

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

In Re: A.S. and W.M.

No. 11-0930 (Hardy County 11-JA-07& 08)

FILED

February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Hardy County, wherein Petitioners Mother and Father had their parental rights to the children, A.S. and W.M., terminated. The appeal was timely perfected by counsel, with petitioners' appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her response on behalf of the children.

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.

On appeal, petitioners argue that the circuit court erred in entering an order terminating their parental rights because the ruling was not supported by substantial evidence, the ruling was against the great weight of the evidence, it was an abuse of discretion, and that it was error to do so without granting petitioners an improvement period. Petitioners argue that the goal of an improvement period is to facilitate reunification of families, when in the best interest of the child. *In re Edward B.*, 210 W.Va. 621, 634, 558 S.E.2d 620, 633 (2001). Petitioners argue that the circuit court based its denial of an improvement period and subsequent termination of parental rights on the petitioners' inability to satisfactorily explain how their daughter sustained a skull fracture, as well as testimony concerning Petitioner Mother's cognitive abilities and the difficulty they created in effective parenting. According to petitioners, these facts do not constitute circumstances under which there is no reasonable likelihood that conditions of neglect or abuse can be substantially corrected, as that is defined in West Virginia Code § 49-6-5(b). As such, petitioners argue that they should have been entitled to an improvement period in order to remedy issues with their parenting because they accepted responsibility for the injuries by stipulating to neglect by failing to timely seek medical treatment for the child. Further, they

argue that through parenting services, the conditions of neglect or abuse could have been substantially corrected and that termination was therefore improper.

In response, the guardian ad litem argues that denial of an improvement period and termination were proper. The guardian cites the severe nature of A.S.'s injuries, being a skull fracture of an unexplained and non-accidental nature. Further, petitioners admitted to waiting approximately five days to take the child to the hospital. According to the guardian, "[b]oth parents gave non-explanations [for the injury] that evolve to this day." The guardian argues that the circuit court was presented with parents who left an infant to be cared for by assorted relatives and associates, despite their lack of employment, and further that the parents themselves have significant psychological issues. Petitioner Mother additionally tested positive for Methamphetamine and Ecstasy prior to the dispositional hearing. As such, it became clear that neither petitioner could even begin to identify parenting issues or care for an infant child. Therefore, termination of parental rights was proper.

The DHHR argues that, while the petitioners offered an explanation as to how the child received the injuries, medical testimony indicated that this explanation was not consistent with the severity of the child's injury, and that the child likely suffered a non-accidental trauma. The circuit court, too, was suspicious of the petitioners' explanation. This lack of a reasonable explanation, coupled with Petitioner Mother's serious cognitive defects and drug use, made successful completion of an improvement period highly unlikely. Therefore, there was no reasonable likelihood that the conditions which led to the abuse and neglect in this matter could be corrected in the near future. Further, contrary to the case law cited by petitioners, the DHHR points out that the parent has the burden of proving that an improvement period is appropriate. *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 461, n. 9, 475 S.E.2d 548, 553, n. 9 (1996). As such, the DHHR argues that denial of an improvement period and termination of parental rights was proper.

"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 circuit court below denied petitioners' motion for an improvement period after finding that they "failed to illustrate that

they can participate in any improvement period.” As noted above, West Virginia Code § 49-6-12 places the burden on the parents to prove by clear and convincing evidence that they are likely to fully participate in a post-adjudicatory improvement period. In denying this motion, the circuit court noted that “[t]his was a very severe injury to a very young child, four months of age, and there was no satisfactory explanation as to the reason for that – that injury.”

Improvement periods are not mandatory and are granted at the circuit court’s discretion per West Virginia Code § 49-6-12. Further, this Court has held that “‘in 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.’ *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996).” *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Clear from the record is the fact that petitioners failed to acknowledge the underlying problem, i.e how the child suffered the injury. While it is true that the parents stipulated to neglect for failure to timely seek medical attention for the child, and also that they claimed the child suffered these injuries when an aunt holding the child fell, this claim is incongruent with the expert medical testimony presented below.

This Court has also held that “‘courts 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.’ Syllabus point 1, [in part], *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). In this matter, expert testimony established that Petitioner Mother suffered such severe cognitive deficits that she was unlikely to be able to provide appropriate parenting to her child and that the services the DHHR offers would not be helpful to her because of these deficits. Further, expert testimony established that issues Petitioner Father suffers would prevent him from providing Petitioner Mother with the level of support she would need to successfully parent a child. For these reasons, the circuit court was not required to provide petitioners an improvement period and was within its discretion to proceed directly to termination of parental rights, based upon the best interest of the child.

This Court reminds the circuit court of its duty to establish permanency for the children. 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 the children within eighteen months of the date of the disposition order. 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 Proceedings¹ 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 to deny petitioners an improvement period, and the termination of petitioners’ parental rights is hereby affirmed.

Affirmed.

ISSUED: February 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

¹Rule 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.