STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.S., M.S., M.S., M.S., M.S., and M.A.S.:

No. 11-1549 (Raleigh County 10-JA-104 through 109)

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by Carl W. Roop, her attorney, appeals the Raleigh County Circuit Court's order dated October 17, 2011, terminating her parental rights to M.S., M.S., M.S., M.S., M.S., and M-A. S. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem John F. Parkulo has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response.

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).

This petition was initiated after one of the children, then six years old, was taken to Raleigh General Hospital, and then transported to Charleston Area Medical Center Women and Children's Hospital, weighing less than twenty pounds, severely dehydrated and malnourished, and with bruises on her body. An investigation revealed that the child was subjected to various abuse, including having her food restricted, being tied into a carseat on a regular basis, and being locked in a utility room at night with no bed or blankets to prevent her from eating in the middle of the night. The

investigation revealed that this abuse had been ongoing for at least two to three years, dating back to when the child lived with both Petitioner Mother and her father in Tennessee. Several referrals were made to the state of Tennessee, but due to errors by those officials, law enforcement was never contacted. Petitioner Mother had moved to West Virginia less than a year before the child's hospitalization, and the father had been to see the child in West Virginia approximately one month prior to her hospitalization. Petitioner Mother and her girlfriend A.W. were arrested on charges of child abuse with substantial injury, child neglect with substantial risk of death, and attempted murder of a child by refusal or failure to supply necessities. A Tennessee police officer testified before the circuit court that an indictment was being sought against the father in Tennessee.

Petitioner Mother did not testify at any of the hearings. However, she moved for a post-adjudicatory improvement period. The circuit court denied this request, finding that Petitioner Mother "has subjected the children to cruelty for a significant period of time and that it was systematically undertaken." The circuit court also found that petitioner has not admitted the abuse and thus "there is no basis for rehabilitation or the granting of an improvement period." The court then terminated Petitioner Mother's parental rights.

On appeal, Petitioner Mother makes several arguments. First, she argues that the circuit court erred in failing to appoint a separate guardian ad litem for each child. Petitioner argues that not appointing separate guardians denied the children effective representation, as the children had competing interests. Moreover, there was evidence that some of the children were abusive to one of the children, and the guardian noted that this was true. This resulted in a failure to protect the interests of all of the children.

The guardian responds, arguing that there was no conflict necessitating separate guardians ad litem in this matter. The guardian notes that he disclosed the other children's abuse of the six-year-old child in reference to possible sibling separation. The guardian argues that the abuse affected all of the children and the recommendation was termination regarding every child. Further, no party moved for separate guardians below. The DHHR concurs in the guardian's response on this issue.

With regard to a guardian ad litem's duties, this Court has held as follows:

> " 'Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code* [§] 49–6–2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct,* respectively, require an attorney to provide competent

> representation to a client, and to act with reasonable diligence and promptness in representing a client.' Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 4, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 4, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005). In the present case, the guardian ad litem fulfilled each of his duties. No motion was made below for appointment of six separate guardians ad litem, and under the facts of this case, this Court finds no error in the appointment of a single guardian for all of the children.

Petitioner Mother next argues that the circuit court erred in failing to comply with the time frames set forth in Rule 36 of the Rules of Procedure for Child Abuse and Neglect Proceedings. Petitioner Mother argues that the final disposition hearing was held on August 11, 2011, and the circuit court terminated Petitioner Mother's parental rights on that date. However, the final order was not entered until October 17, 2011. Petitioner argues that this is sufficient cause to remand the case for further proceedings.

The DHHR argues in response that although the order was presented more than ten days after the hearing, this timing would not change the rulings in the order and constitutes harmless error at best. Further, the DHHR argues that circuit courts rarely enter final dispositional orders within ten days of the dispositional hearing, and the failure to enter the order within ten days has not prejudiced Petitioner Mother. The guardian joins in the DHHR's response.

Rule 36 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings reads, in relevant part:

> At the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to the appropriate disposition in accordance with the provisions of W. Va. Code § 49-6-5. The court shall enter a disposition order, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing.

Moreover, "'[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings . . . has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.' Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001)." Syl. Pt. 6, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005). In the present case, the circuit court did not enter the order within ten days of the conclusion of the hearing. While this Court reminds the circuit court of its duty to adhere to the Rules of Procedure for Child Abuse and Neglect Proceedings, we do not find that the entry of the order "substantially disregarded or frustrated" the process established by the rules.

Petitioner Mother next argues that the circuit court's final order did not contain clear and complete findings of fact and conclusions of law. The petitioner argues that the circuit court did not comply with West Virginia Code § 49-6-5(a)(6). The petitioner also argues that failure to comply with the relevant code provisions prevents proper review by this Court.

In response, the guardian argues that the findings of fact and conclusions of law were properly preserved in both the final order and the record of the circuit judge's decision. The DHHR concurs in the guardian's response.

> Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49–6–5(a)(6) (1998) (Repl.Vol.2001) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an allegedly neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49–6–5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

Syl. Pt. 4, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001). Upon a review of the record in this matter, as well as the relevant orders, this Court finds that the circuit court made adequate findings of fact and conclusions of law.

Petitioner Mother next argues that the circuit court erred in considering her silence as an admission of guilt. The petitioner states that the circuit court must consider the constitutional rights of Petitioner Mother to remain silent in the abuse and neglect case due to pending or threatened criminal charges. The circuit court in this case concluded that the silence of Petitioner Mother was an admission of guilt and therefore denied her an improvement period; however, the petitioner argues that she was cooperative to the DHHR and that the DHHR knew that she could make no admissions due to the criminal charges. The petitioner argues that this case should be remanded pursuant to *In re Daniel D.,* 211 W.Va. 79, 562 S.E.2d 147 (2002).

The guardian argues that *In re Daniel D.* is distinguishable in that it discussed how a respondent parent concerned with criminal prosecution in an abuse and neglect case can advance the case by use of a limiting order. There was no request for a limiting order in this matter. Further, the guardian argues that Petitioner Mother aggressively attempted to prevent termination of her parental rights, but chose not to testify. Further, in this matter, no improvement period was ever granted and the children have been in DHHR custody since the petition was filed. Further, the guardian argues that many factors went into the denial of an improvement period, including the petitioner's

incarceration, the egregious nature of the case, and the impact on the children. Moreover, the guardian argues that the DHHR is not required to make reasonable efforts to preserve the family if the child has been subjected to aggravated circumstances, including chronic abuse. The guardian argues that termination was proper in this matter. The DHHR concurs in the guardian's arguments.

This Court has held that "[b]ecause the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability." Syl. Pt. 2, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002) (quoting Syl. Pt. 2, *W. Va. Dep't. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996)). However, this Court clarified:

> As applied to the issue of culpability, the rule [allowing one's silence as affirmative evidence of culpability] simply confronts the accused parent with a choice: Assert the privilege against self-incrimination with the risk that silence will be considered in the civil proceeding as evidence of culpability, or waive the privilege and offer such evidence as the accused may alone possess to refute the charge of abuse and neglect.

In re Daniel D., 211 W.Va. 79, 87, 562 S.E.2d 147, 155 (2002). Further, this Court has held:

> "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). First, this Court finds that the circuit court had adequate evidence in which to deny the petitioner an improvement period, including that Petitioner Mother never admitted to any wrongdoing. Further, pursuant to *In re Daniel D.*, Petitioner Mother's silence could properly be considered evidence of her culpability. This Court finds no error in the denial of an improvement period.

Petitioner Mother next argues that the circuit court erred in allowing the State and the DHHR to forego providing Petitioner Mother with proper notice and evidence as required by Rules 28, 29, and 30 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Specifically, the petitioner argues that "the actions of the department demonstrate a complete refusal to attempt to provide [petitioner] with services available to reunify the family." Petitioner Mother argues that the DHHR failed to prepare a child's case plan and permanency plan, as well as a list of witnesses.

The DHHR argues first that none of these issues were raised in the circuit court proceedings. The DHHR also notes that a caseworker testified that the proper documents had been prepared, although the worker could not determine who received the information. The DHHR notes that there is no clear evidence that the deficiencies complained of occurred, but there is evidence that none of these issues were raised below. Petitioner Mother had the opportunity to present her own witnesses and cross-examine all other witnesses. Further, the DHHR notes that it filed at least two case summary reports in this matter, stating that it intended to seek termination of parental rights. Moreover, the DHHR notes that it was not required to make efforts at reunification in this matter due to the aggravated circumstances. The guardian concurs in the DHHR's response.

Although we are concerned about the allegations that the DHHR failed to follow procedures such as the proper preparation of the child case plan, we conclude that such alleged omissions do not warrant reversal in light of all the circumstances in this case. It is clear from the record that Petitioner Mother had adequate notice that the DHHR was seeking termination, and pursuant to West Virginia Code § 49-6-5(a)(7)(A), the DHHR is not required to make reasonable efforts toward reunification due to the chronic abuse of the child.

Finally, Petitioner Mother argues that the circuit court erred in failing to have a separate and distinct hearing for the motion for an improvement period and the final termination hearing. Petitioner Mother argues that the circuit court erred in failing to consider the different standards and purposes of each issue. The guardian responds, arguing that Rule 36 of the Rules of Procedure for Child Abuse and Neglect Proceedings allows the two hearings to be conducted together. The DHHR concurs in the guardian's response. This Court finds no error in the circuit court's decision to address both issues in one hearing, and the petitioner has presented no legal basis to overturn the order based on the two issues being decided in the same hearing.

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

[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.

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). This Court further notes that continued sibling visitation should occur, as long as said visitation is in the best interests of the children.

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: April 16, 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