

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

In Re: T.M. and M.M.:

No. 11-0603 (Nicholas County 10-JA-61 & 62)

FILED

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Nicholas County, wherein the Petitioner Father's parental rights to his children, T.M. and M.M., were terminated. The appeal was timely perfected by counsel, with an appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the children, in support of the circuit court's termination order. The West Virginia Department of Health and Human Resources ("DHHR") also filed a response in support of termination and submitted a supplemental appendix.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. The case is mature for consideration. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Petitioner Father challenges the circuit court's order terminating his parental rights to T.M. and M.M. He argues that the circuit court erred in finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future. In support, he asserts that he has demonstrated the capacity to solve the problems alleged in the abuse and neglect petition and has made substantial progress toward doing so.

The petition for this case was filed on October 25, 2010, after the Nicholas County Drug Task Force executed a search of the home shared by the Petitioner Father, the subject children, and the children's mother. From this search, the police found methamphetamine and materials for making methamphetamine. Present at this time were the Petitioner Father, the children's mother, an unrelated adult individual, and an unrelated infant child. The Petitioner Father admitted to Sergeant P.D. Kutcher of the Central West Virginia Drug Task Force that on approximately three other occasions in the past couple of months, he and the unrelated adult individual cooked methamphetamine in the family's home. Consequently, the Petitioner Father and the children's mother were each charged with attempt to operate a clandestine lab and child neglect causing risk of injury. An amended petition was filed on

November 5, 2010, which further alleged that the parents had exposed the children to the effects of manufacturing methamphetamine in the home.

The record reflects that this was not the Petitioner Father's first child abuse and neglect case. In 2008, a petition was filed after the Petitioner Father admitted to accidentally twisting T.M.'s arm. Physicians who examined T.M., however, could not testify that the injury resulted from non-accidental trauma and the case was dismissed. Another petition was filed in 2009. In this case, the Richwood Police Department arrived at the family's residence and found the Petitioner Father lying on the floor. The Petitioner Father admitted to taking approximately fifteen pills of his Wellbutrin medication and seven or eight pills of the Klonopin medication prescribed to the children's mother, along with at least ten twelve-ounce beers. At least one of the subject children was present then. During those proceedings, both of the children's parents admitted to misusing their prescription drugs to the extent that proper parenting was seriously impaired. The circuit court granted the parents an improvement period with the requirement that they remain free of drugs and alcohol and participate in services. Subsequently, the circuit court found that both parents satisfactorily completed their improvement period and the case was dismissed by order entered on February 5, 2010. Less than ten months later, the instant petition was filed in the case at bar. At adjudication, the circuit court did not grant the parents an improvement period in the instant case and a dispositional hearing was held a little over a month later.

In its decision to terminate the Petitioner Father's parental rights in the instant petition, the circuit court considered evidence presented at the adjudicatory and dispositional hearings and coupled this with the Petitioner Father's history in the prior abuse and neglect action. Although the subject children were not present when the Nicholas County Drug Task Force uncovered the methamphetamine in the home, the children's mother testified at the adjudicatory hearing that she and the Petitioner Father have used methamphetamine and marijuana before in front of their children. She further admitted that the Petitioner Father has manufactured methamphetamine in their home before and that the materials to make it were stored in a room near the children's bedroom. Child Protective Services ("CPS") worker Sara Simpson testified at the adjudicatory hearing that the children's mother had previously told her that she did not realize that fumes from cooking methamphetamine stay in the walls and could harm the children. Ms. Simpson further testified that she had serious concerns about the children's development. For instance, she testified that both children have limited speech and at three-and-a-half years old, M.M. was still not toilet-trained. At the dispositional hearing, Ms. Simpson testified that Birth to Three services were in the home for the prior petition and the services ended after that case was closed. Since the close of that case, she testified that she is unaware of the parents seeking out services for their children's developmental delays. Consequently, Ms. Simpson recommended termination because she questioned the parents' ability to maintain sobriety and mental health based on their history.

The Petitioner Father testified at the dispositional hearing that he has been attending classes at the Day Report Center, has been working toward his General Equivalency Diploma (“GED”), is receiving counseling, and has stopped taking drugs. He also testified that he “knowed [sic] it wasn’t okay” when he smoked methamphetamine in the home while the children were in another room.

After considering the facts of the current petition and the circumstances preceding its filing, the circuit court found that continuation in the home would be contrary to the children’s best interests. The circuit court outlined on the record that the children in this case both have speech problems and social skills deficits to the extent that social services were ordered. With regard to the Petitioner Father, the circuit court made findings that he was currently incarcerated. It also found that the Petitioner Father made the decision to cook methamphetamine in the home which subjected the children to methamphetamine exposure likely to have contributed to their developmental and speech delays. Moreover, his decision to store chemicals for cooking methamphetamine in the home is indicative of his lack of care for the safety of the children. In considering the Petitioner Father’s past abuse and neglect matter, the circuit court found that at the conclusion of the improvement period, neither he nor the children’s mother continued to seek or provide treatment for their children’s developmental and social delays. The circuit court also outlined that psychologist Eric Walls, who had performed evaluations of both parents, opined that neither parent could correct the problems of abuse or neglect to the extent that they would be able to properly parent the children in the near future. Consequently, the circuit court concluded that there is no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future.

“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.’ Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).” Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010). “Termination 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.’ 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).

Petitioner Father argues that the circuit court erred in its finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future. The Petitioner Father argues that he has taken the initiative to show the court that he can improve and has the capacity to solve the problems of abuse in this case. He asserts that he has passed all of his drug screens, has sought and participated in counseling to address his mental health issues, attends Seneca Mental Health and anger management counseling, attends Narcotics Anonymous at the Day Report Center, and has earned his GED. In response, the children’s guardian ad litem argues that although the Petitioner Father passed every drug screen in his prior abuse and neglect proceeding, within ten months of its dismissal, he was again using drugs, was using them in the children’s presence, and was manufacturing methamphetamine in the family’s home. DHHR indicated in its response that termination of parental rights was appropriate in this case.

Here, the record shows that in deciding to terminate the Petitioner Father’s parental rights, the circuit court considered testimony presented. The circuit court’s order of termination reflects its consideration of such testimony and its application of relevant law. Although the prior abuse and neglect matter was dismissed based upon the Petitioner Father’s successful completion of his improvement period and the children returned home, within ten months of the dismissal, Petitioner Father returned to using drugs and even making drugs in the family’s home. Accordingly, the circuit court did not err in concluding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and that further, continuation in the home would be contrary to the children’s best interests.

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: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh