

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

In the Interest of: K.H.:

No. 11-1474 (Harrison County 09-JA-91-1)

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 Harrison County, wherein Petitioner Father's parental rights were terminated. This appeal of the order terminating Petitioner Father's parental rights was timely perfected by his counsel Perry Jones, with an appendix accompanying Petitioner Father's petition. The child's guardian ad litem April Conner has filed a response on behalf of the child 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 of Appellate Procedure.

“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 Father on November 20, 2009, due to his issues with domestic violence and with substance abuse. At the adjudicatory hearing on May 10, 2010, the circuit court found the subject child abused and neglected due to Petitioner Father's domestic violence in front of the subject child and use of drugs to the point where, at times, he was under the influence while caring for the child. The circuit court further found that Petitioner Father has made only minimal support contributions to the subject child.

Following the adjudicatory hearing, the circuit court granted Petitioner Father a six-month post-adjudicatory improvement period and subsequently, at a hearing on January 31, 2011, it granted a three-month extension to this improvement period to allow Petitioner Father to complete a drug treatment program. After hearing testimony from several witnesses, it further found that Petitioner Father substantially complied with the terms of his improvement period and that an extension of the improvement period would be in the subject child's best interest. At the dispositional hearing on September 8, 2011, the circuit court heard testimony from Petitioner Father's Child Protective Services ("CPS") caseworker, Joyce Anderson. The dispositional order reflects that Ms. Anderson testified that Petitioner Father has not participated in any services; has not completed any drug screens; has not made contact with DHHR; has not made contact with the subject child since February 14, 2011; and has not paid any child support for the subject child. No other witnesses testified. The circuit court consequently found that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future and that it would be in the best interests of the subject child to terminate Petitioner Father's parental rights. It is from this order that Petitioner Father appeals.

On appeal, Petitioner Father argues that the circuit court erred when it failed to consider less restrictive alternatives when it found that there was no reasonable likelihood under West Virginia Code § 49-6-5(a)(6)¹ that conditions of abuse and neglect could be corrected. He argues that the circuit court should have entered a disposition pursuant to West Virginia Code 49-6-5(a)(5).² In support, Petitioner Father argues that, pursuant to West Virginia Code § 49-6-12(b)(2), he showed throughout the majority of the proceedings that he would be likely to participate in, and benefit from, an improvement period. He argues that he substantially complied with the terms and conditions of his improvement period. Petitioner Father asserts that, for instance, he actively participated in all evaluations arranged by DHHR, participated in visitations, and fully cooperated with DHHR prior to the dispositional hearing. Petitioner Father further argues that the subject child was not in any immediate danger of being abused and/or neglected by him because Petitioner Father was not living with the subject child's mother at the time she was removed from the home. Moreover, Petitioner Father argues that the circuit court's extension of his improvement period demonstrates that termination was not necessary. Accordingly, Petitioner Father argues that because the circuit court could have granted him an improvement period at disposition, termination of his parental rights was in error.

K.H.'s guardian ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Father's parental rights. The guardian ad litem argues that after the extension of his post-adjudicatory improvement period was granted, Petitioner Father abandoned the case and

¹ Petitioner Father's brief neglected to add subsection (a), only citing this Code section as 49-6-5(6).

² Upon review of the Code, it appears that the subsection Petitioner Father is arguing for is that of West Virginia Code § 49-6-5(c), pertaining to an improvement period at disposition. West Virginia Code § 49-6-5(a)(5) pertains to termination.

the subject child, as reflected in the circuit court's dispositional order. In that order, the circuit court found that Petitioner Father failed to participate in any services or drug screens, failed to contact DHHR or the subject child, and failed to pay for any support for the subject child. The guardian ad litem argues that this Court has held as follows:

At 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.

Syl. Pt. 6, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). The guardian ad litem further argues the Court's directive pertaining to improvement periods as follows: "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 91980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

DHHR also responds in support of the circuit court's order terminating Petitioner Father's parental rights to K.H. It similarly argues that Petitioner Father abandoned the case and the child after the circuit court granted the extension to his post-adjudicatory improvement period. Likewise, it asserts that after the extension, Petitioner Father failed to complete his substance abuse treatment, failed to participate in other services; failed to attend drug screens; failed to maintain contact with DHHR, the subject child, or his attorney; and failed to attend the dispositional hearing which resulted in the termination of his parental rights. Although the circuit court noted evidence of a strong bond between Petitioner Father and his child at the January 31, 2011, hearing, Petitioner Father abandoned the child shortly thereafter and at the September 8, 2011, hearing, testimony provided that Petitioner Father had made no contact with his child since February 14, 2011. Petitioner Father has made no efforts since January of 2011 to rectify the conditions that opened this case. Even though Petitioner Father may have shown substantial compliance during his initial improvement period, he did not follow suit with the extension of this improvement period.

The Court finds that the circuit court did not abuse its discretion in terminating Petitioner Father's parental rights. The appendix contains the circuit court's orders pertaining to Petitioner Father's adjudication, post-adjudicatory improvement period, and dispositional hearing. No transcripts were submitted. A review of this limited appendix reflects that at the dispositional hearing, CPS caseworker Joyce Anderson testified to Petitioner Father's absence in the case after he was granted an extension to his improvement period. Petitioner Father argues that the circuit court should have granted an improvement period at disposition, yet does not provide any supporting evidence or documents for why it should have done so. Pursuant to West Virginia Code § 49-6-12, a circuit court is not required to grant an improvement period unless the subject parent has shown by clear and convincing evidence that he or she will fully comply with the terms of an improvement period. At the January 31, 2011, hearing, several witnesses testified in support of a three-month

extension to Petitioner Father's improvement period. However, at the September 8, 2011, hearing, Petitioner Father failed to appear and the only witness present testified to Petitioner Father's absence and lack of participation after the previous hearing. Although the circuit court found that Petitioner Father substantially complied with the terms of his improvement period to warrant an extension, Petitioner Father did not show why another improvement period was equally warranted at disposition. The Court finds no error in the circuit court's order terminating Petitioner Father's parental rights to K.H.

This Court reminds the circuit court of its duty to establish permanency for K.H. 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 K.H. 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.

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.

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