STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: J.H.**

No. 12-0181 (Mingo County 11-JA-89)

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Marsha Webb-Rumora, appeals the Circuit Court of Mingo County's order entered on January 17, 2012, terminating her parental rights to J.H. The guardian ad litem, Diana Carter Wiedel, has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

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 petition was filed and alleged aggravated circumstances due to the prior termination of Petitioner Mother's parental rights to two older children following her guilty plea to criminal charges that led to the previous termination. Prior to her incarceration on those charges, Petitioner Mother became pregnant with J.H. She also discontinued her use of drugs, which she had been abusing during the prior abuse and neglect proceedings. Petitioner gave birth to J.H. while incarcerated, after which the instant petition was filed. She was released from incarceration approximately a month after the birth and was placed on parole for eight months, during which time she was barred from contact with any minor, including J.H. On the date of her release, Petitioner Mother went to the DHHR offices requesting services in an attempt to be reunited with her child. Due to a delay in the DHHR's commencement of services for Petitioner Mother, she chose to seek out her own services. Although the circuit court recognized Petitioner Mother's compliance in all services and in remaining drug-free, the circuit court found that because a condition of her parole barred her from contact with any minor, her parental rights had to be terminated in order to provide permanency for the child. Further, the circuit court noted that petitioner was previously diagnosed with bipolar disorder, but was not undergoing treatment at that time.

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).

On appeal, Petitioner Mother argues that the circuit court erred in terminating her parental rights. She notes that she has done everything possible to improve her circumstances since the prior termination, including having all negative drug screens and seeking all available services. Moreover, she continues to participate in drug rehabilitation and has divorced the father of the two older children. Petitioner notes that her parole conditions would end around the same time as an improvement period would end.

The DHHR responds in favor of the termination of Petitioner Mother's parental rights and argues that although petitioner has remained drug-free, she has never requested inpatient drug treatment. The DHHR asserts that petitioner continues to exhibit poor judgment, as she became pregnant with J.H. by a man who is now in prison. Importantly, as the DHHR notes, petitioner was prohibited from having contact with a minor and, therefore, could not have contact with her own child for eight months, thus preventing reunification within a reasonable amount of time.

The guardian responds that she would have recommended reunification in this matter, as she believes that Petitioner Mother has changed her circumstances, but notes that reunification could not occur based on Petitioner Mother's parole conditions. The guardian therefore reluctantly supports the termination of parental rights in this matter.

This Court has found as follows:

> When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49–6–5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

Syl. Pt. 4, *In re George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). Moreover,

> [w]here an abuse and neglect petition is filed based on prior involuntary termination(s) of parental rights to a sibling, if such prior involuntary termination(s) involved neglect or non-aggravated abuse, the parent(s) may meet the statutory standard for receiving an improvement period with appropriate conditions, and the court may direct the Department of Health and Human Resources to make reasonable efforts to reunify the parent(s) and child. Under these circumstances, the court should give due consideration to the types of remedial measures in which the parent(s) participated or are currently participating and whether the circumstances leading to the prior involuntary termination(s) have been remedied.

Syl. Pt. 5, *In re George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). In the present matter, the circuit court recognized that while Petitioner Mother had improved her circumstances, she could not comply in an improvement period due to her parole conditions. Additionally, the circuit court noted that she was not undergoing mental health treatment at the time. This Court finds no reversible error in the order of the circuit court.

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 twelve months of the date of the disposition order. As this Court has stated,

> [t]he [twelve]-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: October 22, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum