

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: Y.F. and S.F.

No. 11-1536 (Kanawha County 09-JA-54 & 10-JA-11)

FILED

September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Kristopher Faerber, arises from the Circuit Court of Kanawha County, wherein her parental rights to the children, Y.F. and S.F., were terminated by order entered on October 7, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Sandra K. Bullman, has filed her response on behalf of the children.

This Court has considered the parties' briefs and the 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 record 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 abuse and neglect proceedings below were initiated upon allegations that the petitioner's home was unsafe and uninhabitable due to being filthy and structurally unsound. unfit for human habitation. In fact, Y.F. was placed in a car seat on top of the trash in her crib to sleep. The initial petition also contained allegations of petitioner's mental health problems, including bipolar schizoaffective disorder, and her lack of sufficient motivation and organization to meet the needs of the infant child on an ongoing basis. Petitioner entered into a stipulated adjudication, and the circuit court found the child, Y.F., to be neglected. The circuit court granted petitioner a post-adjudicatory improvement period requiring her to (1) participate in parenting and adult life skills education; (2) follow the recommendations of a psychological evaluation; (3) obtain and maintain education or employment; (4) obtain and maintain suitable housing; and, (5) receive supervised visitation with the children. Petitioner initially complied with the terms of this improvement period such that the circuit court continued the same several times.

On January 16, 2010, petitioner and Respondent Father had another child, S.F., after which the DHHR filed an amended petition to include this child in the abuse and neglect proceedings below. At the conclusion of petitioner's improvement period, the circuit court set the matter for a dispositional hearing and found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future given that petitioner did not follow through with the reasonable family case plan or other rehabilitative

efforts. Based upon the children's best interests, the circuit court terminated petitioner's parental rights.

On appeal, petitioner alleges that the circuit court erred in terminating her parental rights and failing to employ the least restrictive alternative at disposition as required by West Virginia Code § 49-6-5(a). Specifically, she argues that she substantially corrected the conditions of abuse and neglect during her improvement period; that the stipulation at adjudication was based on the conditions of the home; that she and Respondent Father were able to secure and maintain appropriate housing, as acknowledged by a DHHR employee; that her failures to seek mental health treatment and to benefit from parenting classes are not grounds for termination; and, that the circuit court's finding as to her incapacity to properly parent her children is not a sufficient factual basis for termination. In relation to allegations of her mental health, petitioner argues that the DHHR failed to present any evidence that could be relied upon in determining that the children's welfare was endangered by her mental health; thus, the DHHR did not meet its clear and convincing burden of proof at disposition.

The guardian responds in support of affirming the circuit court's termination of petitioner's parental rights. The guardian argues, inter alia, that petitioner had mixed compliance during her improvement period; that petitioner was discharged from her psychologist for noncompliance; that petitioner missed several visitations with the children, had trouble feeding, bathing, and dressing the children, did not know how to calm or quiet the young children; and, that the parents admitted that the children were missing in the home "all the time" and for as long as two hours on one occasion. The guardian argues that at the time of the dispositional hearing, petitioner had not seen her children for five weeks, and it had become obvious that she was not capable of providing a safe and nurturing environment for the children.

The DHHR also responds in favor of affirming the circuit court's termination of parental rights. The DHHR argues that the conditions prompting the abuse and neglect proceeding were not remedied; that petitioner failed to comply with her improvement period when she did not complete the recommendations of her psychological evaluation, which reaffirmed a prior diagnosis of schizoaffective disorder, bi-polar type requiring constant treatment; and that Respondent Father testified that both parents stopped treating their mental illnesses in November of 2010. The DHHR asserts that the record is replete with evidence that Despite extensive and intensive parenting services, petitioner simply could not handle the responsibilities of parenting and that her mental health issues prevented her from forming the type of parental bond which fosters emotional growth and well-being in children.

The Court has previously established the following standard of review:

"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.” Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.* 228 W.Va. 89, 717 S.E.2d 873(2011).

Upon review of the appendix, the Court finds no error in the circuit court’s termination of petitioner’s parental rights. West Virginia Code § 49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where “[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” The circuit court was presented with ample evidence upon which to support its finding that petitioner had not followed through with the reasonable family case plan and other rehabilitative efforts during the extended period she was receiving services. When reviewing the testimony introduced at the dispositional hearing, it is clear that the circuit court did not err in finding there was no reasonable likelihood that petitioner could substantially correct the issues of neglect. As such, the circuit court did not err in proceeding to termination of parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

As for petitioner’s argument that the circuit court should have employed a less restrictive alternative at disposition, the Court finds this argument to be without merit. West Virginia Code § 49-6-5(a)(6) requires termination of parental rights upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future when necessary for the welfare of the child. As noted above, the circuit court made such findings, which are wholly supported by the record. As such, the circuit court did not err in proceeding to termination. Further, we note that

“[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . 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.” Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). The children in question were of the age contemplated by this language, and the circuit court specifically found that their best interests required termination of petitioner’s parental rights. Therefore, the Court finds no error in the circuit court’s decision to terminate petitioner’s 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 petitioner’s parental rights is hereby affirmed.

Affirmed.

ISSUED: September 24, 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

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.