

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

In Re: L.L.

No. 11-1601 (Grant County 10-JA-28)

FILED

May 29, 2012

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

MEMORANDUM DECISION

Petitioner Mother appeals, by counsel Gaynore L. Cosner III, from the Circuit Court of Grant County's October 26, 2011, order, wherein her parental rights to L.L. were terminated. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgodka, has filed its response. The guardian ad litem, Jessica M. Baker, has filed her response on behalf of the child.

This Court has considered the parties' briefs and the appendix 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.

On November 30, 2010, the DHHR filed its initial petition in the abuse and neglect proceedings below. The DHHR alleged that petitioner and her boyfriend, J.C., had repeatedly engaged in domestic violence in the child's presence. Upon the initial referral, the DHHR attempted to investigate the allegations of domestic violence in petitioner's home. According to the DHHR's petition filed below, petitioner was uncooperative and even "hampered efforts . . . to meet with and interview [the child] by sending her to stay for awhile [sic] in Garrett County, Maryland." The petition also alleged that petitioner allowed the child to ride unrestrained in a vehicle driven by J.C., while he was intoxicated and traveling 78 m.p.h. in a 55 m.p.h. zone. The DHHR further alleged that petitioner failed to provide the child with a safe, healthy, nurturing, and stable environment.

At adjudication, petitioner stipulated to abuse and neglect of the child. The circuit court found the child was abused and neglected in that petitioner allowed her to be present during instances of domestic violence and failed to protect the child from the same. The circuit court further found that petitioner put the child at risk of serious injury by allowing her to ride in a vehicle unrestrained while the vehicle was operated at a high rate of speed by an intoxicated driver. Thereafter, petitioner was granted a post-adjudicatory improvement period.

During the proceedings below, petitioner expressed her intention to marry J.C. once her divorce from Respondent Father was finalized, despite their history of domestic violence. Based upon this intention, J.C. was also included in the proceedings and was granted a post-adjudicatory improvement period as well. However, J.C. violated the terms of his home confinement from a

separate criminal proceeding and was subsequently incarcerated. Following his incarceration, J.C. announced to the circuit court that he and petitioner were no longer a couple and that he wished to be dismissed from the proceedings. The circuit court granted this request.

As to petitioner's participation below, the circuit court found that she "completely failed to comply with the terms and conditions of the improvement period" The record reflects that petitioner was arrested, charged with, and made admissions to numerous crimes of burglary and theft which were alleged to have taken place during a portion of her improvement period. Based upon these criminal accusations, as well as many other issues evidencing non-compliance with the terms of her improvement period, the circuit court terminated petitioner's parental rights. On appeal, petitioner argues that the circuit court erred in finding that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and in terminating her parental rights. Petitioner argues that the weight of the evidence adduced at disposition showed that she made progress during her improvement period, including the following facts: she found employment; she found a more stable residence; she obtained a learner's permit and driver's license; she attempted to locate a GED class; and, she planned to apply for services in Maryland once she had transportation to the social services office. Based upon these facts, petitioner argues that the circuit court's finding that she could not substantially remedy the conditions of abuse and neglect in the near future was clearly erroneous. For these reasons, petitioner argues that the circuit court's termination should be reversed.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that petitioner showed little to no improvement, despite the extensive services offered during her improvement period. The guardian argues that petitioner's decision to commit multiple crimes during her improvement period demonstrates that she was not serious about improving and did not believe there would be adverse consequences to her actions. The guardian further argues that, aside from obtaining her driver's license, petitioner did nothing to indicate that she would be able to maintain a stable residence for herself and the child once services were concluded. In fact, the guardian argues that even with a full complement of services, petitioner was unable to maintain a residence and ended up incarcerated for a large portion of the improvement period. The guardian concludes that the evidence clearly shows that petitioner demonstrated a complete lack of effort and ability to complete any of the tasks set forth for her in the family case plan.

The DHHR responds and argues that petitioner has omitted several of her failings during her improvement period, including her discharge from two different therapists for failure to attend appointments. The DHHR also argues that petitioner missed ten to twelve scheduled appointments with the worker assigned to provide petitioner with parenting training. According to that worker's testimony, petitioner was difficult to contact, did not call to cancel or reschedule appointments, and eventually told the worker that she did not need the services. The DHHR also cites petitioner's lack of interest in visiting her child since testimony showed that petitioner only visited the child once after July of 2011. Aside from obtaining her driver's license, the DHHR argues that petitioner did nothing to promote stability in the child's life as she drifted from place to place before her incarceration. For

these reasons, the DHHR argues that the circuit court's termination should be affirmed. The Court agrees.

“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).

Simply put, the Court finds no merit in petitioner's assignment of error. The record below clearly established that petitioner failed to follow through with the reasonable family case plan during her improvement period. At disposition, the circuit court noted that, despite blaming J.C. for her problems, petitioner continued her relationship with him even after he perpetrated domestic violence against her. The circuit court also found that petitioner failed to follow through with the family case plan in the following ways: continued association with individuals using controlled substances and alcohol; inability to obtain transportation to comply with services, despite obtaining transportation to commit crimes; failure to attend meetings with service providers; failure to complete parenting adult life skills; failure to complete therapy; refusal to arrange for supervised visitation with the child; failure to maintain a stable, suitable residence; continued moving from residence to residence; the decision to move to Maryland, thereby disrupting services from the DHHR; and, failure to provide even slight financial support for the child. The circuit court found that the applicable case plan clearly set forth the issues that petitioner was to address and that the DHHR provided services in order to help petitioner rectify her problems. The circuit court found that, despite this assistance, petitioner “totally failed to comply with the terms and conditions” thereof, as most egregiously evidenced by her perpetration of multiple crimes during the improvement period.

West Virginia Code § 49-6-5(b)(3) states, in relevant part, that there is no reasonable likelihood the conditions of abuse and neglect can be substantially corrected in circumstances 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, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child.” Based on the evidence outlined above, the circuit court specifically found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect in the near future. Further, the circuit court found that it was not in the child's best interest “to further delay her need for [a] stable and nurturing environment by waiting for the [petitioner] to grow up and fully recognize and accept [her] responsibilities.” Upon review of the appendix, the Court has

determined that this finding was not erroneous, nor was termination of petitioner's parental rights. Pursuant to West Virginia Code § 49-6-5(a)(6), the circuit court was within its discretion to terminate petitioner's parental rights upon the finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect. For these reasons, we decline to disturb the circuit court's termination on appeal.

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.

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.

ISSUED: May 29, 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