STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: D.D. and T.D.**

No. 12-0103 (Raleigh County 10-JA-37 & 38)

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Sante Boninsegna Jr., arises from the Circuit Court of Raleigh County, wherein her parental rights to the children, D.D. and T.D., were terminated by order entered on December 27, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem for the children, Matthew A. Victor, has filed a 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.

The proceedings below were initiated after petitioner was arrested for child neglect creating risk of injury. According to the initial abuse and neglect petition, one child had cigarette burns on his arm and he indicated that petitioner was responsible for them. Petitioner admitted to substance abuse and entered a stipulation at adjudication, and was thereafter granted a post-adjudicatory improvement period. On October 17, 2011, the DHHR filed a motion to revoke the petitioner's post-adjudicatory improvement period, citing her failure to participate in services after March 2011 and her continued drug abuse. On October 19, 2011, the circuit court revoked petitioner's post-adjudicatory improvement period and set the matter for disposition. Petitioner thereafter moved for a dispositional improvement period, but the circuit court ultimately denied that motion. On November 28, 2011, the dispositional hearing was held and the circuit court terminated petitioner's parental rights to the children.

On appeal, petitioner alleges that the circuit court erred in the following ways: by refusing to grant her a dispositional improvement period; by admitting into evidence an uncertified copy of a domestic violence petition naming her as a respondent without an attesting witness; and, by failing to keep the record open so that she could present documents concerning her drug treatment. Petitioner argues that at disposition, the DHHR alleged that she failed to comply with the family case plan, but that no one could establish that a family case plan had been filed with the circuit court as required by West Virginia Code § 49-6-2(b) and our prior case law. Petitioner further argues that despite the DHHR ceasing services after October 19,

2011, she actually achieved goals during that period and would have provided negative drug screens had the DHHR continued testing her. Therefore, petitioner argues that she should have been granted a dispositional improvement period. Petitioner also argues that the introduction of a domestic violence petition naming her as a respondent was unfairly prejudicial, especially because the document was not a certified, self-authenticating copy of an official government record, nor was it a business record. As such, she argues that this record constitutes inadmissible hearsay according to the West Virginia Rules of Evidence. Lastly, petitioner argues that the circuit court should have allowed her additional time to provide documentation that supported her assertions that she made independent efforts to address issues raised in the petition.

The DHHR responds in favor of the circuit court's termination of petitioner's parental rights. According to the DHHR, while it could not be definitively confirmed that a case plan had been filed, petitioner admitted that she had full knowledge of what was required of her to achieve reunification with her children as set forth in a case plan. Because petitioner was clearly served with a family case plan, the DHHR argues that petitioner simply chose to ignore the plan's requirements. The DHHR also argues that the domestic violence petition in question was admissible since it was a document maintained in the normal course of business and was self-authenticating due to the magistrate's ratification. Lastly, the DHHR argues that petitioner had ample time to gather the records in question prior to disposition and provide them to her attorney, but failed to do so.

The guardian ad litem also responds in favor of the circuit court's termination of petitioner's parental rights. The guardian argues that petitioner's procedural and evidentiary arguments amount to harmless error and are simply an attempt to mask the fact that she was essentially homeless during the proceedings and remained addicted to multiple controlled substances. Further, the guardian argues that petitioner exhibited, at best, sporadic participation in parenting and adult life skills services. Under these circumstances, the guardian argues that termination was proper for the welfare of the children.

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). To begin, the Court finds no error in the circuit court denying petitioner a post-dispositional improvement period. In "Respondent's Stipulation To Petition," petitioner specifically stated that a multidisciplinary team ("MDT") meeting had been held and that she "[understood] the terms and conditions of the family case plan which she must comply with to be re-united with her children." Further, in her motion for a post-adjudicatory improvement period, petitioner stated that she "participated in the MDT meeting and can complete the terms and conditions of the family case plan." While West Virginia Code § 49-6-2(b) requires that a family case plan be filed with the circuit court after the granting of an improvement period, we have previously held that

> "[t]he purpose of the family case plan as set out in W.Va.Code, 49–6D–3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syl. Pt. 5, *State ex rel. W.Va. Dep't of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

Syl. Pt. 3, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001). Upon a review of the record, it is clear that petitioner knew what was expected of her during her post-adjudicatory improvement period pursuant to the case plan that was developed through the MDT process. For these reasons, the circuit court did not err in relying on petitioner's failures to comply with the terms of her post-adjudicatory improvement period when denying her a dispositional improvement period.

Further, it was not error for the circuit court to deny petitioner a dispositional improvement period because she failed to meet the clear and convincing burden of proof that she was likely to fully participate in the same as required by West Virginia Code § 49-6-12(c)(2). In fact, the circuit court specifically found that petitioner had regressed in the month between the termination of her improvement period and the dispositional hearing. This includes continued unemployment, a "very questionable home situation," DHHR employee testimony that petitioner appeared intoxicated at her most recent supervised visitation, and allegations of domestic violence supported by petitioner's own admission to "kicking of doors and . . . destruction of property." For these reasons, the circuit court did not err in denying petitioner an improvement period.

Next, the Court finds no error in regard to the circuit court admitting into evidence the domestic violence petition in question. Contrary to petitioner's argument that the circuit court based its ruling on the allegations contained in the petition, it is clear from the record that several factors supported the circuit court's decisions to deny petitioner a dispositional improvement period and terminate her parental rights. As noted above, petitioner even testified to instances of domestic problems which the circuit court considered in rendering its decisions, and it is clear that the circuit court had ample evidence upon which to base its decisions. As such, even if the petition's admission was error, it was harmless error.

Lastly, the Court finds no error in the circuit court's decision to deny petitioner additional time to introduce documents into evidence. The matter in question had been ongoing for some

time, and petitioner was aware of the scheduled dispositional hearing. Despite this notice, petitioner failed to attend the hearing and also failed to provide her counsel with the documents she sought to introduce. Further, even if the documents did reflect petitioner's completion of a detoxification program and attendance at substance abuse meetings, the Court has previously held that "'[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.' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). For these reasons, the circuit court did not err in denying petitioner's request to keep the record open for the admission of additional documents.

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 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.

[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.

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: October 22, 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