STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.B. and Z.B. :

No. 11-0527 (Mineral County 10-JA-9 & 10)

FILED
October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mineral County, wherein the Petitioner Mother's parental rights to her children, B.B. and Z.B., were terminated. The appeal was timely perfected by counsel, with an appendix accompanying the petition. The guardians ad litem have filed a joint response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has also filed a response.

Having reviewed the record 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. The case is mature for consideration. Upon consideration of the standard of review and the record 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.

The Petitioner Mother challenges the circuit court's order terminating her parental rights to her children, B.B. and Z.B.[1] She argues that because DHHR did not provide tailored services to address her needs, the court erred in finding that DHHR made reasonable efforts to reunify her with her children. Petitioner Mother further argues that the court erred in not reinstating her improvement period and in finding that she had abandoned the children.

The children's maternal grandmother obtained legal custody of the subject children in 2003.[2] At that time, Petitioner Mother had not had her parental rights terminated, but she

---

[1] In these same proceedings, the circuit court also terminated the children's maternal grandmother's custodial rights. She has filed a separate appeal for her termination. She did not file a response in the Petitioner Mother's appeal.

[2] The children's biological father has had little to no involvement in the children's lives. At the time of the adjudicatory hearing, B.B. was twelve years old and Z.B. was thirteen years old; yet, their father had not seen either of them since B.B. . . .

had been in and out of prison, was intermittently abusing drugs, and was an unstable parent. The petition in the instant case was filed against the Petitioner Mother and the children's maternal grandmother in February 2010 after police officers found drug paraphernalia in the grandmother's home. The Petitioner Mother was not living with them at this time and the petition referenced a past family court order which granted custodial rights to the children's grandmother, stating that the children's parents had "essentially abandoned" them. At the time of the children's removal, known drug users and drug dealers also shared the grandmother's home and the home was in disrepair, unclean, and infested with cockroaches and rodents. At the adjudicatory hearing, the circuit court found that the Petitioner Mother's continued drug use, repeated incarcerations, homelessness, and instability led to her abandonment of the children. The circuit court granted the Petitioner Mother a six-month adjudicatory improvement period to participate in services, which was later revoked. At the dispositional hearing, the circuit court found that the Petitioner Mother missed six appointments with her Family Preservation Services provider and failed to reschedule these appointments, failed to notify her Family Preservation Services provider of her permanent address, and further found that Petitioner Mother failed to submit to any drug screens. Further, the circuit court found that the Petitioner Mother chose to relocate to Maryland where services were unavailable and later was incarcerated in August 2010, during her improvement period, preventing her from further participation in any services. Based on these findings, the court concluded that reunification would not be in the children's best interests, nor is there reasonable likelihood that the Petitioner Mother would be able to substantially correct the conditions of abuse and neglect in the near future.

"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

---

. . . was about fourteen months old. The children's biological father lives in Missouri, participated in the first few hearings of these proceedings by telephone, but did not continue participation in any hearings as the case progressed. At the adjudicatory hearing, the circuit court found that he legally abandoned the children. However, at disposition, it did not terminate his parental rights because it did not believe that it had adequate jurisdiction to do so.

of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Additionally, the Court is mindful that "[t]ermination 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).

Petitioner Mother raises three assignments of error in her appeal. First, she argues that the circuit court erred in finding that DHHR had made reasonable efforts to preserve and reunify her with her children. She asserts that DHHR failed to tailor services for her specific needs and argues that pursuant to *In re Aaron Thomas M.*, 212 W.Va. 604, 575 S.E.2d 214 (2002), her lack of participation in services must have been willful. In response, the children's guardians ad litem and the DHHR support the circuit court's termination order, highlighting the Petitioner Mother's failure to comply with her services. A review of the Petitioner Mother's appendix supports these assertions, revealing that the treatment plan clearly set forth that the Petitioner Mother was responsible for rescheduling any missed appointments with her Family Preservation Services provider. The case plan further outlined that she was to submit to drug testing three times a week. The Petitioner Mother failed to comply with either of these requirements before her August 4, 2010, incarceration. Although DHHR conceded that it did not provide a referral to Community Corrections for the Petitioner Mother's tri-weekly drug screens, it also asserts that the Petitioner Mother had reviewed the treatment plan, signed it, and knew what was expected of her. At the dispositional hearing, DHHR supervisor Roann Welch testified that if the Petitioner Mother appeared for drug screens, it would not have been a problem to proceed with them. However, the Petitioner Mother failed to report for any drug screens. Moreover, the Petitioner Mother's reliance upon *In re Aaron Thomas M.* is misplaced. A review of this case only indicates that it supports the circuit court's decision to terminate. Similar to the instant case, the circuit court in *Aaron Thomas* found that the mother in that case failed to follow through with the family case plan. On appeal, this Court affirmed the circuit court's decision to terminate. In terminating the Petitioner Mother's parental rights in the case-at-bar, the circuit court did not err in finding that DHHR had made reasonable efforts to preserve and reunify the Petitioner Mother with her children.

Petitioner Mother also argues that the circuit court erred in not reinstating her improvement period after her release from incarceration. In response, the guardians ad litem and DHHR assert that the circuit court had the discretion to decline to reinstate the Petitioner Mother's improvement period. A circuit court has the discretion to grant improvement periods within the applicable statutory requirements and to terminate them if it is not satisfied

with the necessary progress. Syl. Pt. 2, *In re Lacey P.*, 189 W.Va. 580, 433 S.E.2d 518 (1993). Here, the circuit court terminated the Petitioner Mother's improvement period upon finding that she missed six scheduled appointments with her Family Preservation Services provider and failed to reschedule these appointments, and that she failed to report to any of her drug screens. The circuit court also found that although the Petitioner Mother had all services provided to her in Mineral County, she chose to relocate to Maryland, where services were not available; the Petitioner Mother was arrested on August 4, 2010, for fraudulent use of a credit card and burglary, and was incarcerated; and that there had not been substantial compliance with the treatment plan and the period of improvement. At the hearing on the motion to reinstate her improvement period, the circuit court allowed the Petitioner Mother to continue visits with the children if she had a negative drug test, but denied her motion for reinstatement of her improvement period. In its discretion to award improvement periods, the circuit court did not err in its decision to terminate the petitioner's improvement period nor in its decision to deny the petitioner's request for reinstatement of her improvement period.

Lastly, Petitioner Mother argues that the circuit court erred in finding that part of the Petitioner Mother's abuse and neglect toward her children was due to her abandonment of them. She asserts that no allegations or averments of abandonment were made in the petition of this case. In their responses, the children's guardians ad litem and the DHHR contend that the petition referred to a past family court order which stated that the children's parents had "effectively abandoned" them. Further, the Petitioner Mother admitted at the preliminary hearing that her mother had been caring for the children since 1999. A review of the pertinent documents in the appendix supports these contentions. The circuit court did not err in finding abandonment as part of the Petitioner Mother's abuse and neglect of her children.

This Court reminds the circuit court of its duty to establish permanency for B.B. and Z.B. pursuant to Rules 36a, 39, 41 and 42 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Further, this Court reminds the circuit court of its duty pursuant to Rule 43 to find permanent placement for B.B. and Z.B. within eighteen months of the date of the disposition order. 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.*, 2011 WL 864950 (W.Va. 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).

For the foregoing reasons, this Court finds no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: October 25, 2011

CONCURRED IN BY:

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