STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: R.B. & F.B. Jr.**

No. 12-0384 (Barbour County 11-JA-16 & 17)

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother, by counsel Mary S. Nelson, appeals the Circuit Court of Barbour County's order entered by the circuit court on February 27, 2012, terminating her parental rights to R.B. and F.B. Jr. The guardian ad litem, Karen Hill Johnson, has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

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 petition in this matter arose after a neighbor called police in May of 2011, indicating that R.B., then four years old, had left her home and crossed the highway in only her underwear, and that she had a black eye. When police arrived asking R.B.'s whereabouts, Petitioner Mother and stepfather indicated that she was in her room, and they were asleep at the time. The home was in disarray with animals, animal feces, food, garbage and blood in the home. R.B. indicated that her stepfather had given her the black eye by hitting her in the face. R.B. also had bruises on her back. The older child, F.B., was seven years old at the time, and had been living with his maternal grandparents since he was three years old. Petitioner Mother has a third child who is in a legal guardianship with the child's paternal grandparents who was not named in this matter. There have been three prior referrals for this family, for reasons including lack of supervision, dangerous shelter, inadequate nutrition, abuse, and inadequate physical care. In photographs from a prior January of 2011 referral, R.B. again had a black eye.

Petitioner Mother and stepfather stipulated to the allegations in the petition; however, Petitioner Mother never admitted that R.B. had been physically abused. Instead, she gave several explanations for R.B.'s two black eyes within five months of one another, including horseplay and lack of sleep. She also indicated that the back bruising was from a fall from bed, but then indicated that it could be from a spanking Petitioner Mother gave to R.B. As to the conditions of the home, Petitioner Mother indicated that this was due solely to a missed garbage pickup that week. Both Petitioner Mother and stepfather requested improvement periods, but those motions were denied based on their failure to provide "acceptable, reasonable, logical explanation" for R.B.'s injuries.

Petitioner Mother's parental rights were later terminated, based on the circuit court's finding that neither Petitioner Mother nor stepfather have identified R.B.'s abuser. The circuit court ordered that the guardian ad litem and the DHHR are given discretion regarding future contact between the children and Petitioner Mother.

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 first argues that the circuit court erred in denying a post-adjudicatory improvement period, as petitioner was honest regarding her failure to supervise the child, the conditions of the home, and her knowledge regarding the child's injuries. Moreover, Petitioner Mother argues that she expressed insight into the manner in which she was abusive and neglectful, as well as a willingness to remedy the findings of abuse and neglect. Petitioner notes that the circuit court had to ask the child seven times before the child disclosed that Petitioner Mother allegedly caused the bruises on her back, and suggests that the child was confused. Petitioner argues that she admitted to problems with her parenting and the only remaining issue was how the child hurt her eye. Petitioner Mother argues that there was no medical evidence to show that the child was injured in a manner inconsistent with Petitioner Mother's rendition of events. Petitioner Mother argues that permanency would not have been affected by giving her an improvement period, as the children's father received an improvement period. Petitioner Mother argues that she was willing to participate in an improvement period, and that the circuit court erred in denying her the same.

The guardian argues in response that the circuit court was correct in denying an improvement period, as Petitioner Mother continuously denied any physical abuse of R.B., even with evidence of the same. Petitioner Mother gave conflicting testimony regarding the bruising on R.B.'s back, first stating that it occurred when the child fell off a bed, and then admitting that the bruising could have been caused by a spanking that Petitioner Mother had given the child. Furthermore, although R.B. had two black eyes within a five-month period, petitioner's explanations were that one was an accident and one was not a black eye but rather were dark circles from lack of sleep. The guardian

argues that Petitioner Mother never admitted that R.B. was abused, and therefore is not entitled to an improvement period.

The DHHR argues that the circuit court was correct in denying an improvement period, noting that improvement periods are within the circuit court's discretion. The DHHR argues that Petitioner Mother was not likely to benefit from an improvement period, as she never fully acknowledged the serious issues that needed to be remedied. She admitted to the child's injuries but attempted to explain each one as an accident. Further, she admitted that her house was filthy but blamed it on a missed garbage pickup. The DHHR argues that petitioner did not meet her burden in proving that an improvement period was appropriate.

West Virginia Code § 49-6-12 does not provide a parent with a guaranteed right to an improvement period because the language therein allows a circuit court discretion in granting improvement periods. Further, that Code section states that a parent must establish "by clear and convincing evidence [] that the [parent] is likely to fully participate in the improvement period . . ." W. Va. Code § 49-6-12(a)(2). Simply put, the only evidence petitioner presented to meet her burden were her own assertions that she would avail herself of any opportunity for appropriate programs. Petitioner argues that she admitted the deficiencies in her parenting, but a review of the record shows that for every admission, petitioner had an excuse for her deficiencies. Further, she failed to admit to or identify the perpetrator of the most egregious behavior, which was the physical abuse of her daughter. The circuit court's decision to deny petitioner a post-adjudicatory improvement period was not clearly erroneous.

Petitioner Mother also argues that the circuit court erred in terminating her parental rights, as opposed to ordering a lesser disposition. Petitioner argues that a less drastic alternative would have been to place the children with a relative as their guardian without the necessity of a termination of parental rights. Petitioner argues that termination was not necessary in this matter.

The guardian argues that termination was proper in this matter due to Petitioner Mother's denial of physical abuse in the face of evidence of the same. The guardian argues that due to this denial, the circuit court's only recourse was termination of parental rights. The DHHR also argues in favor of termination, noting that the preservation of Petitioner Mother's parental rights was not in the children's best interest, and that Petitioner Mother failed to establish how the children's interests would be promoted by maintaining parental rights.

With regard to the termination of Petitioner Mother's parental rights, this Court notes that the least restrictive alternative is generally employed pursuant to West Virginia Code § 49–6–5. However, this Court has 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). Furthermore, this Court has found that:

> "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 4, *In re Harley C.*, 203 W.Va. 594, 509 S.E.2d 875 (1998). R.B. had at least two black eyes in a five-month period, along with bruising on her back. Although Petitioner Mother admitted that the child suffered injuries, her explanations for the injuries were illogical to the circuit court. We find no error in the circuit court's findings and decline to disturb the termination of parental rights.

Finally, Petitioner Mother argues that the circuit court erred in denying post-termination visitation. Petitioner argues that the children enjoyed contact with her, and that the children are with the maternal grandparents, so contact would be convenient. Petitioner Mother argues that the circuit court made no determination on the record as to future visitation, leaving it up to the DHHR and the guardian.

The guardian notes that post-termination visitation was not denied in this matter. In fact, the guardian and DHHR worked together to schedule visitation between Petitioner Mother and the children, but Petitioner Mother failed to appear. Since visitation was not denied, Petitioner Mother's assignment of error is invalid. The DHHR also argues that the circuit court did not deny post-termination visitation, but merely set parameters for said visitation. The DHHR argues that a remand of the case on this issue is not necessary, as there is no basis for appeal, since visitation was not denied.

A review of the circuit court's order shows that the circuit court did not terminate or prevent post-termination visitation. Rather, visitation was left to the discretion of the DHHR and the guardian. The guardian indicates that visitation was planned but that Petitioner Mother failed to appear. Regardless, there is no merit in petitioner's final assignment of error, as the circuit court did not deny post-termination visitation in the disposition order.

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: September 7, 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