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.W. and A.O.**

No. 21-0497 (Tucker County 19-JA-26 and 20-JA-13)

MEMORANDUM DECISION

Petitioner Father D.W., by counsel J. Brent Easton, appeals the Circuit Court of Tucker County's May 24, 2021, order terminating his parental rights to B.W. and A.O.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Patrick Morrisey and Lee Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem ("guardian"), Heather M. Weese, filed a response on behalf of the children in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in terminating his parental rights rather than granting him a post-adjudicatory improvement period.

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.

The original petition in this matter was filed against the mother in March of 2018, alleging that she abandoned three other children not at issue on appeal. After the mother gave birth to B.W. in October of 2019, the DHHR filed an amended petition naming petitioner as the respondent father. The DHHR alleged that the mother and petitioner had a history of substance and abuse and admitted to using methamphetamine. Thereafter, petitioner waived his preliminary hearing, and the court ordered him to submit to drug screens.

In February of 2020, the circuit court granted petitioner's previously filed motion for a preadjudicatory improvement period, the terms of which required that he cease his relationship

[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).

with the mother, whose rights to B.W. had been terminated, and obtain adequate and independent housing. Due to petitioner's work schedule, he was excused from submitting to daily or weekly random drug screens but was ordered to submit to any drug screens requested by the DHHR or the guardian prior to visits with B.W.

Proceedings were delayed due to the COVID-19 pandemic, and the circuit court held a review hearing in June of 2020. The court learned that petitioner was living and working in Alabama, had not exercised telephonic or video visits with the child since March of 2020 when visits changed to remote, and had only contacted the foster parent to check on the child's welfare once. At the end of the month, the multidisciplinary team ("MDT") members created a new visitation schedule to accommodate petitioner and he fully complied with visitation over the next month and a half. On July 17, 2020, petitioner returned to exercise an overnight visit and submitted to a drug screen, which the lab showed was positive for methamphetamine. Thereafter, visits were suspended, and the DHHR filed another amended petition highlighting petitioner's lack of contact with the child and continued drug abuse during his preadjudicatory improvement period. In August of 2020, the circuit court reinstated petitioner's requirement to call daily to see if he needed to submit a drug screen through the Call-To-Test program.

In September of 2020, petitioner stipulated at an adjudicatory hearing to using methamphetamine that impacted his ability to parent the child. Petitioner admitted to testing positive for methamphetamine on August 11, 2020, but stated that he stopped submitting to further drug screens due to a lack of transportation. Petitioner stated that he was going to get another vehicle and would be able to submit to future drug screens. Petitioner requested a post-adjudicatory improvement period, which was held in abeyance. That same month, the DHHR filed another amended petition after the mother gave birth to A.O., naming petitioner as the respondent father.

The circuit court held an adjudicatory hearing as to A.O. and a final dispositional hearing as to both children in January of 2021.[2] Petitioner stipulated to the allegations in regard to A.O. The circuit court accepted petitioner's stipulation, adjudicated him as an abusing parent, and proceeded to disposition on both children. The DHHR presented evidence that petitioner failed to submit to drug screens after September 21, 2020, had not fully exercised visits with the children, and had an untreated drug problem as evidenced by his positive drug screens for methamphetamine. Each child's foster mother testified to petitioner's sporadic visitation with the children and that his contact trailed off in December of 2020. The DHHR presented evidence that petitioner substantially complied with the terms and conditions of his improvement period in June and July of 2020, and the DHHR had planned to reunify B.W. with petitioner before he tested positive for methamphetamine. According to records, petitioner stopped submitting to drug screens on August 21, 2020. Petitioner testified in support of his motion for a post-adjudicatory improvement period, stating that he was employed in Virginia, had rented an apartment, had completed required parenting classes, and would test negative for illicit substances. However, petitioner denied having a drug addiction and stated that he did not need help or drug treatment.

[2]According to the record, at a hearing in October of 2020, the parties agreed to an accelerated final dispositional hearing as to A.O. and noticed the final dispositional hearing to include both children after petitioner's adjudication for A.O. *See* Rule 32(b) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

Based on the evidence, the circuit court found that petitioner's preadjudicatory improvement period was unsuccessful and, thus, a post-adjudicatory improvement period was not warranted. In support, the court cited petitioner's failure to comply with drug screening, his continued drug abuse, and lack of consistent contact with the children. The court noted that it had no evidence of petitioner's sobriety as he had failed to drug screen for the previous five months. The court maintained that petitioner failed to take full advantage of the fact that both children were placed with relatives and thus more flexible to arrange visitation and phone/video calls. The court concluded that the matter had been pending for a year and petitioner was unlikely to benefit from another improvement period. Accordingly, the circuit court found that there was no reasonable likelihood that petitioner could correct the conditions of abuse and neglect in the near future and that termination of his parental rights was necessary for the children's welfare. The circuit court terminated petitioner's parental rights by order entered on May 24, 2021.[3] It is from the dispositional order that petitioner appeals.

The Court has previously established the following standard of review:

> "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, petitioner argues that the circuit court erred in denying him a post-adjudicatory improvement period when he testified that he would comply with the terms and conditions of another improvement period, had stable housing and employment, and completed parenting classes.

According to West Virginia Code § 49-4-610(2)(D), in order to obtain a post-dispositional improvement period after having already been granted an improvement period, a parent must first "demonstrate[] that since the initial improvement period, [he] has experienced a substantial change in circumstances" and "that due to that change in circumstances, [he] is likely to fully participate in the improvement period." "This Court has explained that 'an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the . . . parent to modify his/her

[3]The mother's parental rights were also terminated below. The permanency plan for the children is adoption in their respective foster homes.

behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged.'" *In re Kaitlyn P.*, 225 W. Va. 123, 126, 690 S.E.2d 131, 134 (2010) (citation omitted). However, the circuit court has discretion to deny an improvement period when no improvement is likely. *See In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002). Further, we have held that

> [i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

In re Timber M., 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted).

Contrary to petitioner's argument, we see no error in the circuit court's determination that he was unlikely to fully participate in another improvement period. The record shows that petitioner failed to submit to drug screens for the five months prior to the dispositional hearing. While petitioner argues that he proved he was likely to participate in an improvement period by having appropriate housing and employment, and participating in parentings classes, petitioner ignores the fact that he failed to address the most serious allegation—methamphetamine use. As the circuit court found that petitioner failed to acknowledge that he had a substance abuse problem despite testing positive for methamphetamine several times throughout the proceedings, any future improvement period would be an "exercise in futility at the child[ren]'s expense." *Id.* Furthermore, the foster mothers testified that petitioner's contact with each child was sporadic and the circuit court noted that petitioner was afforded more flexibility with contact and visitation due to the children being placed with relatives. "We have previously pointed out that the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent's custody is a significant factor in determining the parent's potential to improve sufficiently and achieve minimum standards to parent the child." *In re Katie S.*, 198 W. Va. 79, 90 n.14, 479 S.E.2d 589, 600 n.14 (1996) (citations omitted). Given this evidence, we find no error in the circuit court's decision to deny petitioner a post-adjudicatory improvement period.

Finally, we find no error in the circuit court's termination of petitioner's parental rights. According to West Virginia Code §49-4-604(d)(3), a situation in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes one in which "[t]he abusing parent . . . [has] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts . . . designed to reduce or prevent the abuse or neglect of the child[ren]." Again, while petitioner may have complied with some services below, the record overwhelming shows that he failed to fully follow through with all services and, in fact, thwarted the DHHR's reunification efforts by testing positive for methamphetamine in August of 2020. Additionally, petitioner's failure to submit to drug screens for five months left the circuit court without a baseline to determine the severity of his addiction and how to approach a course of treatment more accurately for him. Pursuant to West Virginia Code § 49-4-604(c)(6), circuit courts may terminate parental rights upon finding that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future, and we find no error with this determination.

Finally, we agree with the circuit court's finding that termination of petitioner's parental rights was necessary for the children's interests. Here, both children were less than two years old and lacked a bond with petitioner as he had never had custody of either from birth. "Our cases indicate that a close emotional bond generally takes several years to develop." *In re Alyssa W.*, 217 W. Va. 707, 711, 619 S.E.2d 220, 224 (2005). We have previously noted,

> the early, most formative years of a child's life are crucial to his or her development. There would be no adequate remedy at law for these children were they permitted to continue in this abyss of uncertainty. We have repeatedly emphasized that children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement. The legislature has recognized this by limiting the extent and duration of improvement periods a court may grant in an abuse and neglect case.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 257-58, 470 S.E.2d 205, 211-12 (1996).

For the foregoing reasons, we find no error in the decision of the circuit court, and its May 24, 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