STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re*:* F.W. Jr., F.W. & S.C.

No. 12-0514 (Harrison County 10-JA-56, 57 & 58)

And

In Re: S.O.

No. 12-0535 (Harrison County 11-JA-102)

FILED
November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother files this appeal, by counsel Allison McClure, from the Circuit Court of Harrison County, which terminated Petitioner Mother's parental rights to F.W. Jr., F.W., S.C., and S.O. by orders entered on March 26, 2012, and March 30, 2012.[1] The guardian ad litem for the children, Dreama Sinkkanen, has filed a response on behalf of the children supporting the circuit court's orders. Petitioner Mother's guardian ad litem, attorney Terri Tichenor, has filed a response in support of the circuit court's decision. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of termination.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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.

DHHR filed the petition in the instant case after it had been involved with the family for several months. Petitioner Mother became involved with a man, C.C., who had his parental rights terminated to six of his own biological children based on allegations that he was sexually abusive to his children. The biological father of F.W. Jr. and F.W. expressed his concerns to DHHR that Petitioner Mother was allowing contact between his children and C.C. When DHHR initially asked Petitioner Mother about her relationship with C.C., Petitioner Mother was untruthful. She later had C.C.'s baby, S.C.

[1] Petitioner Mother's motion to consolidate her appeals of both cases was granted. Accordingly, Case Number 12-0514 concerning F.W. Jr., F.W., and S.C. has been consolidated with Case Number 12-0535 concerning S.O. for consideration and decision.

Child Protective Services ("CPS") spoke with the children's physician and learned that F.W. Jr. and F.W. had fleabites and S.C. had diaper rash. Child S.O. was born in November of 2011, after which DHHR amended the petition to include S.O. in the proceedings. Although Petitioner Mother separated herself from C.C., she married S.O.'s father, T.O., who voluntarily relinquished his parental rights to his child I.O. after he was adjudicated of neglecting her due to severe substance abuse and unsafe living conditions.

Throughout the course of these proceedings, Petitioner Mother was granted an improvement period, provided services within this period, and granted an extension to her improvement period. The circuit court found that despite these services, Petitioner Mother failed to make any improvements or progress. The circuit court terminated Petitioner Mother's parental rights to F.W. Jr., F.W., and S.C. by order entered on March 26, 2012, and terminated her rights to S.O. by order entered on March 30, 2012. Petitioner Mother appeals.

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).

Petitioner Mother argues that the circuit court erred in terminating her parental rights to the three older children, F.W. Jr., F.W., and S.C., because she substantially corrected the conditions that led to the filing of the petition and the children's removal from the home. The petition was initially filed because of Petitioner Mother's relationship with C.C. By October or November of 2010, however, Petitioner Mother had ended her relationship with C.C. and was participating in her improvement period. The deficiencies discussed at Petitioner Mother's dispositional hearings were not the deficiencies that led to DHHR's involvement with the family nor were they included in a petition against Petitioner Mother. Petitioner Mother adds that DHHR had not been providing her with services from June of 2010 through March of 2011. Second, Petitioner Mother argues that even if she had not substantially corrected the neglectful conditions, the circuit court erred because termination was not necessary for the children's welfare. She argues that because F.W. Jr. and F.W. are with their biological father and S.C. is in a stable foster home, the circuit court should have ordered a less restrictive alternative to terminating her parental rights.

Third, Petitioner Mother argues that the circuit court erred in terminating her parental rights to S.O. because she did not fail to protect S.O. as DHHR alleged. She argues that the more common "failure to protect" phrase derives from West Virginia Code § 49-1-3(1)(A) as it pertains to an "abused child." Here, the older children were deemed neglected and, therefore, the "failure to protect" allegation is not the proper mechanism to terminate Petitioner Mother's parental rights to S.O. Termination based on the testimony at S.O.'s adjudicatory hearing concerning Petitioner Mother's care to S.O. would not be appropriate because an amended petition concerning those allegations was never filed. Lastly, Petitioner Mother argues that the involuntary termination of her rights to S.O. was error because the neglect found with respect to the older children does not equate to finding S.O. neglected. She argues that although it is true that the abuse of one child in the home deems all other children in the home as abused, the same is not the true for neglected children, referencing West Virginia Code § 49-1-3(1)(A) and West Virginia Code § 49-1-3(11)(A). The older children were found only to be neglected, instead of abused, and S.O. was not in the home at the time of their neglect.

The children's guardian ad litem, Petitioner Mother's guardian ad litem, and DHHR all respond in support of the circuit court's termination orders. In particular, they refer to the circuit court's extensive findings of Petitioner Mother's lack of progress or improvement since the beginning of DHHR's involvement. They further argue that termination was proper given the children's tender ages and need for permanency. With regard to S.O., the guardian argues that there was ample evidence that Petitioner Mother failed to protect any of her children from C.C., a known sex offender, constituting sexual abuse of a child under West Virginia Code § 49-1-3. *See* Syl. Pt. 8, *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997). Moreover, Petitioner Mother was provided services for S.O. after her birth, but still did not know how to care for her. DHHR adds that the terms abuse and neglect are used interchangeably. *See* W.Va. Code § 49-1-3(4). Petitioner Mother failed to correct her issues and continued to place her children in the danger of inappropriate men. Although the circuit court termed Petitioner Mother's "failure to protect" as "neglect," the threat that her actions would lead to abuse remained present throughout the proceedings of both cases.

We find no error in the circuit court's orders terminating Petitioner Mother's parental rights to F.W. Jr., F.W., S.C., and S.O. We have held as follows:

> "[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). We have also held the following:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code* [§] 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code* [§] 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

Syl. Pt. 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). Further, "the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). Based on our review of the record and given the circumstances of the case, including the children's young ages, Petitioner Mother was given time and services to improve, but did not, even after she had her youngest child S.O. Accordingly, we find no error by the circuit court.

For the foregoing reasons, we affirm the circuit court's orders terminating Petitioner Mother's parental rights to F.W. Jr., F.W., S.C., and S.O.

Affirmed.

ISSUED: November 19, 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