STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: C.G.

No. 11-1589 (Webster County 11-JA-7)

FILED
June 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel Daniel Grindo, arises from the Circuit Court of Webster County, wherein Petitioner Mother's parental rights were terminated by order entered on October 17, 2011. The child's guardian ad litem, Joyce Morton, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William Bands, filed a response joining in and concurring with the guardian ad litem and a supplemental appendix.

This Court has considered the parties' briefs and the appendix 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 appendix 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.

In May of 2010, Petitioner Mother voluntarily relinquished her parental rights to a prior child, J.W. In that case, the circuit court had ordered Petitioner Mother to not have contact with convicted felons. In spite of this order, Petitioner Mother allowed B.G., a convicted felon, to reside in her home. DHHR filed a motion to revoke Petitioner Mother's improvement period and to terminate her parental rights. Prior to the hearing on this motion, Petitioner Mother voluntarily relinquished her parental rights to J.W. At this hearing, the circuit court found that Petitioner Mother had been noncompliant with services and had very little bond with the child. At the time of the voluntary relinquishment, Petitioner Mother was pregnant with the subject child of the instant case, C.G.

The petition in the instant case was filed in February of 2011, based on allegations that Petitioner Mother had been ordered to not have contact with convicted felons, yet allowed a convicted felon, B.G., father of C.G., to reside in her home. B.G. further admitted to DHHR that he was using THC (i.e., tetrahydrocannabinol, the primary component in marijuana) four days before the subject child's birth. At the preliminary hearing, the circuit court found that under public policy, the instant case was a mandatory filing case due to Petitioner Mother's previous voluntary relinquishment of parental rights to J.W. The circuit court recognized the circumstances of the prior case in which B.G. and B.G.'s drug paraphernalia were found in Petitioner Mother's home. The circuit court further found that B.G. was currently living with Petitioner Mother. However, at the encouragement of the guardian who argued that the child should be returned because the State's evidence at that time was "very thin," the circuit court returned C.G. to Petitioner Mother with orders

not to have contact with B.G. or to allow B.G. to have contact with C.G. The circuit court further ordered that Petitioner Mother avoid contact with anyone under the influence of, or having possession of, alcohol or drugs and to avoid contact with anyone convicted of any felony or misdemeanor. Petitioner Mother was ordered to participate in parenting classes and home services and to not keep drug paraphernalia in her home. The circuit court directed that the child C.G. be removed immediately if Petitioner Mother violated any of these terms.

At the adjudicatory hearing in March of 2011, the circuit court again deemed that this case was a mandatory filing case, to which Petitioner Mother objected, due to Petitioner Mother's prior voluntary relinquishment. The circuit court found that despite Petitioner Mother's previous court orders and her knowledge of B.G.'s continued drug use, she allowed B.G. to reside in her home. B.G. testified and admitted to his drug use and prior criminal convictions, which included charges for breaking and entering, driving under the influence, and the sale of methamphetamine and cocaine. Tammy Skidmore, the manager of Petitioner Mother's apartment, testified that tenants who allow convicted felons in their apartments would be in danger of eviction. The circuit court found that Petitioner Mother failed to protect her child from B.G.'s drug problems and risked eviction from her and C.G.'s home. As such, she failed to substantially correct the circumstances of abuse and neglect. The circuit court adjudicated Petitioner Mother as an abusive and neglectful parent to C.G.

At the dispositional hearing in May of 2011, Petitioner Mother testified that she had not been in contact with B.G., but had been in touch with B.G.'s mother. The circuit court found this testimony untruthful and found that she had not made progress in the last year and had continued a relationship with B.G. The circuit court denied Petitioner Mother an improvement period but reluctantly granted Petitioner Mother a two-year rehabilitation period with orders to avoid contact with B.G., B.G.'s mother, anyone involved with drugs or alcohol, and anyone with prior criminal convictions. The circuit court further ordered Petitioner Mother to continue with counseling and parenting classes.

At the end of September of 2011, the circuit court heard testimony with regard to terminating Petitioner Mother's parental rights. The circuit court reiterated that this was a mandatory filing case due to the "prior termination of her parental rights." The circuit court found that Petitioner Mother had not substantially corrected the circumstances of abuse and neglect that led to the filing of the previous and instant case. In particular, the circuit court found that Petitioner Mother had more recently involved herself in a relationship with another man, L.G., who had had his own parental rights terminated to other children due to his substance abuse. On one occasion in the summer, Petitioner Mother was present with L.G. when he was stopped in traffic and found to have Valium and a stolen firearm. There were also about six occasions in which L.G. was present in Petitioner Mother's home. New Hope parent educator Lori Pierce testified that Petitioner Mother had not gained any insight as to which men are inappropriate for relationships and how their legal and drug histories could have an impact on her and her children. She testified that Petitioner Mother felt that L.G. did not pose a problem because they did not have any domestic violence issues and he did not use drugs in front of C.G. The circuit court concluded that, despite being given many opportunities with specific directions, Petitioner Mother continued to maintain inappropriate relationships with

individuals that adversely affect the health, safety, and welfare of her child. Consequently, the circuit court terminated Petitioner Mother's parental rights and denied post-termination visitation in an order entered in October of 2011. Petitioner Mother appeals this order, raising three assignments of error.

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 Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

On appeal, Petitioner Mother argues that the circuit court erred when it used her voluntary relinquishment and contact with certain individuals as a basis for ratifying the petition of the instant case, adjudicating her as an abusive and neglectful parent, and terminating her parental rights to C.G. Petitioner Mother argues that West Virginia Code § 49-6-5b(a)(3) only directs that a petition is mandatorily filed after a parent's parental rights are involuntarily terminated. Petitioner Mother argues that because she lost her parental rights to her prior child by voluntary relinquishment rather than involuntary termination, the instant petition should not have been filed. She argues that the Court stated in *In re: Kyiah P.*, 213 W.Va. 424, 582 S.E.2d 871 (2003), that voluntary termination of parental rights is not a triggering factor in West Virginia Code § 49-6-5b. The guardian responds, contending that the petition was properly filed and ratified. The guardian argues that interpretation of the statute does not allow parents who voluntarily relinquish their parental rights to remain unchecked when they have subsequent children.

The Court finds that the circuit court did not abuse its discretion when it ratified the petition of the instant case. In *Kyiah P.*, we disagreed with the respondent parents who maintained that the petition should have been dismissed once it was established that their parental rights to their other children were not involuntarily terminated. *Kyiah P.*, 213 W.Va. at 429, 582 S.E.2d at 876. As we reiterated in *Kyiah P.*, we have stated as follows:

> "[W]e note[d] that while W.Va.Code § 49-6-5b (1998) does not include the voluntary termination of parental rights as one of the factors triggering a new petition against

> a parent with additional children, the *absence* of one of these factors does not in any way prevent [DHHR] from filing such a petition should conditions warrant. Nothing prevents [DHHR] from conducting an investigation if it believes that a parent who has voluntarily terminated parental rights with respect to one child might be mistreating another child, or from providing such a parent with assistance or counseling where available." [*In re James G.]*, 211 W.Va. [339,] 346, 566 S.E.2d [226,] 233 [(2002)].

Kyiah P., 213 W.Va. at 429, 582 S.E.2d at 876. Here, a review of the appendix indicates that at the time the instant petition was filed, Petitioner Mother was residing with B.G., who admitted to using THC just days before C.G. was born. The appendix provides that B.G. had also been living with Petitioner Mother at the close of her previous case when she voluntarily relinquished her parental rights to J.W. Given B.G.'s drug abuse and Petitioner Mother's permission for him to reside in the home, the circumstances alone without a prior involuntary termination were enough to alert DHHR to file a petition in the instant case. The Court finds no error in the circuit court's ratification of the petition.

Petitioner Mother also argues that the circuit court erred in adjudicating her as abusive and neglectful based on her prior relinquishment to J.W. and her contact with B.G. In support, she argues that there was no clear and convincing evidence that B.G. was using controlled substances at the time of C.G.'s birth, that his use of drugs placed the child at risk, or that Petitioner Mother behaved in any way to harm the child or place the child in danger. The bulk of the evidence at adjudication dealt with the prior abuse and neglect case, which was inappropriate given that the petition in this case was based on Petitioner Mother's alleged failure to correct conditions of a case in which she voluntarily relinquished her parental rights. Petitioner Mother argues that the testimony given at the preliminary and adjudicatory hearings indicated that Petitioner Mother kept an appropriate home for the instant child and was capable of caring for the child. Consequently, she argues that the circuit court should have considered the conditions that existed at the time of the instant petition, not those of the prior case.

Lastly, Petitioner Mother argues that the circuit court erred in terminating her parental rights based on her prior relinquishment to J.W. and on her association with individuals the circuit court deemed unsavory. In support, Petitioner Mother argues that the circuit court incorrectly applied the law by finding that the instant case was a mandatory filing case. She contends that the circuit court misapplied the Court's holding in *In the Matter of George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999), which provides that a parent must show that the conditions which give rise to the previous involuntary termination have been substantially corrected. She argues that because DHHR filed the petition to the instant case after she voluntarily relinquished her parental rights, rather than having them involuntarily terminated, the *George Glen B.* standard is inapplicable.

The guardian responds, contending that the circuit court properly adjudicated Petitioner Mother and properly terminated her parental rights. The guardian argues that clear and convincing evidence showed that Petitioner Mother has been unable to dissociate herself from men who are

addicted to drugs and thus, men who jeopardize the health, safety, and welfare of both petitioner and her child. The guardian does note that Petitioner Mother made efforts toward rehabilitation but indicates the opinion that DHHR "dropped the ball in assisting with counseling and therapy." DHHR responds, concurring with the guardian's argument in support of the circuit court order, but also contends that it did not "drop the ball" with services, providing in its supplemental appendix a copy of a letter from Chameleon Health Care, Inc. that indicates that it received a referral for counseling for Petitioner Mother. The letter indicates that upon scheduling an appointment with Petitioner Mother, however, she rescheduled and then did not appear for her rescheduled appointment.

The Court finds that the circuit court did not abuse its discretion at adjudication. As discussed, there was no error in ratifying the petition in the instant case. Accordingly, the circuit court correctly proceeded with the instant case in holding an adjudicatory hearing as to Petitioner Mother. West Virginia Code § 49-1-3 directs that children whose physical, mental, or emotional well-being are harmed or threatened are considered abused. Moreover, the Court has held as follows:

> "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." *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996).

In the Interest of Kaitlyn P., 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Here, a review of the appendix provides that although Petitioner Mother kept a tidy home and participated in services, despite specific directions from the circuit court, she continued to engage in inappropriate relationships with men who also resided with her and her child or spent substantial time in their home. Petitioner Mother knew of both men's substance abuse issues but nevertheless allowed them to participate in C.G.'s life. The Court finds no error in the circuit court's adjudication of Petitioner Mother as an abusive and neglectful parent to C.G.

The Court also finds that the circuit court did not abuse its discretion in terminating Petitioner Mother's parental rights. As discussed, the circuit court did not err in proceeding with this case in ratifying the petition or in adjudicating Petitioner Mother. The Court has held as follows:

> "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code [§] 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights 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." Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Moreover, "'the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008). Here, the appendix clearly provides that the circuit court had given Petitioner Mother clear directions for a chance at success in this case. Despite clear instructions, Petitioner Mother failed to adhere to these directions and continued to place C.G. at risk of harm by repeated exposure to substance abusers. The Court finds no error in the termination of her parental rights.

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 eighteen months of the date of the disposition order.[1] 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.*, 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.

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[1] Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

Affirmed.

ISSUED: June 25, 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