FILED
January 12, 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* B.D., L.D., N.D., M.D., and A.D.**

No. 21-0147 (Tyler County 19-JA-17, 19-JA-19, 19-JA-20, 19-JA-21, and 19-JA-25)

AND

***In re* B.D., S.B., L.D., N.D., M.D., and A.D.**

No. 21-0176 (Tyler County 19-JA-17, 19-JA-18, 19-JA-19, 19-JA-20, 19-JA-21, and 19-JA-25)

MEMORANDUM DECISION

Petitioners Father C.D., by counsel R. Jared Lowe, and Mother T.P., by counsel Michael B. Baum, appeals the Circuit Court of Taylor County's January 27, 2021, order terminating their parental rights to B.D., S.B., L.D., N.D., M.D., and A.D.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Patrick Morrisey and Lee A. Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem ("guardian"), David C. White, filed a response on the children's behalf in support of the circuit court's order. Petitioner father filed a reply. On appeal, petitioners argue that the circuit court erred in denying their respective motions for post-dispositional improvement periods and terminating their parental rights without imposing a less-restrictive dispositional alternative.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). Additionally, petitioner father C.D. is not S.B.'s biological father and he asserted no custodial rights to the child below or on appeal.

In September of 2019, the DHHR filed a petition alleging that the children were not provided their medications, had received no dental examinations, and presented to school with atrocious hygiene that persisted for several days. For example, L.D. came to school with "fecal matter on his back, vomit in his hair . . . , and icing in his hair" that remained for several days. The DHHR further alleged that the mother's home (where the children lived) was in deplorable condition and the children were filthy. The Child Protective Services ("CPS") worker observed B.D. smearing his fecal matter on the walls of the home. The DHHR alleged that the mother worried that many of the children's behaviors were due to witnessing domestic violence. The DHHR alleged that it attempted to provide the mother with services but that she avoided scheduling appointments with service providers. As a result, the petition was filed. The DHHR amended the petition to include newborn A.D. as an infant respondent in October of 2019.

In November of 2019, the circuit court convened for an adjudicatory hearing and petitioners stipulated to the deplorable condition of the home, medical neglect of the children, and the failure to provide the children with adequate food, clothing, shelter, supervision, medical care and education. The circuit court accepted their stipulations and adjudicated them as abusing parents. Petitioners moved for improvement periods, which the circuit court granted. The circuit court ordered them to participate in individualized therapy with an anger management component, supervised visitations with the children, and parenting and adult life skills classes. The circuit court also ordered petitioners to maintain suitable housing and employment and maintain contact with the DHHR.

The DHHR filed an amended petition in December of 2019, alleging that then-six-year-old L.D. stated during a forensic interview that petitioner father hit him into a wall and that he did not feel safe with the father. Visitation between petitioner father and L.D. and B.D. was suspended. In February of 2020, the circuit court convened for a second adjudicatory hearing on the amended petition. The DHHR moved to dismiss the amended petition, which was granted.

In April of 2020, the parties entered an agreed order following a multidisciplinary treatment team ("MDT") meeting that set forth a month-long schedule for transitioning the children into petitioners' care. The order found that petitioners were "reported to have been fully participating in the previously agreed upon terms and conditions" of their improvement periods. In May of 2020, the circuit court ordered petitioners to participate in parental fitness evaluations, thereby staying the prior order for a custodial transition.

Prior to the next review hearing, both the children's court-appointed special advocate ("CASA") and the DHHR prepared court summaries. The CASA worker reported that the children were in separate placements: L.D., B.D., M.D., and N.D. were placed together with foster parents in Huntington, West Virginia; A.D. was placed with a foster parent in Tyler County; and S.B. was placed in New Martinsville, West Virginia. The CASA worker reported that the children were involved in multiple therapeutic services. M.D. had nine weekly therapeutic appointments scheduled, for a total of eight hours per week. N.D. had four weekly appointments, for a total of three hours per week. B.D. had three to four weekly appointments, for a total of three to four hours per week. L.D. had three to four weekly appointments, for a total of three to four hours per week.

The CASA worker also noted that B.D. and L.D. were having "behavioral outbursts," which had been minimized since the visitation with petitioners had ceased. According to the CASA worker, the children were thriving in their current placements. However, the worker reported that L.D. continued to express that he was terrified of the father and did not want to see or talk to him. L.D. had recently disclosed that his parents made him "drink bleach whenever he [was] bad." B.D. disclosed that when the siblings were bad the mother "held us under water in the bath screaming 'f**k you' until we couldn't breathe and coughed." The worker stated that the children had forensic interviews scheduled.

In June of 2020, the circuit court held a review hearing on petitioners' improvement period and heard that the parental fitness reports had not yet been completed. It continued the proceedings. Again, the court ordered that petitioners be provided supervised visitations, with the exception that the father not visit with L.D. and B.D.

The DHHR filed a motion for the forensic interviews of all the children following new disclosures from L.D. and B.D. that petitioner urinated on their penises. The motion was granted on July 28, 2020. In August of 2020, the DHHR filed a court summary indicating that petitioners had successfully completed their improvement periods and "continue to work and care for their home." The DHHR indicated that L.D. and B.D. have made "several allegations" and none had been substantiated. However, the newest allegation that the father had urinated on them was still under investigation. The DHHR noted that the children collectively participated in ninety-six appointments per month "ranging from speech and occupational therapy to mental health therapy."

In August of 2020, the circuit court held a review hearing and made no findings regarding petitioners' improvement periods. The DHHR indicated it was seeking termination of petitioners' parental rights. The court granted motions to intervene by the foster parents, C.A. and W.A., and foster parent, T.S., and continued the proceedings.

The circuit court held dispositional hearings in October and December of 2020. C.A., the foster mother for L.D., B.D., M.D., and N.D., testified that the children had an aggregate of 100 appointments per month that would be increasing to 112 appointments, following approval of insurance. C.A. testified that she was a teacher prior to the placement of the children and no longer worked as a result of the children's numerous appointments. She testified that she witnessed the video visitation between the children and petitioners and stated that there was "no interaction" between them.[2] C.A. explained that the children did not seem interested in visiting with their parents, despite her offering "rewards" for participation. C.A. testified that L.D. expressed suicidal ideations and intentionally "cut his hand and fingers" with a piece of glass following a visitation with petitioners. C.A. further testified that each child exhibited negative behaviors after visitation: B.D. and N.D. exhibited aggression and fought each other; N.D. also

[2]It appears from the record that many of the petitioners' visitations with the children were conducted through video due to the COVID-19 pandemic.

experienced diarrhea and urinated on himself; and M.D. did not sleep after visitations. According to C.A., these behaviors were alleviated during a period of time when visitation was suspended.

Petitioners' parental fitness evaluator testified that the father had accepted minimal responsibility for the abuse and neglect of the children. Similarly, the evaluator testified that the mother "limited her acceptance of responsibility by blaming others and minimizing the conditions of [the] home." She did not foresee petitioners' long-term behavior changing rapidly or completely with short-term services. She testified that the father's IQ was seventy-four and the mother's IQ was eighty-four. Based on petitioners' "cognitive abilities and their past history," the evaluator did not believe that they would be capable of sustaining the children's 100 medical appointments per month. The evaluator opined that both parents' prognosis for improvement was "extremely poor."

L.D.'s therapist testified that she had seen the child sixteen times and that the child made "several credible disclosures" to her that the father abused him. She diagnosed L.D. with post-traumatic stress disorder ("PTSD"). She opined that treatment for L.D.'s condition would be counter-productive if there is a risk he could be returned home. Ultimately, she could not ethically say that it is safe for L.D., or any of the other children, to return to their parents' care. L.D.'s school psychologist also testified that L.D. disclosed physical abuse by the father and that the mother failed to protect him. According to the psychologist, L.D. stated that the father "is a monster." The psychologist opined that many of L.D.'s behaviors were indicative of trauma.

T.S., the foster mother of A.D., testified that she fostered B.D. and N.D. until she could no longer control their behaviors. The children were moved in February of 2020 to foster parents C.A. and W.A. Prior to their removal, T.S. witnessed many visitations between the children and petitioners. She testified that petitioners did not seem interested in visiting with newborn A.D. and did not ask to see the child during visits. She explained that the mother requested information about A.D. once or twice per month, but the father never asked for photographs or other information regarding the infant.

The children's CASA worker testified that the children had shown improvement over the course of the proceedings. She explained that L.D. continued to express fear, even when hearing petitioner's name. She testified that it was not in the children's best interests to be returned to petitioners.

A DHHR worker testified that due to L.D.'s fear of the father, the DHHR recommended that visitation be suspended and, thereafter, the child did not want to resume visitation. Likewise, B.D. also participated in very few visitations, and he did not want to resume visitations after a brief period of suspension. The worker testified that the DHHR was recommending termination of petitioners' parental rights because, based upon their history, it did not feel that petitioners would be able to maintain their children's medical appointments. The worker explained that the DHHR initially recommended reunification until it learned of the recommendations of the children's psychologists, particularly L.D.'s treatment providers. The worker stated that the DHHR believed a safety issue existed for L.D. and B.D. if returned to the home, and, therefore, could not recommend that any of the children be returned to the home. The worker further testified that L.D. expressed anxiety over any of his siblings being returned to the home. Finally,

the DHHR worker testified that the children had been subject to "four or five" forensic interviews, during which the children disclosed physical and sexual abuse. The worker testified that based upon L.D. and B.D.'s behaviors, she believed the disclosures were credible.

The petitioner father's psychologist testified that she was treating the father for anger management, domestic violence, and the removal of his children. She opined that the father made progress during the proceedings and was active in his treatment, but she could not opine whether the father's parenting improved as a result of treatment. She also testified that her opinion was based on the father's self-reporting as she had never witnessed the father in a situation where he may become angry. The psychologist testified that the father did not disclose why the children were removed from his care, and, therefore, she could not address every aspect relevant to removal of the children.

Petitioners' parenting and adult life skills provider testified that petitioners were active participants during classes. The provider stated that the services were closed because petitioners "reached maximum benefit from the service" and completed the curriculum. According to the provider, petitioners had appropriate housing and employment when she last saw them, and they were using extra money from their employment to buy things for the children. She explained that she had not seen petitioners interact with all of the children. She witnessed a few visitations between petitioners and S.B. and believed petitioners had utilized the skills taught in the classes.

Petitioner father testified that he had employment, which was suspended due to the COVID-19 pandemic. Nevertheless, he maintained an apartment with petitioner mother and testified that the home was clean and safe for the children. The father testified that he sought out therapy services of his own accord to seek treatment for his anger and depression. The father asserted that he could maintain the children's appointment schedule if given an opportunity. He believed that his employer would schedule his hours so that they did not overlap with the mother's hours, and, therefore, one parent would always be available to take the children to appointments. The father acknowledged that he was not a good parent and that he learned multiple skills to effectively parent through the services. The father admitted that it had been a year since he had a visit with all of the children and that he had been unable to utilize the parenting skills taught in his classes.

Petitioner mother testified that she participated in and completed the terms of her improvement period. She testified that foster parent C.A. informed her of the children's appointments and details. When asked if she could ensure that the children make it to their appointments, she responded "I can't show anybody if I'm not given the chance to prove it. There's no other way I can guarantee anything. You've got to let me show it." The mother admitted that she had "mixed emotions" about the children returning to her care because she saw the improvement that L.D. and B.D. made in the care of their foster parents. She testified that L.D. and B.D. might be better off remaining with the foster parents.

The visitation supervisor testified regarding three in-person visitations held in February of 2020. She testified that L.D. hid from providers prior to visitations and stated that he did not want to go. For the second visit, B.D. also hid and stated that he did not want to go see petitioner father because B.D. remembered petitioner father breaking plates. For the final visit, N.D. and

M.D. also attempted to hide to avoid visiting with petitioners. She also testified that the children reacted poorly to the video call visits and often cried. The supervisor stated that she did not feel it was in the children's best interests to increase visitations.

Finally, B.D.'s therapist testified that she diagnosed the child with post-traumatic stress disorder, as a "victim of child sexual abuse," and as a witness of domestic violence. The therapist testified that within the first thirty minutes of meeting B.D., he made allegations of physical and sexual abuse by his parents. She also testified that the child described his nightmares to her, which included the father placing a plastic bag over his head and forcing him to drink bleach.

Ultimately, the circuit court found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future because petitioners could not remedy the conditions of abuse and neglect on their own or with help. It further found that reunification with petitioners was not in the children's best interests and that termination of parental rights was necessary for the welfare of the children. The circuit court's decision was memorialized by its January 27, 2021, order. Petitioners now appeal this order.[3]

The Court has previously held:

> "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." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

On appeal, petitioners argue that the circuit court erred in terminating their parental rights rather than granting them a less-restrictive dispositional alternative, such as a post-dispositional improvement period. Petitioners argue that they substantially complied with the terms of their post-adjudicatory improvement period, which indicates that they were likely to fully participate in a post-dispositional improvement period. Petitioners assert that they would have been able to

[3]According to the parties, the permanency plan for the children is adoption in their respective foster placements. S.B. will be adopted by a relative, A.D. will be adopted by intervenor T.S., and the remaining children will be adopted by intervenors C.A. and W.A.

address the children's medical needs during a post-dispositional improvement period and would have been able to demonstrate their ability to maintain the children's appointment schedule. Petitioners further argue that the circuit court erred in determining that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future. Upon our review, we find that petitioners are entitled to no relief as the circuit court correctly determined that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected by petitioners.

Pursuant to West Virginia Code § 49-4-604(c)(6), a circuit court may terminate a parent's parental rights upon finding that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that termination is necessary for the welfare of the children. West Virginia Code § 49-4-604(d) provides that "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected" means that "the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help."

Here, while petitioners substantially complied with the terms of their improvement periods, the record demonstrates that petitioners' conduct prior to the children's removal resulted in the children's extreme fear of them and associated behavioral issues such that reunification was contrary to their best interests. "In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child." Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014). The record is rife with evidence that the children were afraid to visit petitioners and demonstrated extreme behaviors after visitations. Both L.D. and B.D. had been diagnosed with PTSD following their removal from petitioners and disclosed extreme fear of visiting with them. Likewise, N.D. and M.D. resisted visitation with petitioners and cried when visitation was attempted. Further evidence showed that the video visitation between petitioners and the children was not productive as petitioners did not engage with the children. Many of the witnesses agreed that reunification with petitioners was not in the children's best interests due to the behaviors exhibited after visitation.

While petitioners argue on appeal that they should have been provided more of an opportunity to demonstrate their advancement in parenting by exercising visitation with the children, we note that Rule 15 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings specifically provides that "the court may make such provision for reasonable visitation . . . *as consistent with the child[ren]'s well-being and best interests*." (emphasis added). The evidence in this case clearly shows that continued visitation between petitioners and the children was not in the children's best interests.

> "[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, 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." Syl. Pt. 1, in part, *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980).

Cecil T., 228 W. Va. at 91, 717 S.E.2d at 875, Syl. Pt. 4. "'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948)." Syl. Pt. 3, *In re S.W.*, 233 W. Va. 91, 755 S.E.2d 8 (2014). Based upon evidence below that the visitation with petitioners was not in the children's best interests, we find no error in the circuit court's determination that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future.

We have also held as follows:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] . . . that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). Therefore, as the circuit court properly found that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future, it did not err in terminating petitioners' parental rights rather than granting them a less-restrictive dispositional alternative, such as a post-dispositional improvement period.

Furthermore, the Court cannot ignore the significant evidence presented at the dispositional hearing that the children may have been sexually and physically abused in their parents' care. While we note that the DHHR did not seek to adjudicate petitioners upon allegations that the children were physically and sexually abused, the record provides that the children were subject to multiple forensic interviews, made credible disclosures of physical and sexual abuse to their therapists, and received therapy related to dealing with the trauma of physical and sexual abuse. We remind the DHHR that Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings permits amendment to a child abuse and neglect petition after the adjudicatory phase of the proceedings and that the DHHR has a statutory duty "[u]pon notification of suspected child abuse or neglect, [to] commence or cause to be commenced a thorough investigation" of the allegations. W. Va. Code § 49-2-802(c)(3); *see also* Syl. Pt. 6, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013) ("[T]he circuit court has the inherent authority to compel the [DHHR] to amend the petition to encompass the evidence or allegations."). Under the specific circumstances of this case, although the petition was not amended, the evidence presented at the dispositional hearing is highly relevant and serves to underscore the circuit court's determination that reunification with petitioners was not in the children's best interests.

For the foregoing reasons, we find no error in the decision of the circuit court, and its January 27, 2021, order is hereby affirmed.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton