

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

**In Re: Z.C..**

**No. 11-1162** (Pleasants County 10-JA-4)

**FILED**

April 16, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

This appeal arises from the Circuit Court of Kanawha County, wherein Petitioner Mother's motion for custody was denied and the circuit court found that the Respondent Father had complied with the terms of his improvement period in its order of July 13, 2011. The appeal was timely perfected by counsel, Jessica E. Myers, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, has filed its response. The guardian ad litem, Rachelle D. McIntyre-Nicholson, has filed her response on behalf of the child. The Respondent Father has also filed a response, by counsel Brian K. Carr.

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 of Appellate Procedure.

The instant matter was initiated following Respondent Father's arrest stemming from an incident in which he was driving a motor vehicle while under the influence of alcohol and fleeing from a law enforcement officer. The subject child was a passenger in the vehicle, and it was alleged that Respondent Father endangered the child's safety and well-being. The petition below also alleged that Petitioner Mother had exercised virtually no parenting time with the child in the year prior to the incident, and that she had essentially abandoned the child. The child was initially placed with a paternal aunt, but was returned to Respondent Father's custody prior to adjudication. At adjudication, the circuit court found that the DHHR failed to establish by clear and convincing evidence that Petitioner Mother was an abusing or neglecting parent, though Respondent Father admitted to the allegations against him and the child was adjudicated as abused. Respondent Father was thereafter granted a post-adjudicatory improvement period. Throughout the proceedings, petitioner made multiple motions for custody of the child at issue, but those motions were denied. Eventually it was found that Respondent Father had successfully completed his improvement period and legal custody of the child was returned to him. Petitioner Mother was also awarded additional parenting time with the child, and the matter was stricken from the circuit court's docket.

On appeal, petitioner argues that the circuit court erred in finding that the Respondent Father substantially complied with the improvement period, and also that it erred in denying her motions for custody of the child and allowing the child to remain in the custody of an abusing parent.

Specifically, petitioner argues that no evidence was submitted to the circuit court regarding the specific services or steps the father took to remedy the conditions of abuse. Nor, she argues, was there evidence that the father followed the recommendations of the psychological evaluations as set forth in the family case plan. Petitioner cites to inaccuracies in the father's report to the psychologist that he did not have custody of the child, noting that custody was returned to the father prior to the evaluation. As such, the psychologist's recommendations included direction that, if the father were to regain custody, he would have to undergo a thorough evaluation of his parenting skills to determine possible services needed and to ensure the child's safety and well-being. Petitioner cites additional inaccuracies in the DHHR's status reports, and also argues that the father could not have completed in-home services because he relocated to Ohio during these proceedings. According to petitioner, a DHHR employee could offer no testimonial evidence as to the specific details of any services provided to the Respondent Father. As such, she argues that the appropriate burden of proof was not met, and that the circuit court erred in finding that the improvement period was successfully completed.

As to her second assignment of error, petitioner specifically argues that this Court has consistently recognized and enforced a parent's right to custody of their child, and that the circuit court found that petitioner was not an abusing and/or neglecting parent. Therefore, petitioner has a natural right as a parent to custody of her child. Despite adjudicating the father as abusive, the circuit court denied petitioner's motion and allowed the child to remain with the father. According to petitioner, the circuit court continually relied upon her limited contact with the child in denying these motions, despite failing to adjudicate her for having abandoned the child. Petitioner argues that, according to *Rozas v. Rozas*, 176 W.Va. 235, 342 S.E.2d 201 (1986), when one parent is fit and the other is unfit, the circuit court must award custody to the fit parent. She further argues that West Virginia statutory and case law presumes that when a parent abuses or neglects a child, that parent is no longer fit and should not have a right to custody of the child. Petitioner argues that West Virginia Code § 62-1C-17 states that in cases involving child abuse, a bond condition shall be that the defendant shall not live in the same residence or have contact with the victim. Further, West Virginia Code § 62-12-9 requires that when any person convicted of an offense set forth in Chapter Sixty-One, Article Eight-D is released on probation, the probationer may not live in the same residence as any minor child, or even exercise visitation with a minor child, and may not have contact with the victim. In this case, those requirements were not followed, and petitioner argues that she was entitled to custody of her child once the father was adjudicated as abusive. In short, petitioner argues that as a non-abusing parent, she was never considered as a placement for the child contrary to this Court's holding in *In the Matter of Bryanna H.*, 225 W.Va. 659, 695 S.E.2d 889 (2010).

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that the terms and conditions of the Respondent Father's improvement period were agreed upon by the multi-disciplinary team ("MDT") and were appropriate. She further argues that "it cannot be validly disputed that the terms and conditions for successful completion were met by the Respondent Father." The guardian does express concern about the parties herein being unable to separate their own interests in hurting one another from the best interests of the child, as

evidenced by the father's refusals to abide by the circuit court's allocation of parenting time which ultimately required a contempt proceeding after disposition. These concerns aside, the guardian argues that petitioner was not a viable placement choice for the child at the time the proceedings were initiated, due to her admission that she had no contact with the child in the year prior. As such, the guardian argues that the circuit court's decision to place the child with a paternal aunt was not erroneous. Further, the guardian argues that even initial visitation with petitioner was not appropriate because the child did not recognize her as his mother and adjudication had not yet commenced on the allegations of her abandonment. Lastly, according to the guardian, the best interests of the child required continued custody with the Respondent Father, and a change in custody was not warranted simply because he was adjudicated as abusive and petitioner was not. However, the guardian states that petitioner was continually granted additional visitation without supervision restrictions, but that the circuit court ultimately returned the child to the father based on the fact that he had primary custody prior to the proceedings. The parents herein were already involved in family court proceedings prior to this abuse and neglect matter, and the guardian argues that any custody matters should be addressed by that court.

The DHHR has also responded, and argues in favor of affirming the circuit court's decision. Specifically, the DHHR argues that Respondent Father only moved a short distance across the border into Ohio, and facilitated services by coming back into West Virginia to participate. Further, it was apparent to the DHHR that the child had a much stronger bond with the father than with petitioner, and that the child turned to him for direction and comfort. The DHHR also argues that ample evidence was presented concerning the father's successful completion of his improvement period, as testified to by an in-home service provider who stated that he completed parenting skills training, including in-home parenting skills services to address safety issues, and also substance abuse education. A DHHR employee also testified as to the substantial bond between father and son, and how it would be detrimental to the child to remove him from a parent with whom he has bonded in favor of placing him with a parent he does not recognize. Further, according to the DHHR, petitioner did not raise any issues concerning the inadequacy of the terms of the improvement period until disposition. For these reasons, the DHHR argues that the circuit court's finding that Respondent Father successfully completed his improvement period were not erroneous.

The DHHR further argues that the child's best interests required the circuit court to deny petitioner's motion for custody, as supported by the petitioner's admitted lack of contact with the child and the visitation reports that showed the child did not have an initial bond with the petitioner. The DHHR further distinguishes the instant matter from *In the Matter of Bryanna H.*, because in the latter case both parents were adjudicated, albeit at different times and for different reasons. That matter was instead remanded because the circuit court failed to consider the possibility of granting custody to the parent who was not previously the primary residential parent. According to the DHHR, petitioner's argument that the circuit court never considered her as a possible placement is not supported by the record, since she was considered pursuant to her motions for custody. In short, the circuit court was correct that the best interests of the child precluded placement with Petitioner Mother, who had no contact with her child in the preceding year.

Lastly, the Respondent Father argues in response that a family case plan was developed prior to his improvement period, listing clear goals and requirements for the improvement period. The treatment plan developed included requirements that the father not endanger his son again, remain alcohol free, and undergo individualized parenting classes and counseling, and for the DHHR to provide in-home services and home visits. Respondent further argues that because the circuit court did not find an immediate threat to the child, a taking was never authorized and the DHHR therefore never had custody of the child. According to the respondent, the record clearly shows that he participated in the required parenting and other social services, attended Alcoholics Anonymous sessions, and had substance abuse counseling. Respondent also completed a driving under the influence driver's course, and underwent conflict counseling with petitioner. Based upon the overwhelming evidence before the circuit court, Respondent Father argues that the finding concerning his completion of the improvement period was not erroneous. Further, respondent argues that the circuit court was properly guided in its decision to deny petitioner's motion for custody by the child's best interests. Because the abuse and neglect petition against him was dismissed, petitioner argues that he is a fit parent and that modification of custody should properly be pursued in family court.

“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).

As to petitioner's first assignment of error, this Court has held that “[a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child[ren].” Syllabus Point 6, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).” Syl. Pt. 4, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010). Based upon our review of the record, it is apparent that the circuit court followed this direction in regard to the Respondent Father's improvement period. As noted above, ample evidence was presented to support the finding that the father completed the improvement period, and the circuit court noted that “the mother's best argument is that she has not seen documentation reflecting that the respondent father has actually complied with the terms of his improvement period; however, the witnesses have testified that is the case.” (Emphasis in original). Based upon the evidence presented, this Court declines to hold that the circuit court's ruling on this issue was clearly erroneous.

Based upon the findings below, we further decline to disturb the circuit court's decision to deny petitioner's motions for custody of the child, especially in light of the unusual circumstances of the case at issue. As noted above, the DHHR initially alleged abandonment against petitioner, and the circuit court had reason to deny her custody while those allegations were pending. At such point as petitioner was found not to be an abusive/neglectful parent, the child had already been returned to the Respondent Father. Based upon the strong bond between the child and his father, as well as the initial lack of a bond between the child and petitioner, the circuit court was guided by the child's best interests in allowing him to remain with the father. "As this Court has frequently emphasized, the best interest of the child is the polar star by which all matters affecting children must be guided." *In re Ryan B.*, 224 W.Va. 461, 467, 686 S.E.2d 601, 607 (2009). The Court is not persuaded by petitioner's reliance on *In the matter of Bryanna H.* because a review of the record clearly establishes that the circuit court did consider petitioner as a placement for the child, but declined to grant her motion for custody because placement with the petitioner was not found to be in the child's best interests.

For the foregoing reasons, we find no error in the circuit court's finding that Respondent Father successfully completed his improvement period, nor do we find error in the decision to deny petitioner's motions for custody, and the circuit court's order is hereby affirmed.

Affirmed.

**ISSUED:** April 16, 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