

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

In re: K.W.,

No. 15-0368 (Hardy County 14-JA-18)

FILED

November 23, 2015

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

MEMORANDUM DECISION

Petitioner Mother J.W., by counsel Jonathan G. Brill, appeals the Circuit Court of Hardy County’s January 29, 2015, order terminating her parental rights to K.W. The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Lee Niezgoda, filed its response in support of the circuit court’s order. The guardian ad litem (“guardian”), Marla Zelene Harman, filed a response on behalf of the child supporting the circuit court’s order. On appeal, petitioner alleges that the circuit court lacked jurisdiction to proceed in the abuse and neglect proceedings below and erred in terminating her parental rights without granting an improvement period or considering less-restrictive dispositional alternatives.¹

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.

In 2012, petitioner’s parental rights to her oldest child, D.W., were terminated by the circuit court due to her cognitive abilities and her lack of compliance and progress during her improvement period. The following year, petitioner gave birth to her second child, M.R., and the DHHR filed a petition in the circuit court alleging aggravated circumstances. At adjudication on the new petition, the circuit court fully reviewed petitioner’s circumstances and found that, although petitioner made some progress in finding housing and applying for disability income, she failed to remedy the conditions of abuse and neglect necessitating the prior termination of parental rights. Specifically, the circuit court found that “there has been no material or significant change of circumstances or remediation of parenting deficiencies that led to the involuntary termination,” and further that petitioner had not “illustrated any ability to comply with the terms and conditions of an improvement period.” Petitioner then voluntarily relinquished her parental rights to the second child.

¹We note that West Virginia Code §§ 49-1-1 through 49-11-10 were repealed and recodified during the 2015 Regular Session of the West Virginia Legislature. The new enactment, West Virginia Code §§ 49-1-101 through 49-7-304, has minor stylistic changes and became effective ninety days after the February 19, 2015, approval date. In this memorandum decision, we apply the statutes as they existed during the pendency of the proceedings below.

In September of 2014, petitioner gave birth to her third child, K.W., who was born prematurely and underweight at a hospital in Winchester, Virginia. As such, the child remained hospitalized for several days after her birth. The guardian ad litem for M.R., whose case remained open for purposes of achieving permanency, filed a new abuse and neglect petition on September 22, 2014, alleging imminent danger to K.W. Several days later, the DHHR also filed a petition in regard to K.W. The circuit court held a preliminary hearing in October of 2014, during which petitioner moved to dismiss the petitions based on a lack of jurisdiction. According to petitioner, she and K.W.'s father moved to Virginia five days prior to K.W.'s birth. The circuit court denied the motion, however, and found that if petitioner secured an apartment in Virginia, it was for the sole purpose of evading removal of K.W. from her custody.²

The circuit court then held an adjudicatory hearing on the petitions concerning K.W. and found petitioner again failed to remedy the circumstances that led to the prior termination of her parental rights and failed to comprehend the parenting deficiencies she needed to correct. Petitioner then moved for a post-adjudicatory improvement period, which the circuit court denied. Thereafter, in January of 2015, the circuit court held a dispositional hearing and found that petitioner neglected K.W. by her lack of pre-natal care and her inability to comprehend and follow through with directives for proper care for K.W. The circuit court further found that petitioner failed to remedy the circumstances that led to the prior termination of parental rights and was unable to identify and understand the deficiencies she needed to correct. As such, the circuit court found there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse or neglect in the near future and terminated petitioner's parental rights to K.W. It is from the dispositional order that petitioner appeals.

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.” Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

²Petitioner then filed a petition for writ of prohibition with this Court seeking to dismiss the case below for lack of jurisdiction. By order entered on October 24, 2014, this Court denied the petition.

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Upon our review, the Court finds no error in the circuit court denying petitioner’s motion to dismiss, motion for a post-adjudicatory improvement period, or in terminating her parental rights.

First, the Court finds no merit in petitioner’s argument that the circuit court lacked jurisdiction to proceed on the initial abuse and neglect petitions. According to petitioner, she and her family moved to Winchester, Virginia, five days prior to the child’s birth. In support of the motion to dismiss below, petitioner submitted a lease agreement for an apartment in Winchester, Virginia, signed approximately five days prior to the child’s birth, and a utility bill for the apartment that showed no usage. As such, she argues that the circuit court lacked jurisdiction to proceed on the petitions. We disagree.

West Virginia Code § 49-6-1(a) states, in pertinent part, that

[i]f the [DHHR] or a reputable person believes that a child is neglected or abused, the [DHHR] or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or if the petition is being brought by the [DHHR], in the county in which the custodial respondent or other named party abuser resides

According to the guardian’s initial petition below, when the child was scheduled to be released from the hospital, she was to reside in one of two residences in Hardy County, West Virginia. Additionally, the circuit court found that petitioner was a “resident[] of West Virginia, Hardy County, for more than one . . . year prior to the [petitions’] filing,” and that upon the child’s birth, the parents presented a West Virginia medical card at the hospital. Ultimately, in ruling on the motion to dismiss, the circuit court noted that the alleged change of residency was for the purpose of circumventing removal of the child. As such, we find the circuit court had jurisdiction over the matter. Simply put, petitioner’s documents in support of her alleged move do not evidence an intention to change her residency to the Commonwealth of Virginia, especially in light of the fact that she presented a West Virginia medical card upon the child’s birth and lived in Hardy County for more than a year prior to the petitions’ filing.

Next, the court finds no merit in petitioner’s argument that the circuit court erred in denying his motion for a post-adjudicatory improvement period. Pursuant to West Virginia Code § 49-6-12(b)(2), a circuit court may only grant a post-adjudicatory improvement period when the parent “demonstrates, by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period” In denying petitioner’s motion, the circuit court noted that petitioner could not “indicate the presence of any deficiencies in parenting ability,” despite the fact that she failed to illustrate any improvement in her cognitive functioning or remedy the circumstances that led to the prior involuntary termination of her parental rights. We have previously held that

[i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable

and in making an improvement period an exercise in futility at the child's expense.

In re Timber M., 231 W.Va. 44, 55, 743 S.E.2d 352, 363 (2013) (quoting *In re: Charity H.*, 215 W.Va. 208, 217, 599 S.E.2d 631, 640 (2004)). As noted above, petitioner failed to acknowledge any deficiencies in her ability to parent and, therefore, failed to satisfy the applicable burden for obtaining a post-adjudicatory improvement period. As such, we find no error in the circuit court denying petitioner's motion for an improvement period.

As to petitioner's argument that the circuit court erred in terminating her parental rights without considering less-restrictive alternatives, the Court finds no error. As addressed above, the evidence established that petitioner failed to remedy the circumstances that led to the prior involuntary termination of her parental rights. The circuit court also noted that petitioner's anger management issues persisted from the prior abuse and neglect proceeding. As such, the circuit court found that petitioner was "presently unwilling and/or unable to provide adequately for the child's needs."

Pursuant to West Virginia Code § 49-6-5(b), "'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected' shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help." Based on the evidence set forth above, it is clear that the circuit court was presented with sufficient evidence upon which to base this finding, as well as the finding that termination of petitioner's parental rights was necessary for the child's welfare. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon these findings. Further, 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, 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).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). As such, it was not error for the circuit court to terminate petitioner's parental rights instead of imposing a less-restrictive dispositional alternative.

For the foregoing reasons, we find no error in the decision of the circuit court and its January 29, 2015, order is hereby affirmed.

Affirmed.

ISSUED: November 23, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Allen H. Loughry II

DISSENTING:

Justice Robin Jean Davis