STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

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

In re: T.F.-1, S.F., and T.F.-2

No. 12-0170 (Barbour County11-JA-10, 11-JA-11, and 11-JA-12)

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel Megan Allender, arises from the Circuit Court of Barbour County, wherein Petitioner Mother's parental rights were terminated by order entered on January 13, 2012. The children's guardian ad litem, Karen Hill Johnson, filed a response on behalf of the children in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of the circuit court's order.

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.

DHHR filed the petition in the instant case against the children's parents in March of 2011. Referrals had been made to DHHR on this family since 2000. The petition in the instant case was based on allegations that the parents failed to adequately provide for the children's needs at home and at school. Both parents were unemployed, were financially dependent on others, and were dependent on drugs. At the preliminary hearing, the circuit court made findings that both parents have been involved with criminal truancy cases and that a juvenile petition for truancy was anticipated to be filed against the oldest child, T.F.-1[1]. Petitioner Mother at one point had also taken the children to Virginia under the belief that she would prevent removal by DHHR from their home. At the adjudicatory hearing in July of 2011, both parents admitted to substance abuse, addiction to narcotics, their past criminal truancy charges, and domestic violence in the home. In particular, Petitioner Mother discussed instances where the father shoved her down the stairs, threatened to set the house on fire with her and the children in it, and choked her. The father submitted that he and Petitioner Mother "grabbed" each other. The circuit court adjudicated both parents as abusive and neglectful and granted both parents a three-month post-adjudicatory improvement period with directions to participate in drug tests and services. At a review hearing in September of 2011, the

[1]Because two children in this matter share the same initials, these children will be referred to throughout this decision as T.F.-1 and T.F.-2.

circuit court found that the parents had not complied with their improvement periods. In particular, neither parent called in for their drug screens and both admitted to continuing to take hydrocodone without a prescription. The circuit court revoked the parents' improvement periods and set the matter for disposition. At the dispositional hearing in October of 2011, the circuit court made findings that the parents continued to use drugs, failed to participate in random drug testing, and failed to cooperate with the terms and goals of the Family Case Plan. After finding that the conditions of abuse and neglect could not be corrected in the foreseeable future, the circuit court terminated the parents' parental rights and terminated visitation. Petitioner Mother appeals this order, arguing 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 first argues that the circuit court erred in finding that imminent danger existed at the time of the filing of the petition that sought an immediate removal of the minor children from her home. Petitioner Mother asserts that DHHR illegally removed her minor children from her home without appropriate cause for a finding of imminent danger, and that the circumstances known to DHHR at the time did not warrant removal. Petitioner Mother asserts that after a conversation with a DHHR worker on March, 11, 2011, she had believed that if she had stayed in the same home as her husband, her children would be removed. Accordingly, she left with her children to go to her parents' home in Virginia.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in finding imminent danger at the time the petition was filed. The petition was filed after the parents appeared in court for criminal truancy cases filed against them. During those hearings, the parents gave testimony that concerned the circuit court which led it to order DHHR to conduct an investigation on the family. The circuit court properly found imminent danger for the children's removal because the parents admitted to staying up late at night and sleeping late the next day, the parents did not cooperate with the investigation and were deceptive, and the children were taken out

of the state to circumvent CPS intervention. Petitioner Mother never notified DHHR about leaving the state with her children prior to going to Virginia.

The Court finds no error in the circuit court's finding of imminent danger at the time the petition was filed. West Virginia Code § 49-6-3 directs that a circuit court may order a child's removal from the home when there exists imminent danger and there are no reasonably available alternatives to removal. The petition states in great detail the number of days the children did not attend school, the parents' admission to staying up late at night and sleeping late the next day, the parents' failure to communicate with DHHR, and the domestic violence in the home. The circuit court did not abuse its discretion in finding imminent danger in the instant petition.

Petitioner Mother also argues that the circuit court erred in revoking her post-adjudicatory improvement period one month prior to its completion. The circuit court based this revocation on Petitioner Mother's continued drug use and her lack of participation in services. Petitioner Mother asserts, however, that she was acting in accordance with the Family Case Plan. She argues that evidence showed that she had participated in a psychological evaluation, a substance abuse evaluation, attended visitation, attended hearings in circuit court, and had attended all but one of the Multi-Disciplinary Treatment Team ("MDT") meetings. Petitioner Mother was beginning to take steps toward the treatment process, despite over thirteen years of usage history. Moreover, the MDT indicated in its Treatment Plan that the three-month improvement period would not be enough time for Petitioner Mother and that an additional two months would be necessary. Petitioner Mother argues that the circuit court should have granted Petitioner Mother a continuance in her improvement period, rather than revoking it before its completion.

The guardian and DHHR respond, contending that the circuit court did not err in revoking Petitioner Mother's improvement period. Although Petitioner Mother asserts that she participated in a psychological evaluation, she did not do so until September of 2011 when she had opportunities since April of 2011. DHHR asserts that Petitioner Mother did little to nothing before her improvement period was revoked. The guardian argues that "entitlement to an improvement period is conditioned upon the ability of the parent/respondent to demonstrate 'by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period . . . ." *In re: Charity H.*, 215 W.Va. 208, 215, 599 S.E.2d 631, 638 (2004) (citing W.Va. Code § 49-6-12(b)(2)). Here, the guardian and DHHR assert that Petitioner Mother continued to use drugs, failed to comply with drug testing, and failed to fully participate with services. Moreover, West Virginia Code § 49-6-12(b) provides that a circuit court may grant an improvement period of up to six months. "[A] circuit court always has the authority to terminate an improvement period if there is evidence that the parent is not following the conditions prescribed or is failing to make improvement." *In the Matter of Brian D.*, 194 W.Va. 623, 636, 461 S.E.2d 129, 142 (1995). The guardian and DHHR accordingly argue that the circuit court did not abuse its authority in granting Petitioner Mother only a three-month improvement period and in revoking it when she was not complying with its terms.

The Court finds no error in the circuit court's decision to revoke Petitioner Mother's post-adjudicatory improvement period. Pursuant to West Virginia Code § 49-6-12(h), "[u]pon the motion

by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent [parent] has failed to fully participate in the terms of the improvement period." The appendix includes court summaries that discuss Petitioner Mother's failure to call for her drug tests and her difficulty with committing to resolving her substance abuse issues. The circuit court did not abuse its discretion in revoking Petitioner Mother's improvement period.

Lastly, Petitioner Mother argues that the circuit court erred in terminating her parental rights to T.F.-1, S.F., and T.F.-2. She argues that there were less drastic alternatives available. Petitioner Mother asserts that she was working toward resolving her issues and that placements with the children's grandmothers were available as options. The children were already living with their paternal grandmother and their maternal grandmother's' home was under home study. Petitioner Mother argues that the circuit court should have waited for the results of the maternal grandparents' home study and then placed the children with either grandmother.

The guardian and DHHR respond, contending that the circuit court did not err in terminating Petitioner Mother's parental rights to the subject children. They argue that the Court has held as follows:

> "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." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Nelson B.*, 225 W.Va. 680, 695 S.E.2d 910 (2010). In the present case, the circuit court had revoked Petitioner Mother's post-adjudicatory improvement period and at disposition, it found that the conditions of abuse and neglect could not be corrected in the near future. DHHR further argues that even though West Virginia Code 49-6-5(a) provides an order of preference in least restrictive alternatives, it does not direct that the need to promote the best interests of the children should be overshadowed. Petitioner Mother did not offer any evidence that proved how preserving her parental rights would promote the best interests of the children.

The Court finds that the circuit court did not abuse its discretion in terminating Petitioner Mother's parental rights. "'[T]he 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). "'[C]ourts 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 . . . .' Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Here, the appendix reflects Petitioner Mother's failure to cooperate with the terms of her improvement period. Given the circumstances of this case, the Court finds no error in the termination of parental rights.

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 parental rights is hereby affirmed.

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