

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

**FILED**

**September 5, 2017**

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

*In re: A.L.*

No. 17-0287 (Mercer County 15-JA-140-WS)

**MEMORANDUM DECISION**

Petitioner Mother T.L., by counsel Gerald R. Linkous, appeals the Circuit Court of Mercer County’s March 1, 2017, order terminating her parental, custodial, and guardianship rights to A.L.<sup>1</sup> The West Virginia Department of Health and Human Resources (“DHHR”), by counsel S.L. Evans, filed a response in support of the circuit court’s order and a supplemental appendix. The guardian ad litem (“guardian”), Elizabeth A. French, filed a response on behalf of the child in support of the circuit court’s order. The intervening foster parent, C.B., by counsel, Kyle G. Lusk, Matthew A. Bradford, and Brandon L. Gray, also filed a brief in support of the circuit court’s order.<sup>2</sup> On appeal, petitioner argues that the circuit court erred in refusing to grant her a post-adjudicatory improvement period prior to terminating her parental, custodial, and guardianship rights.

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 August of 2015, petitioner’s neighbor called the Child Abuse Hotline alleging that she could hear a child being hit at petitioner’s residence. A Child Protective Services (“CPS”) worker arrived at petitioner’s residence and observed welts and bruising on the child’s face. The CPS worker also observed dried mud on the child’s face, arms, and hands and observed that the child’s clothes were soiled and dirty.

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<sup>1</sup>Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W.Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W.Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W.Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

<sup>2</sup>The intervenor’s brief joins C.B.’s spouse, B.B., as an intervenor; however, the circuit court’s October 4, 2016, order clearly grants only C.B. intervenor status below. Therefore, this Court will consider C.B. as the sole intervenor.

In September of 2015, the DHHR filed an abuse and neglect petition against petitioner asserting physical abuse inflicted upon the child. The petition asserted that the owner of the residence where petitioner, the father, and the child resided disclosed to the CPS worker that the child frequently had unexplained injuries. The circuit court held a preliminary hearing and found reasonable cause to believe that the child was in imminent danger due to a nonaccidental trauma that was inflicted upon the child while in petitioner's custody. In October of 2015, the DHHR filed an amended petition including information regarding prior abuse and neglect proceedings against petitioner in Michigan and South Dakota. The amended petition asserted that petitioner, while residing in Michigan and South Dakota, previously had her parental rights to six children terminated, voluntarily and involuntarily. The petition also asserted that the father of the child is a registered sex offender.

In January of 2016, the circuit court held an adjudicatory hearing where petitioner stipulated to abusing the child based upon excessive corporal punishment. The circuit court accepted the stipulations and petitioner was adjudicated as an abusing parent. At the hearing, petitioner moved for a post-adjudicatory improvement period. The DHHR and the guardian opposed any improvement period being granted to petitioner. Shortly after the adjudicatory hearing, the DHHR moved to terminate parental rights. The DHHR asserted that due to aggravating circumstances, the DHHR was not required to make reasonable efforts to preserve the family.

In March of 2016, the circuit court held a dispositional hearing in which it heard the testimony of the DHHR's caseworker in this matter. After the caseworker's testimony, the circuit court continued the hearing to allow for the completion of a home study of a relative in another state who wished to have the child placed with her. The child remained in the foster home.

In February of 2017, the circuit court resumed the dispositional hearing. At the hearing, petitioner testified that while living in Michigan, she had a prior improvement period concerning the subject child for nine months. Petitioner further testified that two months after the improvement period was completed she moved to West Virginia, and approximately six months after that, this abuse and neglect petition was filed against her relating to the same child. Petitioner also testified regarding her prior terminations and admitted that the court in Michigan made a finding that she had beaten one of her children so severely that the child had multiple bruises and a broken arm.

Ultimately, the circuit court denied petitioner's motion for a post-adjudicatory improvement period and terminated her parental, custodial, and guardianship rights in its March 1, 2017, order.<sup>3</sup> It is from the dispositional order that petitioner appeals.

The Court has previously established the following standard of review:

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<sup>3</sup>According to the guardian and the DHHR, the child is currently in a foster home. The permanency plan is adoption. The foster parents wish to adopt the child, and a family member also wants to adopt the child. According to the parties, the circuit court will determine permanent placement at a scheduled permanency hearing.

“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).

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’s findings below.

On appeal, petitioner argues that the circuit court erred in not granting her a post-adjudicatory improvement period prior to terminating her parental rights. We disagree. In support of her argument, petitioner claims that she successfully completed an improvement period in another state prior to moving to West Virginia. However, West Virginia Code § 49-4-610(2)(B) requires that the parent “demonstrates by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period . . . .” Further, we have often noted that the decision to grant or deny an improvement period rests in the sound discretion of the circuit court. *See In re: M.M.*, 236 W.Va. 108, 778 S.E.2d 338 (2015) (stating that “West Virginia law allows the circuit court discretion in deciding whether to grant a parent an improvement period”); Syl. Pt. 6, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) (holding that “[i]t is within the court’s discretion to grant an improvement period within the applicable statutory requirements”).

Here, petitioner failed to present any evidence to demonstrate to the circuit court that she would be likely to fully participate in a post-adjudicatory improvement period. Although petitioner did receive an improvement period and services in Michigan, they did little to remedy conditions of abuse in the home. In 2009, the Probate Court for the County of Mecosta in Michigan found that petitioner did not benefit from the services offered. Between 2007 and 2011, petitioner’s parental rights to four of her children were terminated involuntarily and parental rights to two of her children were voluntarily relinquished. Petitioner allegedly completed an improvement period involving this child in another state prior to the petition being filed in the abuse and neglect case at issue in this appeal, the circumstances surrounding the improvement period were not similar to the case at hand. Petitioner’s prior improvement period involved inappropriate housing, not corporal punishment. Although petitioner testified in this matter that she would be willing to comply with a post-adjudicatory improvement period and make all reasonable efforts to be reunified with her child, her history of using corporal punishment and prior terminations indicate that she would be unlikely to fully participate in a post-adjudicatory improvement period or remedy the conditions of abuse in the home. Accordingly, we find no error below.

In support of her argument that she should have been granted a post-adjudicatory improvement period, petitioner argues that she was denied the opportunity to participate in services aimed at reunification. Although petitioner testified that she would be willing to participate in services, pursuant to West Virginia Code § 49-4-604(a)(7)(C), the DHHR is not required to make reasonable efforts to preserve the family when aggravating circumstances exist. Here, aggravating circumstances do exist due to petitioner's prior involuntary terminations. Therefore, the circuit court did not err in finding that the DHHR did not need to make reasonable efforts to preserve the relationship between petitioner and the child.

Finally, petitioner argues that the circuit court erred in terminating her parental, custodial, and guardianship rights. We do not agree. We have previously held that

“[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 [now West Virginia Code § 49-4-604] . . . 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) [now West Virginia Code § 49-4-604(c)] . . . 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). As discussed above, petitioner's parental rights to six children were voluntarily and involuntarily terminated in Michigan and South Dakota between 2007 and 2011. In 2015, petitioner was granted an improvement period in the state of Michigan involving the subject child. Approximately eight months later, and after moving to West Virginia, the abuse and neglect petition at issue in this appeal was filed against her. Petitioner clearly did not remedy all the inappropriate conditions in the home during her prior abuse and neglect proceedings out of state. For these reasons, we find no error in the circuit court's termination of petitioner's parental, custodial, and guardianship rights.

Lastly, 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.

*Cecil T.*, 228 W.Va. at 91, 717 S.E.2d at 875, Syl. Pt. 6. 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] [now West Virginia Code § 49-4604(b)(6)], 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 its March 1, 2017, order is hereby affirmed.

Affirmed.

**ISSUED:** September 5, 2017

**CONCURRED IN BY:**

Chief Justice Allen H. Loughry II  
Justice Robin Jean Davis  
Justice Margaret L. Workman  
Justice Menis E. Ketchum  
Justice Elizabeth D. Walker