

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

**In Re: D.N.**

**No. 11-1086** (Mercer County 11-JA-07-OA)

**FILED**

March 12, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

This appeal arises from the Circuit Court of Mercer County, wherein Petitioner Mother's parental rights to her child, D.N., were terminated. The appeal was timely perfected by counsel, Gerald R. Linkous, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Ronald Keith Flinchum, has filed his response on behalf of the child.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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.

On appeal, petitioner argues that the circuit court erred by adjudicating the child at issue as abused under West Virginia law. Petitioner argues that the matter below was initiated upon aggravated circumstances due to her parental rights to an older child being involuntarily terminated. However, petitioner argues that the child at issue in this matter was not yet born at the time of the prior abuse, and can therefore not be considered abused under this Court's holding in *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). As such, petitioner cites to our prior holdings to argue that when a petition is brought upon a prior termination, there must be evidence of current abuse or neglect in order to adjudicate that child as abused or neglected. Petitioner cites to the testimony of a DHHR employee who stated there was no current abuse or neglect as to D.N., and that the petition was premised entirely on petitioner's prior termination. For these reasons, petitioner argues that adjudication was improper. Petitioner also argues that disposition was error, based upon the improper adjudication and also the circuit court's failure to give petitioner an improvement period. According to petitioner, her prior termination was based upon non-compliance, but she was never given a formal improvement period in that matter either. As such, she has never had an opportunity to participate in remedial measures.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. He argues that, to date, he has not received notification of any legal separation between petitioner and Respondent Father, other than that imposed by their respective incarcerations stemming from the abuse inflicted upon their prior child. Given that her prior termination was

premised, in part, on her failure to separate from the abusing father, the petitioner has therefore failed to remedy or acknowledge the problems which led to the prior involuntary termination, according to the guardian. Further, no evidence was presented below to show a reasonable likelihood that the conditions which resulted in the prior termination had been eliminated. Lastly, the guardian argues that petitioner was not entitled to an improvement period because she failed to demonstrate by clear and convincing evidence that she was likely to fully participate in the same. The DHHR has also responded, and joins in and concurs with the guardian's response. The DHHR also adds that West Virginia Code §§ 49-6-5(a)(7)(A) and (C) do not require children to live in the same house at the same time, but simply that the subsequent child be born into the same household in order to be considered abused.

“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). The circuit court below terminated petitioner's parental rights after finding that she refused to separate from Respondent Father, who previously burned their older child so badly that she was hospitalized for three days. In that prior abuse and neglect proceeding, petitioner was found to have been in the home at the time the incident occurred, and failed to seek medical attention for the child until ordered to do so by Child Protective Services (“CPS”). According to the representations of the parties herein, petitioner is currently incarcerated after pleading guilty to one count of felony conspiracy for her role in this prior abuse and subsequent attempts to hide the same.

As to her first assignment of error, it is clear upon review of the appendix that the child herein was an abused child, as that term is defined in statutes and our prior holdings. To begin, it is undisputed that petitioner previously had her parental rights to an older child involuntarily terminated. This Court has held as follows:

“Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination

where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.” Syllabus Point 2, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

Syl. Pt. 3, *In re George Glen B.*, 207 W.Va. 346, 532 S.E.2d 64 (2000). As noted above, it is undisputed that one of the factors outlined in West Virginia Code § 49-6-5b(a) is present; namely, that petitioner previously had her parental rights to a sibling involuntarily terminated. Based upon our prior holdings, a lower evidentiary threshold is therefore applicable to petitioner’s action.

As outlined above, prior to termination, petitioner was entitled to review by the circuit court in order to demonstrate that she had remedied the problems which led to the prior involuntary termination sufficient to parent D.N. According to the circuit court’s dispositional order, this was not the case. As noted above, petitioner’s parental rights to the prior child were terminated because of her continued association with the abusing father. In the instant matter, the circuit court found at disposition that only a few months after her prior termination, petitioner “gave birth to another child with the respondent father, [and] she was offered a plan for reunification if she would separate from the respondent father . . . .” Despite this offer, the circuit court found that petitioner “had month after month to take such action,” but refused. For these reasons, it is clear that the problems that led to the prior involuntary termination were not remedied, therefore making D.N. an abused child. As such, the circuit court’s adjudication of the child as abused was not error.

As to petitioner’s second assignment of error, the Court notes that improvement periods are not mandatory and are granted at the circuit court’s discretion per West Virginia Code § 49-6-12. This Court has held that “‘in 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.’ *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996).” *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Clear from the record is the fact that petitioner failed to acknowledge the underlying problem, i.e., the Respondent Father’s abuse of the child and her continued association with him. While it is true that petitioner claims that at disposition she finally admitted that she had chosen Respondent Father over her older child in her prior abuse and neglect matter, and that she wanted to choose D.N. over him in the current matter, the circuit court was in the best position to judge her credibility on this issue. This Court has held that “due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.” *In re Faith C.*, 226 W.Va. 188, 195, 699 S.E.2d 730, 737 (2010) (quoting *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)). Further, petitioner cites no other evidence supporting her assertion that she was likely to fully participate in an improvement period. Based upon its denial of an improvement period, the circuit court must have found that petitioner failed to meet her clear and convincing burden that she was likely to fully participate, and we decline to disturb this finding on appeal.

This Court has held that ““courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights 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.’ Syllabus point 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).” Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Based upon this language, the Court finds that termination in this matter was proper. The child at issue was an infant, and of the tender age that the above-quoted holding was intended to protect. Further, it was clear that the child’s welfare would have been seriously threatened if not for termination, as petitioner continued to value her relationship with the abusive father over the well-being of her children. For these reasons, we find that the circuit court did not err in terminating petitioner’s parental rights.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 child within eighteen months of the date of the disposition order. As this Court has stated, “[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings<sup>1</sup> 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).

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<sup>1</sup>Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

For the foregoing reasons, we find no error in the decision of the circuit court to adjudicate the child as abused or to deny petitioner an improvement period, and the termination of petitioner's parental rights is hereby affirmed.

Affirmed.

**ISSUED:** March 12, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

**NOT PARTICIPATING:**

Justice Margaret L. Workman