

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

In the Interest of: J.M., C.H., B.H., and C.H. Jr.:

No. 11-1165 (Barbour County 11-JA-1 through 4)

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 Barbour County, wherein Petitioner Mother's parental rights were terminated. This appeal was timely perfected by Petitioner Mother's counsel Chaelyn Casteel, with an appendix accompanying the petition. The guardian ad litem for the children, Karen Hill Johnson, has filed a response on behalf of the children supporting the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of termination.

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.

“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 instant petition was filed against Petitioner Mother after an emergency hotline notified DHHR of a domestic violence incident in Petitioner Mother's home. On the evening of January 19, 2011, Petitioner Mother left the subject children in the care of her adult son and his girlfriend. The

subject children's father, C.H.,¹ disapproved of Petitioner Mother's son and his girlfriend as caretakers for the children. Petitioner Mother's son has had his parental rights terminated to one child and his girlfriend has had her parental rights terminated to other children. Upon learning of the children's arrangements, C.H. confronted Petitioner Mother's son, leading to a domestic incident and arrest. The children were removed from the home that evening and DHHR filed a petition with the circuit court for ratification to remove the children from the home. However, the ratification was not submitted until two and a half days later. At the preliminary hearing on January 31, 2011, the circuit court admonished DHHR for its emergency taking of the children because the ratification to do so was not presented "forthwith," pursuant to West Virginia Code § 49-6-3(c). It explained, however, that because it found imminent danger in the home, it signed the order for the petition. The circuit court also made findings pertaining to Petitioner Mother's history of domestic violence with C.H., her mistreatment and disrespect of court personnel, her history with Child Protective Services ("CPS") in Ohio and West Virginia, and a criminal case filed against her for truancy due to her children missing too many days of school. The case was set for adjudication. Petitioner Mother requested that the circuit court consider placing the subject children with her adult daughter in Ohio. Accordingly, Petitioner Mother moved for concurrent planning with a home study of her adult daughter. The circuit court granted this request for concurrent planning to consider the adult daughter's home as a possible placement for all of the children.

At adjudication in February and March of 2011, the circuit court heard testimony from C.H. and Petitioner Mother. Petitioner Mother admitted that her volatile relationship with C.H. has adversely affected the children; that she and C.H. have engaged in drug use, including during two of her pregnancies; that she takes prescription medication but has been terminated as a patient by her former physician; and that she once pulled a knife on C.H. with one of the children present. Petitioner Mother denied that her children have missed as much school as the truancy case indicates; that she has not mistreated or disrespected the court; or that she has any anger problems. The circuit court made findings that Petitioner Mother and C.H.'s past CPS cases in Ohio and in West Virginia were closed due to their uncooperativeness. The circuit court further found from the criminal truancy case that Petitioner Mother educationally neglected her children. Petitioner Mother moved for a post-adjudicatory improvement period. However, the circuit court found that because of Petitioner Mother's poor attitude and denial of her parenting and drug issues, she would benefit little from an improvement period and consequently, it denied this motion.

At disposition in June of 2011, the circuit court noted Petitioner Mother's refusal to submit to a drug test before the hearing. It further found that there had been no change from the beginning of Petitioner Mother's past CPS cases in Ohio and West Virginia to the instant one before the circuit court. It found that Petitioner Mother refused to take part in services in her Ohio and West Virginia cases and that she has refused to recognize her drug problems or parenting problems. Consequently, the circuit court terminated Petitioner Mother's parental rights to J.M., C.H., B.H., and C.H. Jr.

¹ C.H. is the biological father of only C.H., B.H., and C.H. Jr. The circuit court later terminated his parental rights to these children. Child J.M. is fathered by a different man whose abuse and neglect proceedings are still ongoing.

On appeal, Petitioner Mother argues two assignments of error. She first argues that the circuit court erred in finding that imminent danger existed when the petition that sought immediate removal of the subject children was filed. She further argues that the circuit court improperly terminated her parental rights because less drastic alternatives were available. In particular, Petitioner Mother argues that the circuit court could have granted her an improvement period pursuant to West Virginia Code § 49-6-5(c) or could have placed the subject children with her adult daughter in Ohio, pursuant to West Virginia Code § 49-6-5(a)(5)(iv).

In Petitioner Mother's first argument, she asserts that because DHHR did not obtain a ratification for removing her children from the home until two and a half days later and because it did not provide her with any services after the case was initiated, she was denied due process. In support, she argues that the circuit court itself acknowledged this delay at the preliminary hearing, yet still signed the order for the petition. She further asserts that any services she participated in were of her own initiative. However, she provides no evidence or documentation in support of this assertion.

The guardian ad litem and DHHR respond, arguing that when a circuit court considers whether imminent danger necessitates the subject children's removal from the home, it reviews the petition under West Virginia Code §§ 49-2D-3 and 49-6-3(b) and Rules 16(c) and 22 of the West Virginia Rules for Child Abuse and Neglect Proceedings. Pursuant to these provisions, a post-removal hearing shall substitute for a pre-removal hearing when it appears that a child is in imminent danger of serious bodily or emotional injury in the home; if imminent danger exists, the court may schedule a preliminary hearing on the matter; and the court may place custody of a child found in imminent danger with DHHR. Here, the appendix reflects that the circuit court was presented with DHHR's ratification and petition on the same day, January 21, 2011. It did not approve the emergency taking because it was not presented "forthwith" pursuant to West Virginia Code § 49-6-3(c). However, because it appeared to the circuit court that imminent danger to the children existed, it signed the order for the petition and set the matter for a preliminary hearing on January 31, 2011 pursuant to West Virginia Code § 49-6-3(b). The circuit court did not abuse its discretion in disapproving of the emergency removal and finding that imminent danger existed to necessitate the opening of this case. Accordingly, the Court finds no error in the circuit court's order to file the petition to initiate these proceedings.

Petitioner Mother next argues that the circuit court erred in terminating her parental rights when there were less drastic alternatives available. She asserts that the circuit court could have granted her written motion for an improvement period and limited it to six months. She further argues that the circuit court terminated her parental rights without adequately considering whether the subject children could have been placed with her adult daughter in Ohio; the home study for her daughter had not yet been completed at the dispositional hearing.

The guardian ad litem and DHHR respond, arguing that an improvement period here would have been futile because Petitioner Mother never admitted her problems that needed help and correction. They argue that the circuit court did not abuse its discretion in terminating Petitioner

Mother's parental rights, given her CPS history and her denial of her drug and parenting problems. Furthermore, they argue that the circuit court was not required to complete the home study of Petitioner Mother's adult daughter before terminating Petitioner Mother's parental rights. They argue that it would have further delayed the subject children's proceedings and permanency plan to wait for the home study of a potential placement out of West Virginia. The Court has held as follows:

“[C]ourts 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). DHHR argues that West Virginia Code § 49-6-12 directs that a circuit court may grant a post-adjudicatory improvement period when the subject parent has filed a written motion for such and has shown by clear and convincing evidence that he or she is likely to fully participate in the improvement period. Here, the appendix reflects that the circuit court laid out its findings on the record and in its adjudicatory order as to why it denied Petitioner Mother's motion for an improvement period.

Pursuant to West Virginia Code, the circuit court is not required to grant an improvement period. Rather, the subject parent has the burden of demonstrating by clear and convincing evidence that he or she is likely to fully participate in an improvement period. The circuit court thereafter has the discretion to grant or deny it. The circuit court found that due to Petitioner Mother's problems with drugs, domestic violence, parenting, attitude, and anger, along with her failure to recognize her issues with these problems, there is no likelihood for her to improve the abuse and neglect in the matter. If further found that due to Petitioner Mother's past history with CPS and her lack of cooperation, there is little likelihood that she would cooperate with an improvement period in this instance. The Court finds no error in the circuit court denying Petitioner Mother an improvement period. Further, the circuit court did not abuse its discretion in terminating her rights without the home study for Petitioner Mother's adult daughter. “Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings.” Syllabus Point 5, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999).” *Kristopher O. v. Mazzone*, 227 W.Va. 184, 191, 706 S.E.2d 381, 388 n.9 (2011). The record reflects that at disposition, the subject children were placed in foster care. The circuit court ordered that they remain in their foster care placement under the legal custody of DHHR. The circuit court continued a placement for the subject children that they had already been in during these proceedings. Petitioner Mother did not present at disposition any evidence in support of transferring the subject children's placement to her adult daughter in another state. Accordingly, the circuit court did not abuse its discretion in continuing disposition without the home study of Petitioner Mother's adult daughter. The Court finds no error in the circuit court's termination of Petitioner Mother's parental

rights.²

This Court reminds the circuit court of its duty to establish permanency for J.M., C.H., B.H., and C.H. Jr. 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 J.M., C.H., B.H., and C.H. Jr. within eighteen months of the date of the disposition order.³ 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 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 parental rights is hereby affirmed.

Affirmed.

² After termination and after a later review hearing, the circuit court granted placement of the oldest subject child J.M. with her half sister in Ohio.

³ 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.

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