

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

*In Re: H.C. and S.C.*

**No. 12-0471** (Wood County 11-JA-111 & 11-JA-112)

**FILED**

September 24, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Father's appeal, by counsel Eric K. Powell, arises from the Circuit Court of Wood County, wherein his parental rights to the children, H.C. and S.C., were terminated by order entered on March 15, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, G. Bradley Frum, has filed a response on behalf of the children. Petitioner has further filed a reply.

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 abuse and neglect proceedings below were initiated after a referral to the DHHR that the parents were abusing bath salts. Within a two-month span in 2011, according to the abuse and neglect petition, Respondent Mother overdosed on bath salts on at least three occasions, and petitioner's drug abuse caused him to engage in paranoid behavior. The petition alleged that petitioner's paranoid behavior included the following: wandering around the home with a machete; law enforcement discovering petitioner looking for his sister because someone had killed her by "overdos[ing]" her; and, police responding to petitioner's home because he stated that someone was in his attic. Following these actions, the DHHR filed a petition to institute the abuse and neglect proceedings below. At the adjudicatory hearing, the circuit court found the children were neglected as a result of petitioner's drug use. Petitioner requested a post-adjudicatory improvement period, but the same was denied at that time. However, the record reflects that petitioner was eventually granted an improvement period, though certain procedural delays prevented the improvement period from commencing. At the dispositional hearing, the circuit court ultimately terminated petitioner's parental rights. On appeal, petitioner alleges four assignments of error. These assignments of error, as well as the respondent's responses thereto, are addressed in turn below.

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.” 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 Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). First, petitioner alleges that the circuit court erred in admitting evidence of his prior drug use in 2003 through two substantiated referrals to the DHHR. Petitioner argues that because the DHHR did not produce the records or offer testimony as to the sources or standard of proof necessary to substantiate such referrals, the circuit court erred in allowing a DHHR employee to testify about the prior drug use. In his reply, petitioner further argues that West Virginia Code § 49-7-1 does not provide that the identity of people the DHHR interviewed are to be kept confidential, nor does it grant the DHHR a license to introduce substantive evidence of what the referent said while depriving the parent the right to cross-examination.

The DHHR responds and argues in favor of the circuit court’s termination of petitioner’s parental rights. In regard to this assignment of error, the DHHR argues that West Virginia Code § 49-7-1 requires that the identity of anyone making a referral to the DHHR be kept confidential. The guardian ad litem responds and also argues in support of the circuit court’s termination of petitioner’s parental rights. According to the guardian, petitioner’s first assignment of error constitutes harmless error because the circuit court did not even mention petitioner’s prior drug use in its adjudicatory order.

Upon a review of the appendix, the Court finds no merit in petitioner’s first assignment of error. As noted by both the DHHR and the guardian, the circuit court did not rely on the prior drug abuse in determining that petitioner is an abusing parent or in terminating petitioner’s parental rights. While the circuit court did note in its order terminating his parental rights that petitioner “has a long history of drug use,” the circuit court cites petitioner’s substance abuse evaluation in support of this finding. Nowhere in either the adjudicatory order or the order terminating petitioner’s parental rights does the circuit court refer to the substantiated referrals of petitioner’s drug abuse in 2003, nor does it appear that the circuit court relied upon them in reaching its decisions at adjudication or disposition. Most importantly, however, the circuit court specifically relied only upon petitioner’s substance abuse during the period of August 6, 2011, through August 12, 2011, in its adjudicatory order. Based upon our review of the record, and as

more fully addressed below, it is clear that the circuit court needed only to rely on petitioner's recent drug abuse to both adjudicate him as an abusing parent and later to terminate his parental rights. For these reasons, the Court finds no merit in petitioner's first assignment of error.

Next, petitioner alleges that he did not receive diligent and effective representation of counsel during the abuse and neglect proceedings below. According to petitioner, his counsel harmed his case by failing to object to certain evidence and by introducing evidence adverse to petitioner. In response, the DHHR argues that petitioner did receive effective assistance of counsel, as evidenced by his counsel's multiple objections to the introduction of specific evidence. The DHHR argues that there is no evidence that counsel knew such testimony would be adverse. The guardian also argues that petitioner's counsel objected to the admission of the petitioner's 2003 drug usage, but that he was overruled. The guardian also notes that petitioner failed to attend several hearings and was not present to aid his counsel in the defense of the case.

In regard to petitioner's second assignment of error, the Court declines to address the allegations of ineffective assistance of counsel. Specifically, the Court has never recognized a claim for ineffective assistance of counsel in the context of abuse and neglect matters, and declines to do so here. However, even if such a claim were recognized, it is clear from review of the record that petitioner received effective assistance throughout the proceedings below. As we have already addressed, the DHHR's prior referrals of petitioner's drug use being admitted constituted harmless error since petitioner's recent drug use was sufficient to support adjudication. Further, the record shows that counsel did object to the introduction of such evidence. For these reasons, the Court declines to find that petitioner received ineffective assistance of counsel.

As to his third assignment of error, petitioner argues that the circuit court erred in adjudicating him as an abusing parent because the evidence was insufficient to support that finding. According to petitioner, no evidence was introduced to show that the children's physical or mental health was harmed by a lack of food, clothing, shelter, supervision, or medical care. Petitioner argues that testimony established that the children were healthy and normal. In his reply, petitioner argues that there was no evidence at adjudication that his son had used drugs or alcohol, and this allegation is therefore irrelevant. Petitioner argues that after thoroughly researching applicable case law, no case could be found where a parent's drug use by itself was sufficient to support adjudication.

In response, the DHHR argues that petitioner has admitted that he and Respondent Mother used bath salts while living with the children, and there is evidence that petitioner called law enforcement to the home on three separate occasions because of his unfounded belief that intruders were in his home. The DHHR argues that children twelve and seven years of age simply could not live in this type of environment without being neglected. According to the DHHR, it is clear that petitioner made the children's needs secondary to his own decision to feed his addiction. The guardian also argues that the evidence below was sufficient to support adjudication, noting that the circuit court's findings show that the children's physical and/or mental health was, at a minimum, threatened by a lack of supervision. More importantly, the

guardian argues that the circuit court found the lack of supervision was caused by petitioner's drug abuse.

Upon our review of the record, the Court finds that the circuit court was not clearly erroneous in finding that the evidence was sufficient to support adjudication in this matter. West Virginia Code § 49-1-3(11)(A)(i) defines a neglected child as one

[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent.

As noted by the respondents, the evidence clearly established that the children's health was harmed by petitioner's failure to supply them with necessary supervision because of his drug abuse. While petitioner argues that some aggravating factor must be coupled with drug abuse in order to rise to the level of neglect, this is a misstatement of our statutory law. As noted above, failure to properly supervise a child constitutes neglect by itself, and the record establishes that petitioner's drug abuse deprived the children herein of appropriate supervision. For these reasons, the Court finds no error in the circuit court's decision to adjudicate petitioner as an abusing parent.

Lastly, petitioner argues that the circuit court erred in terminating his parental rights because there was insufficient evidence to establish that his parenting skills were seriously impaired or had been deficient when the children were in the home. Petitioner argues that he had several negative drug screens, that he participated in group therapy, and that he always professed love and affection for his children. Petitioner argues that he may have achieved reunification if granted an improvement period, but that the circuit court continually delayed ruling on his motion for an improvement period and required petitioner to perform before granting his motion. In his reply, petitioner cites multiple instances wherein he admitted to the circuit court that he was willing to comply with services. According to petitioner, he demonstrated, by clear and convincing evidence, that he was likely to fully participate in an improvement period had he received one.

In response, the DHHR argues that petitioner bears the burden of establishing that he should have been granted an improvement period, and that he utterly failed to show his compliance by his behaviors during the proceedings below. According to the DHHR, petitioner failed to attend parenting classes and left inpatient treatment after only one day. The DHHR argues that petitioner tested positive for drugs on multiple occasions. According to the DHHR, the circuit court gave petitioner every opportunity to show he was committed to sobriety, but that he only demonstrated how serious his addiction truly is. The guardian also argues that petitioner bears the burden of establishing that he was likely to fully comply with the terms of an improvement period, and that petitioner failed to establish such compliance despite multiple opportunities. According to the guardian, petitioner failed to follow through with inpatient

substance abuse treatment, failed to follow through with drug screening, failed several drug screens, and did not participate in individual therapy or parenting services.

Based upon our review of the record, the Court finds no error in the circuit court's decision to terminate petitioner's parental rights. The Court finds no merit in the petitioner's argument that the circuit court unnecessarily delayed the proceedings by failing to implement a post-adjudicatory improvement period. More importantly, the Court finds no merit in petitioner's argument that he would have been more willing to participate in an improvement period if it had been implemented more quickly. Petitioner was required to comply with the services offered in order to achieve reunification with his children, but he failed to comply, and the circuit court found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect in the near future. Pursuant to West Virginia Code § 49-6-5(b)(1), it is clear that the circuit court was presented with sufficient evidence to make those findings because petitioner has habitually used or is addicted to controlled substances or drugs to the extent that his proper parenting skills have been seriously impaired, and also because he had not followed through with the recommended and appropriate treatment. Because there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future, and because termination was necessary for the welfare of the children, the circuit court did not err in terminating petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

This Court reminds the circuit court of its duty to establish permanency for the children. 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 children 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 petitioner's parental rights is hereby affirmed.

Affirmed.

**ISSUED:** September 24, 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