STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **B.B.**

No. 20-0210 (Kanawha County 19-JA-534)

FILED
November 4, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother M.B., by counsel Michael M. Cary, appeals the Circuit Court of Kanawha County's January 28, 2020, order terminating her parental rights to B.B.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Mindy M. Parsley, filed a response in support of the circuit court's order. The guardian ad litem, Erica Lord, filed a response on behalf of the child in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying her a meaningful post-adjudicatory improvement period and terminating her parental rights.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Prior to the filing of the instant petition, the DHHR filed an abuse and neglect petition against petitioner and the father upon the birth of B.B. in 2016. In that petition, the DHHR alleged that petitioner tested positive for methamphetamine and ecstasy and that the child's cord blood tested positive for methamphetamine. Petitioner and the father were adjudicated as abusing parents, granted and completed improvement periods, and the child was ultimately returned to their custody. In September of 2019, the DHHR filed a new child abuse and neglect petition against petitioner and the father after receiving a referral regarding drug use in the home. The home was reported as clean, but it lacked electricity. The DHHR alleged that petitioner was reportedly in and

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

out of the home and was otherwise homeless. The DHHR also alleged that B.B. had been taken to a "drug house" on at least one occasion. Additionally, the DHHR alleged that petitioner and the father were abusing drugs and that the father said petitioner overdosed two weeks prior to the petition's filing. The DHHR further asserted that the child was not being bathed on a regular basis because of the parents' drug use. An in-home safety plan was put into place but abandoned shortly thereafter due to the father's drug use and petitioner's "homelessness, violence, and drug use." Specifically, the DHHR alleged that one day after the implementation of the safety plan, petitioner was seen at the home, under the influence of drugs, and engaging in domestic violence against the father in the child's presence. The DHHR also alleged that the child disclosed witnessing petitioner engage in domestic violence against the father. Finally, the DHHR alleged that the parents failed to provide B.B. with the necessary food, clothing, supervision, housing, and financial support. Thereafter, petitioner waived her preliminary hearing.

The next month, the circuit court held an adjudicatory hearing wherein the DHHR reported that petitioner left her in-patient drug rehabilitation program after just one day. Additionally, the DHHR reported that petitioner had been arrested for possession of a stolen vehicle and her whereabouts were unknown after her release from incarceration. As such, petitioner did not appear in person at the hearing but was represented by counsel. At the hearing, the circuit court accepted the father's stipulation to the allegations in the petition, took evidence in regard to petitioner's conduct, adjudicated both parents as abusing and neglecting parents, and ordered that the father have no contact with petitioner.

In November of 2019, the circuit court held a dispositional hearing. Petitioner did not appear in person at the hearing but was represented by counsel. The DHHR moved for termination of petitioner's parental rights. At the hearing, a DHHR caseworker testified that petitioner failed to participate in any services or any random drug screening and her whereabouts were still unknown. Additionally, the caseworker testified that there had been some concerns that the father and petitioner were still communicating despite a court-ordered prohibition. In light of the evidence at the dispositional hearing, the circuit court found that petitioner "failed to participate in services offered by the [DHHR]." Further, the circuit court found that petitioner "had received proper notice of these proceedings." Based upon these findings, the circuit court found there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and that it was in the best interests of the child to terminate petitioner's parental rights.[2] The circuit court entered an order reflecting its decision on January 28, 2020. Petitioner appeals from this order.

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

[2]Petitioner's parental rights were terminated during the proceedings below. The father retains his parental rights and is participating in services. According to the parties, the permanency plan for the child is legal guardianship by his aunt and uncle with a concurrent plan for reunification with the father.

> 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).

On appeal, petitioner argues that the circuit court erred in denying her a meaningful post-adjudicatory improvement period because she would have been "more than willing" to participate in services, random drug screenings, and supervised visitations. Further, petitioner notes that she successfully completed an improvement period in a prior abuse and neglect proceeding. We find petitioner's arguments unavailing.

West Virginia Code § 49-4-610(2)(B) provides that the circuit court may grant a parent a post-adjudicatory improvement when the parent "demonstrates, by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period." "This Court has explained that 'an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged.'" *In re Kaitlyn P.*, 225 W. Va. 123, 126, 690 S.E.2d 131, 134 (2010) (citation omitted). Finally, the circuit court has discretion to deny an improvement period when no improvement is likely. *In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002).

Despite petitioner's argument that she would have substantially complied with services and corrected the conditions of abuse and neglect, the record shows that she largely failed to participate in services during the proceedings. On appeal, petitioner focuses her argument primarily on her unsubstantiated claim that she was participating in a substance abuse treatment program at the time of the dispositional hearing. While petitioner admits that she did not tell the DHHR about her participation in that program, she fails to recognize that there is no evidence in the record to corroborate this claim. Simply put, this Court refuses to grant petitioner relief on the basis of an assertion for which there is no support in the record. Instead, the record shows that petitioner's whereabouts were unknown for several weeks, during which time she was absent from both the adjudicatory and dispositional hearings. According to the record, this extended absence followed petitioner's release from incarceration for stealing a vehicle. In fact, the only evidence in the record concerning petitioner's attempt to remedy her substance abuse shows that she left treatment after just one day and continued to engage in drug use and domestic violence in the presence of the child. The record also reflects that petitioner was homeless at the time of the petition's filing and struggled to maintain housing throughout the proceedings. Despite this evidence, petitioner asserts

that she would have complied with the terms and conditions of a meaningful post-adjudicatory improvement period.

Given petitioner's willful refusal to participate in services designed to remedy the conditions of abuse and neglect, it is disingenuous for her to assert that she would have participated in services if granted a "meaningful" improvement period during the proceedings below. While petitioner did complete an improvement period in a prior abuse and neglect proceeding, her successful competition did not deter her return to substance abuse and endangerment of the child. Petitioner's actions in refusing to successfully complete substance abuse treatment, attend her hearings, or stay in communication with the DHHR established that she was not likely to fully participate in an improvement period. As such, we find no error in the circuit court's denial of petitioner's motion for an additional improvement period.

Moreover, the evidence before the circuit court supports its termination of petitioner's parental rights. As set forth above, the DHHR presented extensive evidence of petitioner's noncompliance with services throughout the proceedings, including her refusal to participate in substance abuse treatment and her continued substance abuse, domestic violence, and contact with the father. West Virginia Code § 49-4-604(c)(6) permits a circuit court to terminate parental rights upon finding that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that termination is necessary for the welfare of the child. With these parameters in mind, it is clear that the record supports the circuit court's finding that there was no reasonable likelihood petitioner could substantially correct the conditions of abuse and neglect given her untreated substance abuse issues. While it is true that petitioner may be able to undergo some treatment in the future for her substance abuse, such possible improvement is based on pure speculation. Further, petitioner often failed to avail herself of the DHHR's services, leaving her drug treatment program after one day and then failing to communicate with her caseworker. Although petitioner also takes issue with the timeframe from adjudication to termination, arguing that she should have been given additional time and an opportunity to demonstrate that she could correct the conditions of abuse and neglect, we have 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." *Cecil T.*, 228 W. Va. at 91, 717 S.E.2d at 875, syl. pt. 4, in part (citation omitted). Further, we have held that

> "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] 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 Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). As such, we find no error in the termination of petitioner's parental rights.

Lastly, because the proceedings remain ongoing with regard to the child's father, 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 that

> [a]t 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 Procedure[] 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.

Cecil T., 228 W. Va. at 91, 717 S.E.2d at 875, syl. pt. 6. Moreover, this Court has stated that

> [i]n determining the appropriate permanent out-of-home placement of a child under [West Virginia Code § 49-4-604(c)(6)], 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 [cannot] 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 its January 28, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison