

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: C.D.

No. 12-0721(Logan County 10-JA-66)

FILED

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

MEMORANDUM DECISION

Petitioner Mother, by counsel William T. Forester, appeals the Circuit Court of Logan County's order entered on May 14, 2012, terminating her parental rights to C.D. The guardian ad litem, David A. Wandling, has filed his response on behalf of the child.¹ The West Virginia Department of Health and Human Services ("DHHR"), by counsel William L. Bands, 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 was filed based on allegations of sexual abuse by Respondent Father and Petitioner Mother's failure to protect the child. This family has been the subject of prior abuse and neglect proceedings based on the parents' ongoing mental health problems and neglect. C.D. was removed in the prior case and later reunited with her parents. The referral in this action came approximately a year prior to the petition being filed, and in that time, the child disclosed that Petitioner Mother had actually witnessed and participated in the abuse by holding C.D. down at times while the father abused C.D. Petitioner Mother never took the child for mental health treatment, which was suggested, and did not separate from Respondent Father. The parents admitted to having mental health issues, but neither admitted to the sexual abuse. The parents were adjudicated as abusing parents. Both parents moved for an improvement period, but the circuit court never granted one. Visitation was denied to Respondent Father, due to the finding of sexual abuse, but Petitioner Mother was granted visitation. However, she started missing visitation, missing multidisciplinary treatment team meetings, and missing hearings, including the hearing on her motion for an improvement period. Both parents' parental rights were terminated, based on their failure to admit the sexual abuse and on their untreated mental health conditions. Post-termination visitation was denied.

¹ Although the guardian did not file a response in this case, he did file a response in case number 12-0722, which is the petition of the father in this matter, and directed his response to both parents. Thus, this Court has considered the guardian's response herein.

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 argues several assignments of error are summarized as follows: the circuit court erred in failing to grant Petitioner Mother an improvement period, either post-adjudicatory or post-dispositional; the circuit court erred in terminating Petitioner Mother's parental rights; the circuit court failed to follow the proper time standards mandated in abuse and neglect proceedings; and the circuit court erred in failing to grant post-termination visitation. Petitioner Mother first argues that the circuit court erred in failing to grant her an improvement period, noting that the circuit court continuously failed to rule on her motion for an improvement period in this matter and then terminated her parental rights. Petitioner relies upon this Court's prior case law to argue that since the circuit court failed to give a compelling reason not to grant an improvement period, petitioner was entitled to the improvement period. Petitioner argues that she was not called upon to specifically acknowledge that the father of C.D. abused the child, and that the failure of the State to prosecute Respondent Father confused her. Petitioner Mother argues that an improvement period would not have harmed the child, as the child was not in the home.

The guardian responds, arguing that neither parent sufficiently acknowledged the existence of abuse and/or neglect and therefore, the problems were untreatable. The guardian argues that an improvement period would have been an exercise in futility at the expense of the child. The DHHR agrees with the guardian's arguments, and adds that reasonable efforts to preserve and unify the family are not required when a parent has subjected a child to sexual abuse.

This Court has stated as follows:

in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. 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.

W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). Petitioner Mother failed to acknowledge the sexual abuse by Respondent Father and therefore was not entitled to an improvement period.

Petitioner Mother next argues that the circuit court erred in terminating her parental rights. The circuit court found that Petitioner Mother knew about the abuse and failed to protect the child; however, petitioner argues that the State failed to prove by clear and convincing evidence that Petitioner Mother took no action in the face of knowledge of the abuse or that she aided or protected the abusing parent. Petitioner argues that there was evidence that Respondent Father did not abuse the child. C.D.'s physical examination was inconclusive, Respondent Father passed a lie detector test, the State did not prosecute Respondent Father, and the DHHR did not immediately file an emergency petition. Petitioner argues that she has divorced Respondent Father, who has remarried. Petitioner therefore argues that the primary circumstance resulting in the filing of the petition has been abated, and thus the conditions of abuse and neglect are substantially corrected.

The guardian and the DHHR respond in favor of termination, arguing that there was clear and convincing evidence that both parents abused the child. Both the guardian and the DHHR note that the child spontaneously disclosed that Petitioner Mother witnessed the abuse and even held the child down at times, allowing Respondent Father to sexually abuse her. Both argue that termination was the only option, as there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected. This Court agrees, and affirms the termination of parental rights in this matter. Pursuant to West Virginia Code § 49-6-5(b)(5), there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected when an abusing parent has sexually abused the child. Moreover, Petitioner Mother failed to protect the child from the abuse, as she failed to acknowledge the abuse. Therefore, termination was proper in this matter.

Petitioner Mother also argues that the circuit court erred in failing to follow the time standards mandated in abuse and neglect proceedings by allowing numerous delays, including holding the adjudicatory hearing three months after the preliminary hearing, and not entering the order from the adjudicatory hearing for almost six months. Moreover, Petitioner Mother argues that the disposition hearing was held almost a year after the adjudicatory hearing, even though no improvement period was ever granted. After the disposition hearing was held, the circuit court waited almost four months to enter the disposition order, terminating Petitioner Mother's parental rights. Petitioner Mother argues that these delays violated the West Virginia Rules of Procedure for Abuse and Neglect Proceedings.

The DHHR argues that the circuit court's deviation from time standards is not reversible error, as the parents still received the requisite due process and were not prejudiced by the delays. The guardian argues that the delays neither negatively impacted the best interests of the child, nor prejudiced Petitioner Mother, as she had continued to exercise visitation during that time. While this Court is disturbed by the circuit court's failure to abide by the relevant statutes and rules concerning the applicable timelines for abuse and neglect proceedings, we do not find reversible error. There has been no showing of prejudice on behalf of the petitioner regarding the procedural delays.

Finally, Petitioner Mother argues that the circuit court erred in failing to grant post-termination visitation, and failed to adequately address the issue by making proper findings regarding post-termination visitation. The guardian argues that visitation was not in the child's best interests here, as Petitioner Mother had erratic and bizarre behavior during visitation, and missed many visits while this case was pending, including missing approximately ten weeks of visitation in the spring and summer of 2011.

This Court finds no error in the denial of post-termination visitation. This Court has found as follows:

“When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.” Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 11, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). In the present matter, Petitioner Mother consistently failed to appear at visitation, and often acted erratic and bizarre when she attended visitation. Therefore, this Court finds no error in the denial of post-termination visitation.

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 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: 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