STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: D.W. and M.W.

No. 11-1466 (Mineral County 10-JA-16 and 10-JA-17)

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel Lawrence Sherman Jr., arises from the Circuit Court of Mineral County, wherein Petitioner Mother's parental rights were terminated by order entered on September 29, 2011. The children's guardian ad litem, Marla Harman, filed a response on behalf of the children in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of termination. Petitioner Mother filed a reply.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, 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 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).

In June of 2010, DHHR filed the instant petition against the subject children's parents. The petition alleged that Petitioner Mother and her children were inside Petitioner Mother's vehicle and outside of a home where a drug raid occurred. When police officers searched Petitioner Mother and her vehicle, they discovered an outstanding fugitive warrant for her from Maryland for a charge of driving on a revoked license. The police officers also smelled alcohol on Petitioner Mother's breath and took her into custody. The petition also alleged that Petitioner Mother and the children's father

have a history of domestic violence and substance abuse, both of which have occurred in front of the children.

A preliminary hearing was scheduled in July of 2010, which Petitioner Mother waived. The circuit court found that the children's removal was reasonable based on the parents' failure to provide an "appropriate environment due to the children's presence in a residence where drugs were allegedly used and sold and due to the child[ren]'s presence during a police raid." At the adjudicatory hearing in August of 2010, Petitioner Mother entered stipulations to her history of drug and alcohol abuse, her history of exposing the children to domestic violence, and her history of unstable housing situations. The circuit court found the children neglected and granted Petitioner Mother a six-month post-adjudicatory improvement period. During her improvement period, Petitioner Mother participated in parenting and adult life skills classes, counseling for her issues with alcohol and substance abuse, counseling for her issues with domestic violence, and visitation with the children. At a hearing on February 14, 2011, the circuit court granted Petitioner Mother a ninety-day extension to her improvement period.

After the hearing on February 14, 2011, Petitioner Mother and the children's father met in town and spent approximately eight hours together. During this time, they drank beer, drove around town, and had an incident of domestic violence, after which Petitioner Mother left the car and reported this incident to her case manager, Marsha Thorne. Ms. Thorne in turn reported this incident to Child Protective Services ("CPS") worker Ravenna Redman, who suggested that Petitioner Mother report this incident to the police. Petitioner Mother did so, but not until about two months later. The dispositional hearing was originally scheduled for the end of August of 2011. However, disposition was continued at this hearing and instead, Petitioner Mother moved for dismissal or, in the alternative, to withdraw her stipulations made at adjudication or to extend her improvement period again. The circuit court denied these motions and the dispositional hearing was continued to September.

At the dispositional hearing in September of 2011, the circuit court heard testimony from several witnesses, including Petitioner Mother and the children's father. The circuit court found that although Petitioner Mother made some progress, she had not changed her approach to parenting, she had been dishonest with her service providers by misrepresenting her activities to her therapists and alcohol counselor, and that any progress came "too little too late." The circuit court terminated Petitioner Mother's parental rights without any further improvement period. Petitioner Mother appeals this order.

On appeal, Petitioner Mother argues several assignments of error. She argues that the circuit court abused its discretion in terminating her parental rights, asserting that its ruling was not supported by substantial evidence. She asserts that it was against the weight of the evidence in light of DHHR's failure to complete an investigation substantiating abuse or neglect. Petitioner Mother also argues that the circuit court's ruling was inappropriate because she had ineffective counsel. She asserts that her prior counsel was ineffective because he failed to procure DHHR's file and because he encouraged her to voluntarily stipulate to neglect. Lastly, Petitioner Mother argues that the circuit

court erred in denying her motion to dismiss, denying her motion to withdraw stipulations, denying her motion to extend her improvement period, and by failing to grant her a post-dispositional improvement period.

First, Petitioner Mother argues that the circuit court abused its discretion in terminating her parental rights to D.W. and M.W. She argues that there was not enough evidence to support termination and that DHHR failed to complete an investigation to substantiate abuse or neglect. She argues that there was no imminent danger to the children when DHHR took them from her. The guardian ad litem and DHHR respond, contending that the circuit court properly terminated Petitioner Mother's parental rights. They assert that at disposition, Petitioner Mother still did not have employment, a driver's license, or a stable residence. She continued to be dependent on others, continued to have a relationship with the children's father, and misrepresented matters to the circuit court. DHHR further asserts that Petitioner Mother did not contest findings made at the preliminary hearing and she had over a year to remedy her issues and failed to do so. Moreover, DHHR asserts that removal was proper in that it was acting in the best interests of the children pursuant to West Virginia Code § 49-6-3(a)(1) and (2).

The Court finds no error in DHHR's removal, its allegations in the petition, or the circuit court's order terminating Petitioner Mother's parental rights. Pursuant to Code § 49-6-3(a)(1) and (2), removal by DHHR is appropriate if the circuit court finds that there exists imminent danger to the physical well-being of the children and no other reasonable alternatives to removal are available. The appendix indicates that DHHR removed the children after receiving notice that the children were present with Petitioner Mother at a drug raid. Petitioner Mother subsequently waived her rights to a preliminary hearing and stipulated to neglect at the adjudicatory hearing. Moreover, the circuit court did not err in terminating Petitioner Mother's parental rights without another improvement period. "'[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 . . . .' 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). "'[T]he welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008). The appendix indicates that throughout the case, Petitioner Mother continued to go to bars and that she failed to immediately report the February of 2011 incident with the children's father. The appendix supports the circuit court's findings in its termination order and accordingly, it did not abuse its discretion in terminating Petitioner Mother's parental rights to the subject children.

Second, Petitioner Mother argues that the circuit court erred in its ruling because Petitioner Mother's prior counsel was ineffective. She argues that her counsel failed to procure DHHR's file and encouraged her to voluntarily stipulate to neglect. This Court has not recognized an ineffective assistance of counsel claim in an abuse and neglect proceeding and therefore, finds no merit in this assignment of error.

Lastly, Petitioner Mother argues that the circuit court erred in denying several of her motions throughout this case. She generally argues that none of the factors listed in West Virginia Code § 49-6-5(b) were present in her case. She asserts that her drug tests were negative, she was willing to cooperate in a family case plan, and she met all of the treatment goals in her treatment plan. Petitioner Mother argues that she should be reunified with her children, asserting that if "a neglectful or abuse situation occurs in the future . . . then DHHR would be able to step in, in [its] role, and remove the children once again." The guardian and DHHR respond, contending that the circuit court committed no errors in denying Petitioner Mother's motions and in denying her a post-dispositional improvement period. The guardian and DHHR point out that when Petitioner Mother made her stipulations, the circuit court inquired in open court of her voluntariness and understanding of her rights. DHHR further asserts that the circuit court found that Petitioner Mother failed to effectuate a meaningful change in her overall attitude and approach to parenting.

The Court finds no error in the circuit court's denials of Petitioner Mother's motions. The Court has held as follows:

> The improvement period is granted to allow the parent an opportunity to remedy the existing problems. The case plan simply provides an approach to solving them. As is clear from the language of the statute . . . the ultimate goal is restoration of a stable family environment, not simply meeting the requirements of the case plan.

W.Va. Dept. of Human Services v. Peggy F., 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990). "It is within the [circuit] 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 if the court is not satisfied that the [parent] is making the necessary progress . . . ." *In re Lacy P.*, 189 W.Va. 580, 586, 433 S.E.2d 518, 524 (1993). A review of the appendix shows that the circuit court considered the facts and circumstances of the case with each motion presented by Petitioner Mother. The circuit court found that despite an improvement period of more than one year, Petitioner Mother failed to substantially correct the conditions that led to the filing of the petition. The circuit court did not abuse its discretion in denying Petitioner Mother's motion to dismiss, motion to withdraw her stipulations, or motion to extend her improvement period, and it did not abuse its discretion in denying Petitioner Mother a post-dispositional improvement period.

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.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

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

DISSENTING:

Chief Justice Menis E. Ketchum

[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.