STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: **A.H., T.H. & I.H.**

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

No. 12-0466 (Wood County 10-JA-92, 10-JA-93 & 10-JA-94)

MEMORANDUM DECISION

Petitioner Mother, by counsel Robin S. Bonovitch, appeals the Circuit Court of Wood County's order entered on March 13, 2012, denying her motion to modify the dispositional order, which terminated her parental rights to A.H., T.H., and I.H. The guardian ad litem, Reggie R. Bailey, has filed his 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. Respondent Father has also filed a response, in support of Petitioner Mother's petition.

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 was filed after A.H. was hit in the face by Respondent Father, and neither parent sought medical treatment for her. Respondent Father claimed that he was asleep when he hit A.H., and that "repressed memories of childhood abuse" caused him to hit her. He states that when he awoke, he had no memory of hitting the child. Petitioner Mother indicated that she believes Respondent Father's explanation of the abuse. Both parents indicate that they did not report the abuse, even though they were already under a DHHR safety plan, until at least two days later, because they had not had time. They reported the abuse a day before a service provider was scheduled to be in the home. Interviews with extended family members show a pattern of abuse in the home, including excessive spanking of A.H., and domestic violence against Petitioner Mother. In fact, Petitioner Mother had filed a domestic violence protective order against Respondent Father four months prior, but within weeks dismissed the same.

Respondent Father attempted to stipulate to the allegations in the petition, but the circuit court refused this stipulation as it did not feel that Respondent Father was taking responsibility for his actions. Respondent Father was adjudicated as abusive and neglectful for the physical abuse of A.H. and his failure to seek medical treatment. Petitioner Mother was adjudicated neglectful for failing to seek medical treatment for A.H. and for failing to protect the children. Both parents requested an improvement period, but the circuit court denied these requests, finding that Petitioner Mother has failed to contact the DHHR to obtain services or more visitation, although she claims she wanted her children back and wanted to see them more. Petitioner Mother only

recently left Respondent Father, but she moved in with his mother, who is the same person who did not obtain medical care for the child after her injuries. Moreover, there is nothing other than Respondent Father's testimony to support his claims of rage based on repressed memories. The circuit court did not feel that the parents would fully participate in improvement periods.The circuit court then terminated Respondent Father and Petitioner Mother's parental rights. The circuit court noted that Petitioner Mother continued to reside with Respondent Father until recently, and just left a message on his computer that she still loves him. She also testified that she would return to Respondent Father if her parental rights were terminated. Respondent Father's motion for a post-dispositional improvement period was denied, as was Petitioner Mother's request for reconsideration of the denial of an improvement period. Respondent Father was denied post-termination visitation, but Petitioner Mother was granted supervised post-termination visitation.

Both parents then filed motions to modify the dispositional order, promising that they would live separately. Father supplemented his motion with a transcript of an interview between a police officer and A.H., in which A.H. states that Respondent Father was asleep when he hit her and remained asleep thereafter. The circuit court denied both motions. The circuit court relied on *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007), which holds that parents do not have standing to move for modification of disposition of a child after their rights have been voluntarily or involuntarily terminated. The circuit court also found no merit in Respondent Father's argument that he has presented new evidence, as the interview of the child was available to both parents prior to termination, had they interviewed the detective, who was always listed as a witness. Moreover, the child was only three years old at the time of the interview, and her interview that her father was asleep while hitting her was vague at best. Further, Respondent Father testified himself that he woke up after hitting her, while the child stated that he remained asleep. Additionally, Respondent Father pled guilty to domestic battery after termination.

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 her motion to modify

based upon a change of circumstances. Petitioner Mother argues only that this case is distinguishable from *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007), in that Petitioner Mother's rights were involuntarily terminated, and she brought her motion before her appeal rights had expired. Respondent Father also argues that both he and Petitioner Mother have standing to move to modify the disposition because their rights were involuntarily terminated.

The DHHR responds in support of the denial of the motion for modification, arguing that the Court makes no distinction in the type of termination of parental rights. Further, petitioner offers no argument as to why this would matter under the *Cesar* case. The guardian concurs, arguing that *Cesar* is applicable here and that the circuit court was correct to deny the motion.

> A person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a "parent," pursuant to W. Va.Code § 49–6–6 (1977) (Repl.Vol.2004), to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated.

Syl. Pt. 6, *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007). The circuit court found that this provision prevents petitioner from moving for a modification in this matter. This Court agrees, finding no error in the circuit court's denial of petitioner's motion for modification of disposition.

Petitioner Mother also argues that the circuit court erred in denying the motion to modify the dispositional order because there was newly discovered evidence introduced; namely, the transcript of the interview with A.H. The circuit court properly noted that the interview was not disclosed to either parent during the abuse and neglect proceeding, but still denied the motion. Petitioner argues that this evidence is new and material, as it corroborates the testimony of Respondent Father. Moreover, petitioner argues that the new evidence would have produced a different result. Respondent Father also argues that the newly discovered evidence should cause the circuit court to modify its prior disposition.

The DHHR argues that the police detective who interviewed the child was always listed as a witness, and the circuit court made note of the same in its order denying modification of the dispositional order. Thus, the DHHR argues that the information was readily available to petitioner, and as such, is not newly discovered evidence. The DHHR also notes that the testimony of the child contradicts Respondent Father's testimony in some aspects, and notes that most of the interview consists of the child coloring pictures and not giving responses to the detective's questions. The DHHR feels that termination was proper in this matter. The guardian makes substantially the same arguments as the DHHR, noting that the statement in question was easily obtainable by petitioner in the proceedings below.

> "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and

> securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus, *State v. Frazier,* 162 W.Va. 935, 253 S.E.2d 534 (1979).

Syl. Pt. 1, *State v. William M.,* 225 W.Va. 256, 692 S.E.2d 299 (2010). In the present case, the circuit court found that the interview was obtainable by petitioner in the proceedings below, as the detective was always listed by the State as a witness; however, petitioner never interviewed the detective. Additionally, the circuit court found that the interview would not have changed the outcome in this matter. This Court finds no error in the circuit court's refusal to grant a modification based on new evidence.

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 denial of the motion for modification, as well as the the termination of parental rights, are 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