement period was the safety of the children. Petitioner Mother has repeatedly expressed doubt that her step-father abused the children, even after their repeated disclosures of the abuse. Since she does not believe that the children were abused by her step-father, the only way to maintain the children's safety, and keep them away from their step-grandfather, is termination, since Petitioner Mother refuses to cut her ties with him. This Court finds no error in the termination of parental rights.

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.[1] 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).

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

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[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.

Affirmed.

ISSUED: March 12, 2012

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

DISQUALIFIED:
Justice Thomas E. McHugh

NOT PARTICIPATING:
Justice Margaret L. Workman