

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

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

**No. 11-0604** (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 Mother's parental rights to her 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 Mother challenges the circuit court's order terminating her parental rights to T.M. and M.M. She argues several points of error. She argues that the circuit court erred in failing to find that DHHR failed to meet its burden of proof by showing that the Petitioner Mother was not a victim of domestic violence which interfered with her ability to protect the parties' children from the father's abusive and neglectful exposure of them to methamphetamine-making chemicals. She further argues that the circuit court erred in finding that her efforts toward rehabilitation "occurred too late" and in denying her an improvement period. The Petitioner Mother also argues that the circuit court erred in failing to find that the DHHR's recommendation for termination was premature because it was formed without consideration of the Petitioner Mother's participation in drug rehabilitation, and in finding that the case plan proposed was in accordance with consensus of the multi-disciplinary evaluation team ("MDT").

The instant abuse and neglect petition was filed on October 25, 2010, after the Nicholas County Drug Task Force executed a search of the home shared by the Petitioner Mother, the subject children, and the children's father. From this search, the police found

methamphetamine and materials for making methamphetamine. Present at this time were the Petitioner Mother, the children's father, an unrelated adult individual, and an unrelated infant child. The children's 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 Mother and the children's father 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 Mother's first child abuse and neglect case. A petition for a prior abuse and neglect case was filed in 2009. In this case, the Richwood Police Department arrived at the family's residence and found the children's father lying on the floor. The children's father admitted to taking approximately fifteen pills of his Wellbutrin medication and seven or eight pills of the Klonopin medication prescribed to the Petitioner Mother, along with at least ten twelve-ounce beers. At least one of the subject children was present at that time. 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 Mother'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 Mother'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 Petitioner Mother testified at the adjudicatory hearing that she and the children's father have used methamphetamine and marijuana before in front of their children. She further admitted that the children's father had previously manufactured methamphetamine in their home and that the necessary materials were stored in a room near the children's bedroom. The Petitioner Mother testified that the children's father made threats to her in the past; she would leave occasionally, but then return to him. She testified that a week before they were arrested, the children's father slapped her. At the dispositional hearing, she testified that in December 2010, she was hospitalized because she had taken too many pills. Child Protective Services ("CPS") worker Sara Simpson testified at the adjudicatory hearing that the Petitioner 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.

The Petitioner Mother's mother also testified at the adjudicatory hearing. She testified that in the last four years that her daughter and the children's father had been together, the Petitioner Mother would occasionally come and stay with her. She had the impression that the children's father was manipulating the Petitioner Mother and there were times she saw her with bruises. She further testified that during the times the Petitioner Mother would stay with her, the children's father would call for her to come back and eventually, the Petitioner Mother would return to him. She was aware of a domestic violence protective order filed by the Petitioner Mother against the children's father in 2007 that was later dropped.

At the dispositional hearing, CPS worker 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 Mother testified at the dispositional hearing that she had completed a rehabilitation program at John Good and was in the Mothers Program at F.M.R.S. Health Systems, Inc. ("F.M.R.S.").

After considering the facts of the current petition and the circumstances preceding its filing, the circuit court found at adjudication that DHHR had made reasonable efforts to prevent removal in the prior abuse and neglect case but was not required to make reasonable efforts to preserve the family in the instant case, due to the emergency circumstances of this case, in accordance with West Virginia Code § 49-6-5(a)(7). Accordingly, it denied the Petitioner Mother's motions to continue the hearing for further psychological evaluations and for improvement. At disposition, the circuit court found that the same issues in the prior abuse and neglect case, i.e., prescription drug abuse, mental health issues, and attempted suicide, existed in the present abuse and neglect case. It 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 Mother, the circuit court made findings that even though there is some psychological dependence and some manipulation present in her relationship with the children's father, that it does not go to the crux of the issues in their abuse and neglect proceeding, i.e., the use of methamphetamine in the home. The circuit court found that the Petitioner Mother chose to use drugs over a period of time with the children's father. The circuit court further found that both parents were responsible

for the use and exposure of methamphetamine to the subject children. In the prior abuse and neglect proceeding, the circuit court found that at the conclusion of the improvement period, neither the children's father nor the children's mother continued to seek or provide treatment for their children's developmental and social delays. The circuit court also noted 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 Mother argues that the circuit court erred in failing to find that DHHR failed to meet its burden of proof by showing that the Petitioner Mother was not a victim of domestic violence which interfered with her ability to protect the parties' children from the father's abusive and neglectful exposure of them to methamphetamine-making chemicals. In response, both the children's guardian ad litem and DHHR highlight that the circuit court made findings that any dependence or manipulation present did not go to the crux of the matter, i.e., the use of drugs and drug exposure to the children in the home. Both respondents further highlight that the Petitioner Mother herself used drugs in the home and in front of the children. Any defense of domination or manipulation would not absolve the Petitioner Mother of her own drug use. The circuit court did not err in finding that any domination the children's father had on the Petitioner Mother did not have bearing on her own drug use in

front of the children.

Petitioner Mother further argues that the circuit court erred in finding that her efforts toward drug rehabilitation came too late, in finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future, and in denying the Petitioner Mother an improvement period. She asserts that in the time outside of jail and the hospital since she was arrested, she has independently sought and completed a rehabilitation program at John Good and is in the process of completing the Mothers Program at F.M.R.S. In response, the children's guardian ad litem and DHHR argue that the Petitioner Mother did not seek services until the beginning of January 2011, when services were available to her during and after the dismissal of her last abuse and neglect case. Further, within ten months of the dismissal of the last abuse and neglect proceeding, the instant petition was filed in which the Petitioner Mother has admitted to using drugs in front of her children and in the storage of methamphetamine-making chemicals in their home. The circuit court found that the services they were provided during the previous 2009 case were unsuccessful. The instant case was opened in October 2010 and the Petitioner Mother did not earnestly attempt to begin rehabilitation until January 2011. The circuit court also found that the Petitioner Mother suffers from mental health issues, instability, and drug abuse, all of which contributed to her inability to appropriately parent her children. Under West Virginia Code § 49-6-5(b), circumstances considered in finding that there is no reasonable likelihood that conditions of neglect or abuse can be substantially corrected include habitual drug use to the extent that parenting skills have been seriously impaired, lack of response to family case plans to reduce abuse and neglect of the children, and mental illness of the nature which renders a parent incapable of proper parenting. The circuit court did not err in its findings to terminate the Petitioner Mother's parental rights.

The Petitioner Mother lastly argues that the circuit court erred in failing to find that DHHR's recommendation for termination was premature because the Petitioner Mother had participated in rehabilitation. She also argues that the circuit court erred in finding that the case plan was planned in accordance with the consensus of the MDT. The record reflects that the court had before it the timeline upon when and where the Petitioner Mother participated in rehabilitation and took this into consideration. The circuit court also found on the record that the case plan, including DHHR's recommendation, was filed and provided to all parties, as required, prior to the dispositional hearing. The circuit court committed no errors in these instances.

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