

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

In the Interest of: M.D. and A.D.:

No. 11-1182 (Mingo County 10-JA-44 and 10-JA-45)

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 Mingo County, wherein Petitioner Father's parental rights were terminated. This appeal was timely perfected by his counsel Jerry Lyall, with an appendix accompanying Petitioner Father's petition. The children's guardian ad litem, Diane Carter Weidel, filed a response on behalf of the children in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, also filed a response in support of the circuit court's order.

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 both of the children's parents in November of 2010. The appendix reveals that the parents had been the subjects of prior cases with Child Protective Services ("CPS"), based upon such allegations as engaging in domestic violence in front of child M.D. The instant petition was based on the children's mother using drugs while pregnant with A.D., who was born addicted to drugs and had withdrawal symptoms, and on Petitioner Father's violence, drug use, and incarceration. Petitioner Father was arrested for child neglect, reckless driving, and fleeing in a vehicle, and consequently, was scheduled for release from incarceration in December 2010. Petitioner Father had also been driving on a license suspended based upon two prior Driving

Under the Influence (“DUI”) convictions. At the preliminary hearing, the circuit court ordered for the parents to submit to weekly drug and alcohol screens; undergo psychological evaluations; participate in services such as anger management, substance abuse counseling, and parenting classes; and participate in any necessary in-home services.

At the adjudicatory hearing of December 7, 2010, the circuit court found clear and convincing evidence of the parents’ neglect and abuse of the subject children and clear and convincing evidence of the parents’ emotional abuse of the children. It further found that due to these circumstances, removal from the home was necessary for the children. The Petitioner Father’s motion for a post-adjudicatory improvement period was denied and the circuit court ordered case plans to be filed and for the Multi-Disciplinary Team (“MDT”) to meet. The original dispositional hearing was scheduled for January 20, 2011; however, the circuit court continued this matter and rather, granted Petitioner Father a ninety-day post-adjudicatory improvement period with services such as drug screens and anger management. The circuit court continued Petitioner Father’s improvement period at a status hearing on March 14, 2011.

The final dispositional hearing was held on April 25, 2011. The circuit court terminated Petitioner Father’s parental rights in its order entered on July 28, 2011. In ordering termination, the circuit court incorporated its prior findings and conclusions from the preliminary hearing and adjudicatory hearing. Additionally, the circuit court found that Petitioner Father had submitted to all drug screens but two, and produced negative results; Petitioner Father had not been participating in therapy and anger management counseling since February of 2011; Petitioner Father struck the children’s mother in the face later in March of 2011, breaking her jaw; Petitioner Father was arrested and incarcerated in April of 2011 for fleeing and simple possession; and Petitioner Father kept all visits with his children until his recent incarceration. Accordingly, the circuit court concluded that clear and convincing evidence proved that Petitioner Father has failed to follow through with all rehabilitative efforts and participation in services, that Petitioner Father is unwilling or unable to correct the conditions of abuse and/or neglect that necessitated the children’s removal, and that there is no reasonable likelihood that Petitioner Father will correct the conditions in the near future. As such, the circuit court terminated Petitioner Father’s parental rights, and did so without granting a post-dispositional improvement period and without granting post-termination visitation. Petitioner Father argues that the circuit court erred in terminating Petitioner Father’s parental rights when he was denied the opportunity to meaningfully participate in the matter or correct the conditions that contributed to the removal of his children; that the circuit court erred in terminating his parental rights; that the circuit court erred in not granting him a post-dispositional improvement period; and that the circuit court erred by not granting Petitioner Father post-termination visitation.

Petitioner Father’s main basis for his four assignments of error center on his assertions of indigence and lack of resources and means for transportation. Accordingly, he argues that due to these circumstances, he was unable to fully comply with services and as such, the circuit court erred in terminating his parental rights and erred in doing so without granting a post-dispositional improvement period or post-termination visitation. In support, Petitioner Father asserts that he submitted to all drug screens except for two and produced negative test results and kept all visits

with his children. He asserts that he had informed CPS and the State of his need for transportation and had he had the means to travel, he would have been able to fully participate in efforts to comply with the circuit court's orders. He argues that one's economic status should not dictate whether one has a right to parent.

The children's guardian ad litem and the DHHR respond, contending that the circuit court did not err in terminating Petitioner Father's parental rights. Both argue that Petitioner Father was offered services for transportation, but Petitioner Father was unwilling to make arrangements or plans for these services. They further raise that Petitioner Father failed to discuss hitting the children's mother during the improvement period and his psychological evaluation that indicated his tendencies to place blame on others. The evaluation also indicated that Petitioner Father placed himself in the "victim" role and failed to accept responsibilities for his actions and behaviors in the abuse and neglect proceedings, including incidents of domestic violence. Moreover, Petitioner Father never argued indigence in prior proceedings, but argues this only now on appeal. The guardian ad litem and DHHR argue that the circuit court's order should be affirmed.

The Court agrees. A review of the submitted appendix reflects that the circuit court ordered Petitioner Father to participate in various services throughout these proceedings in vain. Under West Virginia Code § 49-6-5(b), circumstances which constitute a finding that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future include those in which the abusing parent has "not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies" The March 11, 2011, summary of Petitioner Father's anger management attendance indicates that Petitioner Father only kept two of these appointments. This summary also explains that Petitioner Father's "therapist has discussed with him about contacting his in-home worker or DHHR worker to assist him with transportation and he does not take this suggestion seriously." Petitioner Father was not without means for transportation as he claims on appeal; in fact, he was given various options for assistance with transportation. The circuit court did not err in finding that Petitioner Father failed to meaningfully participate in correcting the conditions that contributed to the removal of his children.

The circuit court did not abuse its discretion in terminating Petitioner Father's parental rights. 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). Further, the subject

children's welfare is the guiding "polar star" in their custody. Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008) (quoting Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) and Syl. Pt. 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995)). The appendix reflects that Petitioner Father's initial motion for a post-adjudicatory improvement period was denied; however, when the court later granted Petitioner Father a ninety-day post-adjudicatory improvement period, Petitioner Father failed to fully comply with services; hit the children's mother, breaking her jaw; and was incarcerated for fleeing and simple possession. Given the circumstances that Petitioner Father failed to make improvements throughout the course of this proceeding and the subject children's especially young age, the Court finds no error in the circuit court's termination of Petitioner Father's parental rights.

The circuit court did not abuse its discretion in denying Petitioner Father a post-dispositional improvement period. A circuit court has the discretion to grant or terminate an improvement period if the abusing parent has not made the necessary progress. Syl. Pt. 6, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) (citing Syl. Pt. 2, *In re Lacey P.*, 189 W.Va. 580, 433 S.E.2d 518 (1993)). As discussed, the appendix reflects that the circuit court had granted Petitioner Father a ninety-day post-adjudicatory improvement period. At the expiration of these ninety days, at disposition, the circuit court found that Petitioner Father failed to comply with services to make the necessary improvement to the conditions of abuse and neglect of his children. In terminating Petitioner Father's parental rights, the circuit court found that there was no likelihood that Petitioner Father could substantially correct these conditions. The circuit court did not find that Petitioner Father was making the necessary progress and therefore, did not find that a post-dispositional improvement period was appropriate. Accordingly, the Court finds no error in the circuit court denying Petitioner Father a post-dispositional improvement period.

The circuit court did not abuse its discretion in denying Petitioner Father post-termination visitation. The Court has held as follows:

"When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interests of the child. . . . The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syllabus, in part, *In re Alyssa W.*, 217 W.Va. 707, 619 S.E.2d 220 (2005). Here, the appendix reflects that the circuit court found that there was no reasonable likelihood that Petitioner Father would substantially improve the circumstances of abuse and neglect to his children because he failed to comply with the circuit court's orders. Throughout his improvement period, Petitioner Father not only failed to attend all services, but he continued to get into trouble with the law and engage in domestic violence with the children's mother. The appendix further reflects that Petitioner Father minimized his role in the conditions of abuse and neglect surrounding his children and failed to accept responsibility in contributing actions and behaviors to these conditions. The Court finds no

error in the circuit court denying Petitioner Father post-termination visitation.

This Court reminds the circuit court of its duty to establish permanency for M.D. and A.D. 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 M.D. and A.D. within eighteen months of the date of the disposition order.¹ 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.

¹ 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