STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.S.

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

No. 11-1513 (Kanawha County 10-JA-232)

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Melissa L. Starcher, arises from the Circuit Court of Kanawha County, wherein her parental rights to her child, B.S., were terminated by order entered on July 29, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Edward L. Bullman, has filed his response on behalf of the child.

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.

The instant matter was initiated based upon petitioner's bizarre behaviors as a result of untreated bipolar disorder, her admissions that she had struck the then two-month-old child for "testing" her, and because the petitioner's home was deemed unfit for human habitation. According to the circuit court's findings of fact, the home reeked of cat urine, and dirt and cat hair were prevalent throughout the home, even in the child's bed. Prior to removal of the child, petitioner was receiving services from the DHHR, but she and Respondent Father became so hostile toward the service providers that they refused to return to the home. Following removal of the child, petitioner and Respondent Father moved to Baltimore, Maryland, and did not participate in services offered by the DHHR in West Virginia. At disposition, the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future, and further that petitioner failed to follow through with the reasonable family case plan or other rehabilitative services, as evidenced by the continuation of conditions which threatened the child's health, welfare, and life. It is from this order that petitioner appeals.

On appeal, petitioner argues that the circuit court erred in terminating her parental rights without granting her an improvement period or locating services for her in the state of Maryland, where she relocated during the pendency of the action below. Petitioner further argues that the evidence was insufficient to adjudicate her as an abusive parent, to adjudicate the child as abused or neglected, or to terminate her parental rights. Petitioner argues that she moved to Maryland specifically to live with family and have assistance in learning to parent her child and maintain a

clean residence. Further, she testified that she suffered kidney failure in the month following the child's birth, and was in pain and tired. According to petitioner, she contacted the DHHR on numerous occasions to discuss service providers in the Baltimore, Maryland, area that could provide the services the DHHR required, which shows her willingness to comply with an improvement period. Petitioner also obtained medical and psychiatric treatment, and gave away all of her cats. Petitioner argues that this constitutes the clear and convincing evidence of her being likely to fully participate in an improvement period. Petitioner argues that prior to removal, service providers were in her home seven days per week, which left her no time between sessions to fully implement any instructions she received. She further counters DHHR employee testimony that she was lazy by arguing that a new mother must find time to sleep when the child is asleep, which was exacerbated by her involvement in a car accident that caused her kidneys to fail during the first month of the child's life. Petitioner further addresses her alleged hostility toward the DHHR by noting that she has a history with the agency, having previously relinquished her parental rights to her first child. As such, she argues that she was understandably wary, distrusting, and resentful of the DHHR, though these actions do not support denial of an improvement period or termination of parental rights. In short, petitioner argues that once her medical condition was stabilized, she found placement for her cats, and she found a residence with familial assistance and support, her ability to cooperate with and benefit from an improvement period became obvious. As such, petitioner argues that the circuit court's order terminating her parental rights should be reversed.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that the DHHR had already provided extensive services to prevent removal, but that petitioner refused to cooperate, both prior to removal and during the pendency of the action below. Further, the guardian argues that it was not until the final dispositional hearing that the petitioner stated that services may be available in Baltimore. As such, the guardian argues that the petitioner did not establish by clear and convincing evidence that she was likely to fully participate in an improvement period. According to the guardian, the conditions in the home actually became worse during the month that services were offered prior to removal. The guardian notes that the lessons the petitioner was taught were not being retained, and that the child's pediatrician even expressed concerns for the child's welfare and the parents' ability to properly care for the child. After the parents left the state upon the child's removal, the guardian argues that they did not visit the child, and that this apparent lack of interest is a significant factor in determining the petitioner's ability to improve. In short, the guardian argues that the petitioner refused to participate in any services in West Virginia, and that petitioner did not provide any information or proposals for terms of an improvement period to correct their deficiencies other than vague references to possible services in Maryland. Lastly, the guardian argues that the petitioner's argument that there was no evidence to support adjudication demonstrates that petitioner still does not recognize the problems that necessitated removal, which shows that an improvement period would have been futile. The DHHR has also responded, and fully joins in and concurs with the guardian's response. In addition, the DHHR makes the argument that the petitioner participated in no services in this action, having fled to Maryland after removal of the child.

"'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).

As to petitioner's assignment of error related to the sufficiency of the evidence, the Court finds no merit to this argument. Simply put, the evidence presented at adjudication was sufficient to support the finding that the child was neglected and that petitioner was an abusing parent. In the circuit court's adjudicatory order, it found that "the home in which [the child] resides is unfit for human habitation. The home reeks of cat urine and there is dirt and cat hair everywhere, including in [the child]'s bed." West Virginia Code § 49-1-3(10)(A)(i) defines a neglected child as one "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian." Based upon the above-quoted finding, it is obvious that the child was not provided with the necessary shelter he required due to the unfit conditions in the home. As such, the evidence was sufficient to both adjudicate the child as neglected and petitioner as abusive. The Court also finds the evidence sufficient to support the circuit court's termination of petitioner's parental rights.

At disposition, the circuit court specifically found that petitioner did not follow through with the reasonable family case plan or other rehabilitative services, and that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. West Virginia Code § 49-6-5(a)(6) states, in relevant part, as follows:

> Upon a finding that 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, [a circuit court may] terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

As defined in West Virginia Code § 49-6-5(b)(3), no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future shall be considered to exist when "[t]he abusing parent . . . [has] not responded to or followed through with a reasonable family case

plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child." Based upon the evidence, it is clear that the circuit court was correct in terminating petitioner's parental rights because of her failure to follow through with any of the services offered. Further, we find no error in the DHHR's failure to arrange for out-of-state services under the facts of this case. In the case of *In re Amber Leigh J.*, 216 W.Va. 266, 607 S.E.2d 372 (2004), we recognized that the mother therein, similar to the instant matter, "did not utilize any of the services offered to her by the DHHR, nor did she participate in the family case plan. In fact, after her children were removed from her home, [the mother] left West Virginia because her husband obtained employment in another state." *In re Amber Leigh J.*, 216 W.Va. 266, 271, 607 S.E.2d 372, 376 (2004). While the facts differ slightly in that the parents in that matter did not remain in contact with the DHHR while petitioner herein did, the fact remains that services were offered in West Virginia in both cases, and in both cases the parents failed to participate in the same. As such, we find no error in the circuit court's termination of petitioner's parental rights without directing the DHHR to locate out-of-state services for petitioner.

Lastly, 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. Simply put, the Court finds no merit in petitioner's argument that she was likely to fully comply with the terms of an improvement period. First, petitioner's record of non-compliance with prior services clearly indicated that she was not likely to fully participate in any improvement period offered. As noted in the circuit court's dispositional order, petitioner was so hostile to the service providers who attempted to help her avoid removal of the child from her home, that the providers refused to return. Despite these service, and based upon the representations of the guardian, the conditions in the home actually worsened during the period services were offered. Lastly, as the guardian correctly noted, petitioner's arguments on appeal evidence that she was not entitled to an improvement period.

Petitioner next argues that the evidence was insufficient to support adjudication, when it is clear that the circuit court was presented with incontrovertible evidence that the child was living in unfit conditions. 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). Based upon her argument on appeal, it is clear that petitioner has still not acknowledged the existence of a problem in her home and an improvement period would not have benefitted the child. As such, the Court finds that the circuit court was within its discretion to deny petitioner an improvement period based upon her failure to utilize the services offered below.

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.[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 petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: May 29, 2012

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

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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.

Justice Thomas E. McHugh