STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: B.R. II, A.R., K.R., E.R., and K.R:

No. 11-1596 (Mercer County 10-JA-120 through 10-JA-124)

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein Petitioner Mother's parental rights were terminated by order entered on October 27, 2011. This appeal was timely perfected by her counsel Gerald Linkous, with an appendix accompanying her petition. The children's guardian ad litem, Ryan Flanigan, 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 William L. Bands, also filed a response in support of the circuit court's order, joining in and concurring with the guardian's response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, 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 October of 2010, DHHR filed the instant petition based on allegations that the children's parents failed to provide a proper place for the children to live and had substance abuse issues. In particular, the petition asserted that cockroaches were scattered all throughout the cabinets in the home, crawling over the baby cereal, baby formula, and what little canned food was there. Cockroaches were also observed on the ceilings and walls. A few days before the petition was filed, the parents tested positive for opiates and benzodiazepines and the petition stated that "[i]t appears as though [the parents] are using their financial resources to support their substance abuse rather than providing for their children's basic needs."

At adjudication in December of 2010, both parents stipulated to abuse and neglect and waived their rights to an adjudicatory hearing. The circuit court granted each parent a post-adjudicatory improvement period and family case plans were devised to require the parents to seek substance abuse treatment, attend parent counseling and classes, attend supervised visitation with the children, and obtain suitable housing. In April of 2011, DHHR filed a motion to terminate the parents' parental rights based on their failure to comply with services. The circuit court denied this motion, finding that it would be premature to terminate the improvement period.

At disposition in October of 2011, DHHR again moved for termination of both parents' parental rights. The circuit court heard testimony from several witnesses who were involved with the family throughout these proceedings. The Child Protective Services caseworker, Angela Cooke, testified to the parents' positive drug screens for hydrocodone, hydromorphone, and benzodiazepine on July 7, 2011, the day the parties met to devise a family case plan. Ms. Cooke further testified that after these positive screens, the parents were required to undergo in-patient treatment, but they refused. Ms. Cooke testified that it was difficult to keep in touch with the parents, the parents moved around frequently, and their voicemail boxes were often full. Veronica Stewart, the office manager and assistant at the parents' counselor's office, testified that she had to reschedule several of the parents' appointments. Shannon Kennedy, the chief collector and laboratory technical assistant at the Mercer Day Report Center, testified to the parents' positive drug screens, including those as recent as September of 2011. A provider from Second Chance, John Ervy, also testified that it was difficult to locate the parents and that the home they were living in was a "dump" with a sagging roof, peeling shingles, floors with soft spots, and a large dump site right in the front of the yard. The owner of Second Chance, Angela Ratliff Hamrick, also testified that it was difficult to contact the parents and that the parents did not keep many of their appointments. Dr. Noel Jewell from the suboxone program in Lewisburg testified that the parents were doing fine in the program until their relapse about six to seven weeks into the program. He further opined that neither parent was committed to sobriety. The children's paternal uncle, Gary R., testified. He explained that the subject parents were renting their current residence from him. He admitted that work was needed on the house and the yard, such as on the soft spots on the floor and the trash in the front yard. Lastly, both parents also testified; both testified that many appointments were missed due to health issues or because they could not contact the service providers. Based on the evidence and testimony presented, the circuit court found that neither parent completed their required counseling, visitation, or parenting sessions. It further found that both parents continued to test positive for drugs, even while in drug therapy. Accordingly, the circuit court terminated the parental rights of both parents without a dispositional improvement period. It is from this order that Petitioner Mother appeals.

On appeal, Petitioner Mother argues that the circuit court erred in terminating her parental rights without an improvement period at disposition. She argues that at the dispositional hearing, the evidence indicated that she was undergoing treatment at a suboxone program in Lewisburg and that, despite her relapse, she was receiving counseling at the clinic. She further argues that even though she missed a number of visits with her children, the visits they did have went well. Moreover, although she and the children's father had difficulty obtaining housing, they currently have housing.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Mother's parental rights. They assert that this Court has held as follows:

> "[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, 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." 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). They assert that in this case, the parents were granted a post-adjudicatory improvement period and family case plans were implemented. The case plans required the parents to seek substance abuse treatment, monitoring, and random drug screens. The parents were further required to undergo counseling, parenting classes, supervised visitation with the children, and obtain suitable housing. However, at disposition, the evidence showed that the parents did not complete their drug treatment and had poor attendance in their parent counseling classes, scheduled visitation with the children, and scheduled parenting classes. Further, the testimony at disposition provided that the parents' current housing was not suitable. Accordingly, both the guardian ad litem and DHHR argue that the circuit court did not abuse its discretion in terminating the parents' parental rights without an improvement period at disposition.

The Court agrees. The circuit court is not required to grant an improvement period at disposition. Rather, pursuant to West Virginia Code § 49-6-12, it is the subject parent's burden to first prove by clear and convincing evidence that he or she would substantially comply with the terms of an improvement period. A review of the submitted appendix record confirms the circuit court's findings of fact and conclusions of law in its termination order. Testimony by the family's service providers indicated that the parents were difficult to contact and their attendance for services was very poor. The parents did not deny this poor attendance, even when they gave excuses for it. The testimony also indicated that throughout this case, the parents continued to produce drug screens which were positive for drugs. Morever, the parents' treating psychiatrist in this case provided his opinion that neither parent was committed to sobriety. The parents failed to obtain suitable housing for their family. The parents were granted an adjudicatory improvement period, DHHR was denied of its initial motion to terminate their parental rights in April of 2011, and the parents still failed to make improvements. Petitioner Mother did not meet her burden to the circuit court for an improvement period at disposition. Given these circumstances and given the subject children's young ages, the Court finds no error in the circuit court's termination of Petitioner Mother'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 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

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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.