

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-1203

IN RE: D.H.

Hancock County Case No. 13-JA-29
The Honorable Ronald E. Wilson

**BRIEF OF THE PETITIONER, THE WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES**

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The West Virginia Department of Health and Human Resources (“the Department”) asks this Court to reverse the Circuit Court of Hancock County’s dispositional order below. That order left intact the Respondent Mother, S.H.’s, parental rights to D.H.¹; granted the Respondent Mother a delayed dispositional improvement period; and delayed permanency for D.H. for the next three and a half years. The Circuit Court’s order is erroneous because the evidence presented to the Circuit Court clearly demonstrated no reasonable likelihood that S.H. could rectify the conditions of abuse and neglect in the near future. W. Va. Code § 49-6-5(a)(6). S.H. suffers from a heroin addiction that affects her ability to parent, (App., Vol. 1, p. 73), and during her improvement period she continued to use heroin three to four times a week, (App., Vol. 2, p. 102). Furthermore, during the course of this abuse and neglect case, the Respondent Mother was incarcerated three times: once, before adjudication, for robbing her employer with her boyfriend to get drug money; then, during her improvement period, for testing positive for heroin in violation of the terms of the Drug Court program; and finally, also during her improvement period, for breaking into homes in Ohio to again obtain money for drugs. She currently remains incarcerated in Ohio. (App., Vol. 2, pp. 27-28, 90-91.)

Each time the Respondent Mother was incarcerated, she was unable to visit with her infant child or work with her service providers to rectify her parenting deficiencies. Due to the Respondent Mother’s heroin addiction and criminal activities, D.H. has been in foster care since she was two months old. During the sixteen-month pendency of this abuse and neglect case, D.H. has been cared for by relatives and foster parents with only limited contact with the Respondent Mother.

¹ This case involves minors. Initials are thus used to identify individuals in accordance with Revised Rule of Appellate Procedure 40(e).

At the dispositional stage of an abuse and neglect case, a circuit court's decision must be based on the child's best interests. The Circuit Court's decision here to grant the Respondent Mother a delayed improvement period and to continue monitoring the Respondent Mother's progress until D.H. is **five years old** (for the next three and a half years) leaves nineteen-month-old D.H. without any stability or permanency during her early formative years and is not in D.H.'s best interests. The ruling must thus be reversed.

ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO TERMINATE THE RESPONDENT MOTHER'S PARENTAL RIGHTS.

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN GRANTING THE RESPONDENT MOTHER A TWELVE-MONTH IMPROVEMENT PERIOD TO BEGIN UPON HER PROSPECTIVE RELEASE FROM JAIL IN FEBRUARY OF 2015.

III. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DICTATING THE STANDARD OF REVIEW AND THE SCOPE OF A PROSPECTIVE HEARING ON A MOTION TO MODIFY THE RESPONDENT MOTHER'S DISPOSITION IN CONTRAVENTION OF THE CLEAR LANGUAGE OF W. VA. CODE § 49-6-6.

STATEMENT OF THE CASE

This case involves the welfare of an nineteen-month-old girl, D.H., born on 2013. When D.H. was two months old, the Department received a referral that D.H. had deep abrasions on both sides of her mouth and underneath her chin. According to D.H.'s doctor, the explanation given for the injuries was not consistent with the medical evidence. (App., Vol. 1, p. 2.) During the Department's investigation into D.H.'s injuries, the Respondent Mother admitted that she consumed marijuana and alcohol while caring for D.H. (App., Vol. 1, p. 3.) On August 29, 2013, based upon the unexplained injuries to D.H. and the Respondent Mother's admissions to drug and alcohol use, the Department filed an abuse and neglect petition against the Respondent Mother and her then live-in boyfriend, R.S. (App., Vol. 1, pp. 1-6.) The Circuit Court granted

the Department custody of D.H. and set a preliminary hearing for September 11, 2013. (App., Vol. 1, pp. 7-8.)

On September 11, 2013, the Circuit Court held a preliminary hearing to determine if D.H. should be returned to the Respondent Mother's custody. At that time, R.S. represented to the Circuit Court that he would have no further contact with the Respondent Mother or D.H. The Circuit Court dismissed R.S. from the case as he is not D.H.'s natural father. (App., Vol. 1, p. 11.) The Respondent Mother waived her right to a preliminary hearing. (*Id.*)

On October 28, 2013, the Circuit Court held a status hearing. The Guardian ad Litem reported that the Respondent Mother was arrested on October 16, 2013 for robbing her employer with R.S. and using the money to buy drugs. (App., Vol. 1, p. 13.) The Department filed an amended petition on November 19, 2013, to include the allegations regarding the Respondent Mother's criminal activities. (App., Vol. 1, pp. 16-22.)

The Circuit Court held an adjudicatory hearing on November 25, 2013. During that hearing, the Respondent Mother admitted that she, along with R.S., stole money from her employer to buy heroin and cocaine for her drug habit after she had agreed to no longer have any contact with R.S. (App., Vol. 1, pp. 25-27; *see also* App., Vol. 2, p. 90.) The Circuit Court then granted the Respondent Mother a post-adjudicatory improvement period. (*Id.*) The terms of the Respondent Mother's post-adjudicatory improvement period included that she be free of drugs and alcohol, participate in parenting education, participate in individual therapy, obtain housing, obtain a job to support herself and her daughter, and abide by all requirements of the Drug Court program. (App., Vol. 1, pp. 23-24, 75.)

On February 14, 2014, the Circuit Court reviewed the Respondent Mother's progress during her post-adjudicatory improvement period. At that time, it appeared that the Respondent

Mother was participating in both the terms of her improvement period and the Drug Court program in Brooke County as a result of her criminal charges. (App., Vol. 1, p. 31.) However, at the March 17, 2014 status review hearing, the Guardian ad Litem reported that the Respondent Mother had tested positive for heroin and had served a weekend in jail through the Drug Court program. (App., Vol. 1, p. 33; *see also* App., Vol. 2, p. 28.) Because the Respondent Mother had not tested positive for drugs during the two weeks since her release from jail, the Circuit Court continued her improvement period. (App., Vol. 1, p. 33.)

By the next review hearing on April 28, 2014, the Respondent Mother had been arrested in the State of Ohio for breaking into homes and stealing personal property. (App., Vol. 1, p. 38.) The Respondent Mother pled guilty and was sentenced to six months in the Eastern Ohio Correction Center to begin upon her transfer to that facility. (App., Vol. 1, pp. 91-94.) The Guardian ad Litem reported that S.H. had again tested positive for heroin and that she had not been pursuing employment or housing. (App., Vol. 1, pp. 37-38.) Based upon the Guardian ad Litem's motion, the Circuit Court terminated S.H.'s improvement period for her failure to comply with its terms. (App., Vol. 1, p. 38.)

On May 27, 2014, the Circuit Court once again considered the Guardian ad Litem's motion to terminate the Respondent Mother's improvement period. (App., Vol. 1, pp. 35-36.) The Circuit Court reiterated its termination of the Respondent Mother's post-adjudicatory improvement period stating that the Respondent Mother was four months into her improvement period when she was arrested in Ohio and that there is no way that she can meaningfully participate while she is incarcerated. (App., Vol. 1, p. 41.) The Circuit Court also stated that D.H. "is just turning one year old and is in need of a stable, permanent placement." (*Id.*) On

July 23, 2014, the Department filed its dispositional case plan for D.H., in which it recommended the termination of the S.H.'s parental rights. (App., Vol. 1, p. 48.)

The Circuit Court held a dispositional hearing on September 26, 2014. (App., Vol. 2.) The Circuit Court inquired as to whether there was any dispute that S.H. was addicted to alcohol or controlled substances that seriously impaired her parenting skills and that she failed to participate in a recommended treatment program to address that issue. S.H. could not produce any evidence to the contrary. (App., Vol. 1, p. 73.) Evidence was then presented to support the Department's recommendation that the Circuit Court terminate S.H.'s parental rights.

Child Protective Service Worker Marta McElhoes testified that although S.H. initially participated in some services, ultimately she did not complete her improvement period. (App., Vol. 2, p. 28.) S.H. did not obtain housing or employment or take the recommended steps to apply for HUD housing. (App., Vol. 1, p. 75; App., Vol. 2, p. 25.) She continued to test positive for heroin. (App., Vol. 1, p. 75; App., Vol. 2, p. 28.) When confronted by the multidisciplinary treatment team ("MDT") and Drug Court regarding her need for inpatient treatment, S.H. responded that she "didn't need the drugs." (App., Vol. 1, p. 76; App., Vol. 2, pp. 29-30.) However, following the MDT in which inpatient drug treatment was discussed, S.H. was arrested in the State of Ohio for burglary to obtain money for drugs and currently remains incarcerated for that crime. (*Id.*; *see also* App., Vol. 2, pp. 54, 91.) Ms. McElhoes testified that the Department's recommendation was termination of S.H.'s parental rights because the Respondent Mother did not make any progress during her improvement period to address her parenting deficiencies, did not show any indication that she would change her behaviors, and S.H. had not bonded with D.H. (App., Vol. 1, p. 76; App., Vol. 2, p. 31.) The Department expressed that, given the child's young age, D.H.'s best interests would be served by termination of the

Respondent Mother's parental rights and D.H.'s adoption by her great-aunt and uncle. (App., Vol. 1, p. 76; App., Vol. 2 p. 37.)

Family Education Specialist Brenda Ebeling also testified. (App., Vol. 2., pp. 64-73, 82-89.) Ms. Ebeling testified that she provided parenting education, life skills assistance, and supervised visitation to S.H. (App., Vol. 1, p. 77; App. Vol. 2, p. 65.) Ms. Ebeling testified that S.H. and D.H. did not have a strong bond, that S.H. never reached the point where unsupervised visitation could be recommended, and that S.H. did not retain the information she learned from one visit to the next. (App., Vol. 1, p. 77.)

The Respondent Mother testified and admitted that she committed crimes throughout her improvement period to get money for drugs. (App., Vol. 1, p. 78.; App., Vol. 2, pp. 90-91.) S.H. further admitted that during her improvement period she used drugs "about three or four times a week." (App., Vol. 2, p. 102.) She also admitted that she did not comply with the terms of her improvement period. (App., Vol. 2, p. 104.) S.H. testified that she is currently incarcerated in the Eastern Ohio Correction Center and is participating in a program to address her parenting, mental health, and substance abuse issues. (App., Vol. 2, p. 93.) She testified that upon her release in February of 2015, she would be on probation for three years in Ohio. (App., Vol. 2, p. 99.) S.H. asked the Circuit Court to grant her a disposition consistent with W. Va. Code § 49-6-5(a)(5) in which her parental rights are not terminated so that she might have the possibility of reuniting with D.H. sometime in the future. (App., Vol. 1, p. 78.)

At the conclusion of evidence, the Circuit Court declined to terminate the Respondent Mother's parental rights and instead provided "a final opportunity for her to change." (App., Vol. 2, p. 109.) In its written dispositional order, the Circuit Court found that S.H. had not successfully completed her improvement period because the improvement period was "doomed

to failure” because S.H. could not attend inpatient treatment because of Drug Court. (App., Vol. 1, pp. 79-80.) The Circuit Court wrote,

[o]f course she continued to abuse drugs, did not obtain housing or a job, and committed crimes that resulted in her incarcerations and inability to participate in the Plan or have contact with her daughter. Her hunger for heroin kept her from doing what was necessary to regain the custody of her child.

(*Id.*) The Circuit Court found that S.H. is presently unable to provide for D.H.’s needs and that D.H. has been in foster care for almost one year and needs a safe and stable long-term placement. The Circuit Court stated that it was granting the Respondent Mother a disposition consistent with W. Va. Code § 49-6-5(a)(5) in which it would not terminate S.H.’s parental rights; however, legal guardianship of D.H. would be given to her great-aunt and uncle in Georgia. (App., Vol. 1, p. 80.)

Nevertheless, the Circuit Court went on to order that the case remain open for five years. (App., Vol. 1, p. 80.) The Circuit Court granted S.H. a twelve-month improvement period to begin upon her projected release from incarceration in February of 2015. (App., Vol. 1, pp. 80-81.) Upon S.H.’s release from incarceration, the Circuit Court directed the MDT to meet and draft the terms of S.H.’s one-year improvement period which will include seeking inpatient drug treatment, having no contact with R.S. or anyone who is a danger to herself or her daughter, participating in and completing parenting education, obtaining suitable housing and a job, and responsibly addressing all of her pending legal matters². (App., Vol. 1, p. 81.)

The Circuit Court then restricted the Respondent Mother from petitioning the Circuit Court to return D.H. to her custody until June of 2018, when D.H. is five years old. (App., Vol.

² The terms for S.H.’s twelve-month improvement period set forth by the Circuit Court in its dispositional order are strikingly similar to the terms of S.H.’s post-adjudicatory improvement period which the Circuit Court terminated in May of 2014. (*See App. Vol. 1, pp. 23-24.*)

1, p. 82.) The Circuit Court stated that upon a petition to modify the disposition and return custody of D.H. to S.H. (when D.H. is five years old), any judge assigned to the case is

to look favorably upon [S.H.'s] request to end the legal guardianship and return the child to [S.H.]. The entire focus of that hearing will be upon [S.H.'s] compliance with this Order, and whether she has bonded with her child to the extent that [D.H.] is comfortable being with her mother and that it will not be too traumatic to return her to her mother.

(*Id.*) The Circuit Court ordered D.H.'s foster parents to provide ample opportunity for S.H. and D.H. to develop a close relationship and to encourage reunification. (App., Vol. 1, p. 83.)

The Department now appeals the dispositional order and asks this Court to reverse the Circuit Court's order granting the Respondent Mother its created disposition and condemning nineteen-month-old D.H. to uncertainty and potential upheaval of her life when she turns five, in three and a half years.

SUMMARY OF ARGUMENT

I. The Circuit Court abused its discretion in failing to terminate the Respondent Mother's parental rights. The evidence clearly demonstrated that there was no reasonable likelihood that the Respondent Mother could rectify the conditions of abuse and neglect in the near future. W. Va. Code § 49-6-5(a)(6). The Respondent Mother conceded that there was no evidence to contradict that she is addicted to alcohol or controlled substances that seriously impair her parenting skills and that she failed to participate in a recommended treatment program to address that issue. The Circuit Court found that the Respondent Mother is presently unable to provide for D.H.'s needs. D.H. is currently only nineteen months old and needs stability and permanency. The record in this case demonstrates by clear and convincing evidence that termination of the Respondent Mother's parental rights is in D.H.'s best interest.

II. The Circuit Court erred as a matter of law in granting the Respondent Mother a twelve-month improvement period to begin upon her prospective release from jail in February of 2015. This Court has stated that a dispositional improvement period must begin no later than the date of the hearing granting the improvement period. Syl. Pt. 5, *In re Emily*, 208 W. Va. 325, 540 S.E.2d 542 (2000). Furthermore, the length of an improvement period is governed by the statutory limits set forth in West Virginia Code § 49-6-12. The statute does not allow for a twelve-month improvement period, nor does it allow for an additional improvement period if a respondent parent was previously granted an improvement period and cannot show any substantial change of circumstances. W. Va. Code § 49-6-12(c).

III. The Circuit Court erred as a matter of law in dictating the standard of review and the scope of a prospective hearing on a motion to modify the Respondent Mother's disposition in contravention of the clear language of West Virginia Code § 49-6-6. Section 49-6-6 is the only mechanism through which a party can move to modify a disposition. That statute requires that the Circuit Court determine whether there is clear and convincing evidence of "a material change of circumstances and that such modification is in the child's best interests." *Id.* The Circuit Court here, however, ordered that any judge considering the Respondent Mother's future petition for modification must focus on S.H.'s compliance with the dispositional order and whether it is too traumatic for D.H. to return to S.H. The standard of review set forth by the Circuit Court improperly focuses on the Respondent Mother's compliance with an impermissible improvement period rather than the statutory mandate that any modification of disposition be in D.H.'s best interests.

CURRENT STATUS OF THE MINOR CHILD

D.H. is currently nineteen months old. She resides in Georgia with her maternal great-aunt and uncle who are approved foster parents. According to the Circuit Court's dispositional order, the permanency plan for D.H. is currently legal guardianship with her foster parents. However, should this Court terminate S.H.'s parental rights, D.H.'s permanency plan will be adoption by her kinship foster parents. The Respondent Mother's parental rights to D.H. are intact and she has been given an improvement period to begin upon her release from incarceration in February of 2015. Under the Circuit Court's order, S.H. will be allowed visitation with D.H. if S.H. "is clean of drugs and alcohol and conduct[s] her life in a responsible manner." (App., Vol. 1, p. 83.)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Department respectfully requests oral argument pursuant to Revised Rule of Appellate Procedure 19 as this case involves the Circuit Court's erroneous application of settled law. This case is appropriate for a memorandum decision because it presents no new or significant issues of law. Rev. R.A.P. 21, *State ex rel. P.T. v. Wilson*, No. 12-1489 (W. Va. Supreme Court, February 21, 2013) (memorandum decision).

STANDARD OF REVIEW

This Court reviews a circuit court's final order and ultimate disposition under an abuse of discretion standard. Syl. Pt. 1, in part, *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996). Consequently, the Circuit Court's decision not to terminate the Respondent Mother's parental rights is subject to an abuse of discretion standard. Specific to abuse and neglect cases, this Court has held,

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 a 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 the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Therefore, the Circuit Court's application of the statutes governing improvement periods and the statutory process for modifying a disposition is reviewed *de novo*. *Id.*

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO TERMINATE THE RESPONDENT MOTHER'S PARENTAL RIGHTS.

The Circuit Court abused its discretion in failing to terminate the Respondent Mother's parental rights. West Virginia Code § 49-6-5(a) sets forth the dispositions available to the Circuit Court at the end of an abuse and neglect case. The statute provides for the termination of parental rights when there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." W. Va. Code § 49-6-5(a)(6). Although W. Va. Code § 49-6-5(a) provides the Circuit Court with some discretion in determining the appropriate disposition for an abuse and neglect case, this Court has held that

courts 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, 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). Moreover,

[t]ermination 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.

Syl. Pt. 6, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010) (*per curiam*) (internal citations omitted). The statute defines “no reasonable likelihood that conditions of neglect or abuse can be substantially corrected” to include that

the abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning . . .

W. Va. Code § 49-6-5(b)(1).

The evidence in this case clearly demonstrated that there was no reasonable likelihood that the Respondent Mother could rectify the conditions of abuse and neglect in the near future. There is no dispute that the Respondent Mother suffers from a drug addiction that affects her ability to parent. (App., Vol. 1, p. 73.) She was granted an improvement period with terms designed to address her parenting deficiencies and was participating in Drug Court, pursuant to her criminal charges, to address her drug addiction. However, rather than successfully completing the services offered to address her parenting deficiencies and to combat her drug addiction, the Respondent Mother continued to test positive for heroin and to commit crimes to further pay for her drug habit. (App., Vol. 2, pp. 27-28, 90-91.) The Respondent Mother’s criminal activities led to her incarceration and her inability to make the changes necessary to become an appropriate parent for D.H. For that reason, in April and May of 2014, the Circuit Court terminated her improvement period and stated that D.H. needed stability and permanency. (App., Vol. 1, pp. 38, 41.)

Nevertheless, in deciding not to terminate the Respondent Mother's parental rights, the Circuit Court found that S.H.'s improvement period was "doomed to failure," (App., Vol. 1, p. 80), because her participation with Drug Court prohibited the Department from offering her inpatient treatment for her drug addiction. Although the Respondent Mother did not participate in inpatient treatment, the Department and Drug Court did discuss with the Respondent Mother the necessity for her to participate in inpatient treatment. (App., Vol. 1, p. 63; App., Vol. 2, p. 29.) However, before inpatient treatment could be arranged, the Respondent Mother was arrested in Ohio for burglary to obtain money for her drug habit. (App., Vol. 2, pp. 91-92.) The Respondent Mother remains incarcerated on those charges. The Circuit Court's decision not to terminate the Respondent Mother's rights because her improvement plan lacked "a proper foundation to cure her addiction," (App., Vol. 1, p. 80), and "her hunger for heroin kept her from doing what was necessary to regain the custody of her child," (*id.*), ignores that the Respondent Mother's own choices led to her incarceration and her inability to participate in services designed to rectify her parenting deficiencies.

Moreover, the Respondent Mother conceded at the dispositional hearing that she could produce no evidence to contradict that she is addicted to alcohol or controlled substances that seriously impair her parenting skills and that she failed to participate in a recommended treatment program to address that issue. (App., Vol. 1, p. 73.) As stated above, this concession demonstrates that there is no reasonable likelihood that she can substantially correct the conditions of neglect or abuse. *See* W. Va. Code § 49-6-5(b)(1).

D.H. is currently only nineteen months old and needs stability and permanency. It is well established in West Virginia law that the welfare of the child is the "polar star" by which

permanency decisions must be made. See Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948). This Court has held that

[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.

Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). The best interest of the child includes terminating parental rights when necessary. The record in this case demonstrates by clear and convincing evidence that termination of the Respondent Mother's parental rights is in D.H.'s best interest so that D.H. can achieve permanency through adoption with her kinship foster parents.

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN GRANTING THE RESPONDENT MOTHER A TWELVE-MONTH IMPROVEMENT PERIOD TO BEGIN UPON HER PROSPECTIVE RELEASE FROM JAIL IN FEBRUARY OF 2015.

Although the Circuit Court found, under W. Va. Code § 49-6-5(a)(5), that the Respondent Mother is presently unable to provide for D.H.'s needs, the Circuit Court nevertheless proceeded to grant the Respondent Mother a twelve-month improvement period to begin upon her release from jail in February of 2015. (App., Vol. 1, pp. 80-81.) The Circuit Court's decision to grant the Respondent Mother this delayed improvement period is clear legal error.

West Virginia Code § 49-6-5(c) allows the Circuit Court to grant a parent an improvement period not to exceed six months as an alternate disposition. However, in *In re Emily*, 208 W. Va. 325, 540 S.E.2d 542 (2000), this Court held that "the commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period." Syl. Pt. 5, *Id.* Consequently, the

Circuit Court's decision to give the Respondent Mother a twelve-month improvement period to begin upon her release from jail in February 2015 violates a clear mandate from this Court.

Moreover, the eligibility requirements for a dispositional improvement period are set forth in W. Va. Code § 49-6-12(c). Pertinent to this case, the Circuit Court may only grant the Respondent Mother a dispositional improvement period if she has not previously had an improvement period or if she can demonstrate a substantial change of circumstances since her initial improvement period. W. Va. Code § 49-6-12(c)(4). This prerequisite was not satisfied here. The Respondent Mother was granted a post-adjudicatory improvement period. It is undisputed that she did not successfully complete her improvement period and that the improvement period was terminated because she could not comply with its terms due to her criminal activity and subsequent incarceration. (App., Vol. 1, pp. 41, 80.) Therefore, the Respondent Mother has not shown a substantial change of circumstances since her initial improvement period.

Finally, both W. Va. Code § 49-6-5(c) and § 49-6-12(c) limit the duration of a dispositional improvement period to six months. There is a possibility for a three-month extension if certain criteria are met. W. Va. Code § 49-6-12(g). However, the Circuit Court in this case granted the Respondent Mother an improvement period to last for twelve months. The length of the improvement period granted by the Circuit Court is outside the limits provided by law.

Although the Department can understand the Circuit Court's desire to help this young mother overcome her drug addiction, the primary focus of the abuse and neglect case at the dispositional stage must be the best interests of the child. In discussing the statutory limits on improvement periods, this Court has said,

[a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to provide the basic nurturance of life.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996). D.H.'s best interests require that the Respondent Mother's rights be terminated and that D.H. be allowed to achieve permanency through her adoption by her great-aunt and uncle. The Circuit Court thus erred as a matter of law in granting the Respondent Mother a disposition that includes an improvement period delayed until her release from incarceration and of greater duration than permitted by statute.

III. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DICTATING THE STANDARD OF REVIEW AND THE SCOPE OF A PROSPECTIVE HEARING ON A MOTION TO MODIFY THE RESPONDENT MOTHER'S DISPOSITION IN CONTRAVENTION OF THE CLEAR LANGUAGE OF W. VA. CODE § 49-6-6.

Finally, the Circuit Court erred in setting forth precise guidelines for when and how the Respondent Mother could petition for the return of D.H. to her custody:

If [S.H.] is successful in addressing her substance abuse issues and parenting deficiencies, she may not Petition for the return of [D.H.] until June 2018, when the child is at least 5 years old. If she does Petition the Court, the Judge assigned to the case is required, pursuant to this order in which the Court finds that this plan is in the best interest of the child, [S.H. sic], to look favorably upon her request to end the legal guardianship and return the child to [S.H.]. The entire focus of that hearing will be upon [S.H.'s] compliance with this Order, and whether she has bonded with her child to the extent that [D.H.] is comfortable being with her mother and that it will not be too traumatic to return her to her mother.

(App., Vol. 1, p. 82.) West Virginia Code § 49-6-6 sets forth the only legal mechanism of which the Department is aware through which a parent can petition the Circuit Court to modify the disposition in an abuse and neglect case. While there is no particular time frame set forth in W.

Va. Code § 49-6-6, the statute provides that the Circuit Court may only modify the dispositional order if it finds “by clear and convincing evidence a material change of circumstances *and that such modification is in the child’s best interests.*” W. Va. Code § 49-6-6(a) (emphasis added). However, rather than focusing on D.H.’s best interests as required by statute, the Circuit Court directs that the focus of any prospective hearing on a motion to modify D.H.’s disposition must be on the Respondent Mother’s compliance with the terms of its order. The Circuit Court’s focus thus elevates the Respondent Mother’s change of circumstances over the best interests of D.H.

As this Court has repeatedly held, D.H.’s best interests are the “polar star” which must guide any decision regarding her custody. *See* Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948). To that end, this Court has recognized that a child’s best interest requires a permanent placement:

[T]he early, most formative years of a child’s life are crucial to his or her development. There would be no adequate remedy at law for these children were they permitted to continue in this abyss of uncertainty. We have repeatedly emphasized that children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement.

In re Carlita B., 185 W. Va. 613, 623, 408 S.E.2d 365, 375 (1991). Contrary to this mandate, the disposition created by the Circuit Court does not provide nineteen-month-old D.H. with a permanent placement or more stability. D.H. will undoubtedly be well cared for by her great-aunt and uncle and will develop a parent-child relationship with them over the next three and a half years. However, by leaving this case open and providing an opportunity for the Respondent Mother to regain custody of D.H. when the child is five years old by demonstrating only that she has complied with the Circuit Court’s dispositional order, the Circuit Court has not established permanency. The Circuit Court has created a situation in which D.H. may potentially be forced

to leave the people she considers her family to return to the Respondent Mother without consideration of whether such reunification is in D.H.'s best interests. Nineteen-month-old D.H. needs resolution in her family situation now, not three and a half years from now when she is five years old.

D.H.'s best interests require that this Court reverse the Circuit Court's disposition and terminate S.H.'s parental rights.

CONCLUSION

Wherefore, the Department respectfully requests that this Court remand the case to the Circuit Court with directions to terminate the Respondent Mother's parental rights. The Department asks for any other relief this Court deems fit.

Respectfully Submitted,

West Virginia Department of
Health and Human Resources,

By counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-1203

IN RE: D.H.

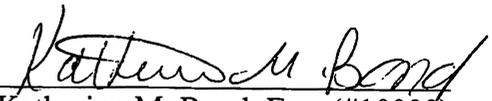
Hancock County Case No. 13-JA-29
The Honorable Ronald E. Wilson

CERTIFICATE OF SERVICE

I certify that I have, on this 9th day of January, 2015, served a true and accurate copy of the foregoing BRIEF OF THE PETITIONER, THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES and PETITIONER'S APPENDIXES VOLUMES 1 and 2 on the following parties of record by sending a copy, via U.S. first-class mail, to the following addresses:

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