STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: B.T.C.**

No. 12-0279 (Harrison County 11-JA-93-1)

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Jerry Blair, arises from the Circuit Court of Harrison County, wherein her parental rights to her child were terminated by order entered on February 2, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, April Conner, has filed a response on behalf of the child.

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 proceedings in regard to this child were initiated when the DHHR filed a fourth amendment to the abuse and neglect petition in a prior matter related to petitioner's three oldest children. According to the amended petition, the DHHR alleged aggravated circumstances against petitioner in relation to B.T.C.[1] due to the involuntary termination of her parental rights to three other children in April of 2010. The DHHR filed this amendment the day after B.T.C.'s birth pursuant to West Virginia Code § 49-6-5b(a)(3). In the prior abuse and neglect proceeding, petitioner was found to be an abusing parent after her daughter, B.C., suffered a fractured femur and two fractured ribs, the injuries being of differing ages. In that proceeding, the circuit court found that petitioner and her then live-in boyfriend, B.S., were the child's sole caregivers at the time she sustained her injuries. At adjudication in the current matter, the circuit court specifically found that "the perpetrator [of this prior abuse] remains unidentified even to this day," and that "[petitioner] has done nothing more than continue to point the finger at [B.S.]" As such, the circuit court found that there had been no substantial change in petitioner's circumstances, and that simply leaving B.S. was insufficient, as petitioner herself could have perpetrated the abuse. Petitioner was therefore found to be an abusing parent in the proceedings related to B.T.C.

[1]Because a discussion of a prior circuit court abuse and neglect proceeding involving a child with the initials B.C. is necessary herein, the Court will refer to the child at issue in this matter by including his middle initial throughout.

At disposition in this matter, the circuit court found that it "still does not know the identity of the perpetrator who injured the infant child, [B.C.] with the serious non-accidental traumas," and that "[petitioner] either physically abused the children or failed to protect her child from said abuse." Further, based upon psychological testing, expert witness Dr. Ed Baker testified that petitioner "still takes no responsibility for what happened to [B.C.]" This expert further testified that there was no realistic expectation that petitioner would meet any requirements necessary to have B.T.C. returned to her, including his recommendation for individual therapy. Additionally, Dr. Baker testified that petitioner was not ready for unsupervised visitation in this matter because of her previous history and her relationships with men upon which she is overly dependent to the point that she places her children in danger. Based upon this evidence, the circuit court specifically found that petitioner had not shown that she remedied the problems that led to the prior involuntary terminations of her parental rights. As such, the circuit court found that there was no reasonable likelihood that petitioner could correct the conditions of abuse and/or neglect in the near future, denied her an improvement period, and thereafter terminated her parental rights to B.T.C.

On appeal, petitioner alleges that the circuit court erred in terminating her parental rights without granting her an improvement period. Specifically, petitioner argues that the circuit court misapplied case law by extending the doctrine regarding failure to identify a perpetrator of abuse beyond its appropriate scope. According to petitioner, this Court's prior decisions related to failure to identify perpetrators of abuse do not extend the prior failure to identify to a subsequent, after-born child who would never be in the same home as the alleged perpetrator. Petitioner argues that there was never any evidence that she perpetrated the abuse against B.C., and that she could not honestly state that her ex-boyfriend B.S. perpetrated the abuse because she did not witness the incident. However, petitioner argues that she has stated that she believes B.S. perpetrated the abuse since she first discovered the child's injuries. According to petitioner, the overwhelming evidence in this matter established that the circuit court should have granted her motion for a post-adjudicatory improvement period to complete her individualized counseling. She further alleges that a substantial change in circumstances was demonstrated by clear and convincing evidence such that there was a reasonable likelihood that she could substantially correct the conditions of abuse and neglect herein. Petitioner argues that this is supported by her demonstration that she had not continued in her poor choices of abusive men, that she fully cooperated in all matters, and that she had established a stable living environment for herself and her child.

The DHHR responds and argues that the proceedings below concerned aggravated circumstances and were governed by West Virginia Code § 49-6-5b(a)(3) due to the prior involuntary termination of petitioner's parental rights to other children. According to the DHHR, prior decisions from this Court lower the evidentiary threshold necessary for termination of parental rights in such cases. The DHHR further notes that our prior cases also require a parent to show a substantial change in circumstances has occurred since the prior termination in order to achieve reunification. In regard to the specific facts of the instant matter, the DHHR argues that petitioner failed to take any responsibility for the abuse that occurred to her infant child. The DHHR asserts that not only did petitioner fail to definitely identify the perpetrator of the abuse, she cannot be ruled out as the perpetrator herself. The DHHR argues that petitioner's explanation for the child's injuries

was implausible and inconsistent with medical testimony presented in the prior proceedings. Further, the DHHR argues that petitioner never recognized the child's injuries as abuse. Specifically, the DHHR argues that medical evidence showed that both fractures would have required a great deal of force and were the result of abuse, and also that the child would have been in a great deal of pain after the femur was broken. According to the DHHR, petitioner failed to admit that she either abused the child herself, or that she knew B.S. abused the child and failed to secure much needed medical assistance after discovering the injuries.

In regard to petitioner's argument that she complied with services, the DHHR notes that the circuit court found petitioner to have only participated with minimal services, while avoiding any services that might have effectuated the needed change. The DHHR argues that petitioner avoided therapeutic intervention designed to redirect her way of thinking and living in order to bring about lasting changes in her lifestyle and approach to parenting. In short, the DHHR argues that petitioner failed to show an overall change in attitude and approach to parenting. Lastly, as to petitioner's argument that the circuit court misapplied applicable law, the DHHR argues that petitioner's issues in the prior proceedings were much deeper than failing to give a detailed account of abuse by B.S. Most importantly, however, the DHHR argues that current evidence suggests that petitioner herself cannot be ruled out as a perpetrator of the prior abuse because she remains committed to a story that is completely converse to medical evidence. Lastly, the DHHR argues that petitioner continues to suffer from relationship instability and psychological disorders which are extremely resistant to change.

The guardian ad litem also argues in support of the circuit court's termination of petitioner's parental rights. In support, the guardian argues that the circuit court was correct in denying petitioner an improvement period because she failed to identify the perpetrator of the serious physical abuse inflicted upon her older child, B.C. The guardian also argues that the circuit court properly considered petitioner's progress in attempting to substantially change the circumstances in her home, and concluded that such progress was insufficient to remedy the problems that led to the prior involuntary termination of her parental rights.

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." 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 Cecil T.* 228 W.Va. 89, 717 S.E.2d 873(2011).

Upon review of the record, the Court finds no error in either the circuit court's decision to deny petitioner an improvement period or in terminating her parental rights to B.T.C. In denying petitioner's motion for a post-adjudicatory improvement period, the circuit court found that petitioner "has not worked to identify the perpetrator of the abuse of the sibling of [B.T.C.] . . . [n]or has she participated in the in depth counseling that Dr. Baker has now recommended on more than one occasion." The circuit court further found that petitioner "is participating in the services that do not require her to look too deeply in to her own problems," and that "until [petitioner] addresses her psychological issues as set out by Dr. Baker, she cannot make any true progress." Pursuant to West Virginia Code § 49-6-12(b)(2), a parent in an abuse and neglect proceeding has the burden to establish by clear and convincing evidence that he or she is likely to fully participate in an improvement period in order to obtain the same. Based upon the circuit court's findings as to petitioner's lack of meaningful compliance throughout these proceedings, it is clear that petitioner failed to meet this burden. Further, this Court had previously held as follows:

> 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.

W. Va. Dept. of Health and Human Res. Ex rel. Wright v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). On appeal, petitioner alleges that she should have been granted an improvement period to complete the recommended counseling, yet the record shows she took no steps to complete the same prior to disposition below despite Dr. Baker having recommended therapy on at least two occasions. As such, the circuit court did not err in denying petitioner a post-adjudicatory improvement period.

As for its decision to terminate petitioner's parental rights, the evidence below supports the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse in the near future. Contrary to petitioner's argument that the circuit court misapplied our prior holdings in regard to failure to identify the perpetrator of physical abuse, the Court finds no error in the circuit court's application of established case law. This Court has held as follows:

> "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified

> and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 6, *W. Va. Dept. of Health and Human Res. Ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). Nothing in our case law precludes a circuit court from applying a parent's past failure to identify an abuser to an after-born child, especially in light of the fact that a parent who has previously had an involuntary termination of parental rights is required to show a substantial change in circumstances in subsequent proceedings.

We have previously held 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).' Syllabus Point 4, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999)."

Syl. Pt. 4, *In re George Glen B.*, 207 W.Va. 346, 532 S.E.2d 64 (2000). As the circuit court found in the instant matter, petitioner did nothing to remedy the circumstance of the prior termination, specifically noting that "[petitioner] has entirely failed to take responsibility in the capacity of caregiver for the abuse levied upon the child." While petitioner argues that she has consistently identified her ex-boyfriend B.S. as the perpetrator of this prior abuse, the circuit court found that it could not rule out the petitioner herself as the abuser. As noted above, the circuit court found at disposition in this matter that petitioner either perpetrated the physical abuse against B.C. or failed to protect her from the same. Accordingly, petitioner's argument that she has remedied the circumstances that led to the prior termination by breaking up with B.S. is wholly without merit.Therefore, the Court finds no error in the circuit court's termination of petitioner's parental rights.

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.

ISSUED: September 7, 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