

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

In Re: S.K., J.K., and C.K.:

No. 11-1671 (Mineral County 10-JA-21, 22, and 23)

FILED

April 16, 2012

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

MEMORANDUM DECISION

Petitioner Mother, by Gaynor L. Cosner III, her attorney, appeals the Circuit Court of Berkeley County’s order dated November 8, 2011, terminating her parental rights to S.K., J.K., and C.K. The appeal was timely perfected by counsel, with petitioner’s appendix accompanying the petition. The guardian ad litem Kelley A. Kuhn has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources (“DHHR”), by Lee A. Niezgoda, 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).

The petition in this matter was filed in August of 2010, alleging that the father sexually abused two year old S.K. S.K. was brought to the hospital by the father with vaginal bleeding, after he was the only adult in contact with her for the prior forty-eight hours. Doctors testified that the injuries were consistent with sexual abuse, although they could not definitively state that S.K. was sexually abused. S.K.’s sister J.K told a DHHR worker that she witnessed her father hurting S.K.’s “pee-pee.” The children were taken to Petitioner Mother and a safety plan was put into place; however, within a day of the children arriving at Petitioner Mother’s home, she called the DHHR

and reported that she could not take care of all of the children together for more than one week. No improvement period was granted based upon the aggravated circumstances. The circuit court found by clear and convincing evidence that the father sexually abused S.K. Thus, the father's parental rights were terminated. At that time, Petitioner Mother was given an improvement period.

Throughout the case, J.K. has been seen by a therapist, and as the case progressed, J.K. disclosed that Petitioner Mother had physically and sexually abused her and her siblings, and had neglected them by not feeding them adequately or caring for them properly. An amended petition was filed, alleging physical and sexual abuse against Petitioner Mother. At several adjudicatory hearings, J.K.'s treating psychologist testified to the disclosures and the abuse reported by J.K. Further, DHHR workers and the Court Appointed Special Advocate ("CASA") in the case reported the children had fear of returning to Petitioner Mother's care. Petitioner Mother's parental rights were terminated via order dated November 8, 2011, after the circuit court found that it was not in the children's best interests to be reunited with the petitioner.

On appeal, Petitioner Mother argues that there was not clear and convincing evidence to establish that J.K. and S.K. were sexually abused. The only witness who testified to the abuse was a psychologist, who had met with J.K. several times. J.K. revealed abuse against herself and her sister S.K., by both their father and their mother. Petitioner Mother testified on her own behalf, indicating that she and her husband had split up and then later divorced. Petitioner Mother also denied that she had abused the children. Petitioner Mother states that the girls were abused by their father, not her, and that the children's fear of her is due to the father's abuse. Moreover, Petitioner Mother argues that the psychologist admitted bias against the mother, as the psychologist stated that the mother could not improve.

The guardian responds, arguing in favor of termination and noting that the treating therapist testified in depth regarding J.K.'s allegations of abuse against her mother, as well as the long term problems J.K. has due to the abuse. The guardian also argues that the therapist is not biased against the mother, and only refused to observe visitation because her presence would have been inappropriate as she has established a counseling relationship with the children. Further, the circuit court determined that the therapist's testimony was reliable. The guardian adds that termination is in the best interests of the children.

The DHHR also responds in favor of termination, arguing that the therapist was not biased against the mother, but merely believed that an impartial person who did not have a prior relationship with the family should observe and assess the family during visitation. Further, the therapist testified to the abuse and her opinion was found credible by the circuit court. Moreover, the only opposing testimony was petitioner's blanket denial.

“[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). In the present matter, this Court finds no error in the termination of parental rights. The circuit court’s findings are not clearly erroneous, given the detailed testimony of the therapist and the reports that the children feared returning to the mother.

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).

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.

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