STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

***In Re*: J.W., L.W. & L.W.**

No. 12-0496 (Putnam County 11-JA-19, 11-JA-20 & 11-JA-21)

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Lisa M. Moye, arises from the Circuit Court of Putnam County, wherein her parental rights to her children were terminated by order entered on February 22, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Bree Whip Ogle, has filed her response on behalf of the children.

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.

According to the initial abuse and neglect petition filed below, these proceedings were initiated upon allegations that petitioner's youngest child, L.W., was born addicted to oxycodone, benzodiazepines, and marijuana. The DHHR alleged that the child exhibited withdrawal symptoms and was placed on methadone following his birth. Petitioner stipulated to neglect at adjudication, admitting that she used marijuana while pregnant with L.W., that she has a history of prescription drug abuse, and that she neglected the children on May 13, 2011, by exposing the children to drug usage and paraphernalia. As such, the circuit court found petitioner to be an abusing parent, and thereafter granted her a post-adjudicatory improvement period. However, approximately two months into petitioner's improvement period, the DHHR filed a motion to revoke the same upon allegations that petitioner missed a drug screen and three visitations with her children. Prior to the hearing on this motion, the DHHR filed an amended motion to revoke, alleging that petitioner had missed an additional drug screen. After a hearing on this motion, the circuit court held the same in abeyance for thirty days. In January of 2012, the DHHR renewed its motion to revoke the improvement period and submitted a voluntary admission from petitioner that she had used methamphetamine, marijuana, and oxycodone on January 5, 2012. The circuit court thereafter revoked petitioner's improvement period and terminated her parental rights to the three children.

On appeal, petitioner alleges that the circuit court erred in revoking her improvement period and in terminating her parental rights. According to petitioner, her lone relapse into drug abuse on a single day was insufficient to revoke her improvement period and terminate her parental rights.

Petitioner argues that she challenged the DHHR's allegations that she was not cooperating with drug screens and visitations, and that the circuit court ordered more cooperation between the parties as a result. Petitioner argues that if she had provided a clean drug screen, the circuit court would have likely continued her improvement period. Petitioner further disagrees with the circuit court's finding that there was no reasonable likelihood that she could substantially correct the conditions of abuse and neglect in the near future, arguing that if her improvement period had continued, she could have received the appropriate treatment for her drug issues. Petitioner cites to our prior holding in *In re Dejah Rose P.*, 216 W.Va. 514, 607 S.E.2d 843 (2004), wherein the mother failed to respond to treatment for drug abuse three times before her parental rights were terminated. According to petitioner, in the present matter, it was never proven that she had an inability to overcome her addiction in the near future. Further, she distinguishes her proceedings from the above-reference case in that she had not yet received any treatment at the time of termination.

Petitioner argues that she refused treatment at Highland Hospital's inpatient substance abuse program because she believed that she would not have been permitted to have her lawfully prescribed medications during this program. According to petitioner, the DHHR expected her to go without these medications, thereby substituting their judgment regarding medical treatment for those of her treating physicians. Petitioner argues that she participated in adult life skills training, individualized parenting training, passed drug screens, and attended supervised visitation with her children. In short, petitioner argues that a drug addiction is not overcome quickly, and the revocation of her improvement period and termination of her parental rights based primarily upon one failed drug screen is unwarranted.

The DHHR responds and argues in support of the circuit court's termination of parental rights. The DHHR notes that petitioner does not specify what medications she required during inpatient treatment, and that the record likewise does not identify these medications. According to the DHHR, petitioner has a history of abusing prescription medication, and that the abuse of such drugs played a role in the termination of her parental rights. The DHHR argues that the best interests of the children are controlling in this matter, and further notes our prior holdings wherein we have stated that courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights. *See* Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). According to the DHHR, the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect is supported by the evidence. Citing West Virginia Code § 49-6-5(b)(1) and (3), the DHHR argues that this finding was supported by petitioner's ongoing addiction to drugs and prescription medication, as well as her failure to follow through with the family case plan and other rehabilitative efforts. For these reasons, the DHHR argues that the circuit court's termination of petitioner's parental rights should be affirmed.

The guardian ad litem responds and also argues in support of the circuit court's termination of petitioner's parental rights. The guardian cites to our decision in *In re Aaron Thomas M.*, 212 W.Va. 604, 575 S.E.2d 214 (2002), to argue that based upon West Virginia Code § 49-6-5(b), drug abuse and failure to comply with a family case plan are grounds for terminating parental rights. According to the guardian, the petitioner repeatedly failed to attend hearings in the proceedings

below, despite the DHHR offering assistance with transportation. Further, the guardian argues that petitioner failed to receive weekly drug screens, and further made no effort to comply with the circuit court's direction in this regard by contacting the DHHR to make alternate arrangements in the event she could not be contacted. In response to petitioner's argument that she could not attend inpatient treatment because she was not allowed to bring her medication, the guardian argues that petitioner did not avail herself of any other substance abuse treatment services, and in fact continued to use drugs as evidenced by her admission. The guardian also notes petitioner's missed visitations, and argues that she made no effort to comply with the circuit court's direction that she obtain suitable housing and employment. Based upon petitioner's multiple failures in regard to the terms of her improvement period and her ongoing drug addiction, the guardian argues that the circuit court did not err in terminating petitioner's 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 revoke petitioner's improvement period or in terminating her parental rights. The record reflects that the circuit court originally held the DHHR's motion to revoke petitioner's improvement period in abeyance for thirty days in an attempt to foster more cooperation between petitioner and the DHHR. However, the circuit court was explicit that petitioner was required to participate in weekly drug screens and visitations with absolute compliance, and that if she failed to meet these expectations, the circuit court would revisit the DHHR's motion prior to the expiration of the thirty-day abeyance. Despite this warning, petitioner thereafter failed to comply with the circuit court's requirements, and even admitted to abusing methamphetamine, marijuana, and oxycodone on January 5, 2012. As such, the circuit court revoked petitioner's post-adjudicatory improvement period, pursuant to West Virginia Code § 49-6-12(f).

That code section states, in relevant part, that "[w]hen the [DHHR] demonstrates that the respondent has failed to participate in any provision of the improvement period, the court shall

forthwith terminate the improvement period." This code section is clear that failure to participate in any provision of the improvement period will result in termination of the same. The record in this matter reflects that petitioner was provided multiple opportunities to comply with the requirements imposed, yet failed to participate in several provisions of the improvement period. Contrary to petitioner's argument that her improvement period was terminated due to a lone relapse incident, the record shows that the circuit court relied upon multiple failures to comply, including missed visitations and drug screens, and petitioner's inability to remain drug free. Additionally, the record reflects that the DHHR offered petitioner assistance with transportation, yet she refused the same to the point that she failed to attend both hearings on the motion to revoke her improvement period. For these reasons, the circuit court did not err in revoking petitioner's 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 neglect in the near future. Contrary to petitioner's argument that her single relapse into drug abuse was insufficient to support termination of her parental rights, the Court finds no error in the circuit court's application of statutory law on this issue. At disposition, the circuit court specifically found that petitioner could not adequately provide for the children's needs due, in part, to her continued drug use and failure to comply with treatment services. West Virginia Code § 49-6-5(b)(1) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where

> [t]he abusing parent . . . [has] habitually abused or [is] addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person . . . [has] not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning.

Further, West Virginia Code § 49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations 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 upon these two code sections, it is clear that the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in the near future is supported by the evidence. This includes petitioner's multiple failures to comply with the terms of the family case plan throughout her improvement period and her ongoing drug addiction. In fact, the circuit court specifically found that "petitioner . . . made no effort whatsoever

to improve herself during the pendency of these proceedings." As such, the circuit court did not err in terminating petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

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 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 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