

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

**In Re: D.K., J.M., N.M., and K.M.**

**No. 11-1312** (Mercer County 09-JA-23, 24, 25 & 11-JA-32)

**FILED**

**April 16, 2012**

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

**MEMORANDUM DECISION**

This appeal arises from the Circuit Court of Mercer County, wherein Petitioner Father's parental, custodial, and guardianship rights to his two children, D.K. and J.M., were terminated by order entered September 9, 2011<sup>1</sup>. The appeal was timely perfected by counsel, Michael P. Cooke, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, P. Michael Magann, has filed his 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 of Appellate Procedure.

The instant matter was initiated following numerous referrals that the Respondent Mother was not properly caring for the children. As to petitioner, the initial petition alleged that he did not have a relationship with the children, and failed to provide them with psychological, emotional, physical, and financial support. The petition also alleged that petitioner had no relationship with Respondent Mother, failed to pay child support, and was also charged with conspiracy, and possession with intent to distribute during a drug raid in Mercer County. During the proceedings below, petitioner was granted both a post-adjudicatory improvement period and a dispositional improvement period. However, petitioner later became incarcerated on criminal charges not related to the abuse and neglect proceedings. Thereafter, the circuit court terminated petitioner's parental, custodial, and guardianship rights without granting an extension to the dispositional improvement period, based upon petitioner's failure to follow through with the reasonable family case plan or other rehabilitative efforts, and a finding that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future.

On appeal, petitioner argues that the circuit court erred in terminating his parental, custodial, and guardianship rights without extending his dispositional improvement period, and also that it was

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<sup>1</sup>In the circuit court, two additional children were the subject of the proceedings. These children were not the petitioner's biological children, and are therefore not the subject of this appeal.

error to terminate these rights while he was incarcerated on unrelated criminal charges. Specifically, petitioner argues that restoration of his full parental rights was within his reach prior to his criminal proceedings, and that he was fully complying with the terms of his improvement period. Petitioner argues that his improvements were remarkable, and that the DHHR even requested overnight visitation based upon his performance. Petitioner cites to the testimony of a Child Protective Services (“CPS”) worker to argue that he was making progress towards reunification prior to his incarceration, and further argues that but for the incarceration he would have achieved this goal, or at the very least could have obtained post-termination visitation. Petitioner cites our prior holding in Syllabus Point 7 of *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), to argue that a parent does not lose custody of a child merely by incarceration. As such, he argues that he should be entitled to participate in his children’s lives upon release, and further that the circuit court’s termination of his parental, custodial, and guardianship rights was clearly erroneous.

In response, the guardian ad litem argues in favor of affirming the circuit court’s decision. The guardian argues that the DHHR developed a family case plan and a program for reunification, but that petitioner failed to achieve the goals set forth and ultimately failed to address the problems that led to his neglect of the children. The guardian analogizes to the case of *In re Austin G.*, 220 W.Va. 582, 648 S.E.2d 346 (2007), in which we held that termination of the father’s rights was warranted because the father therein was given numerous opportunities to become part of the children’s lives, but chose not to do so, despite knowing that his rights to his children were in jeopardy. The guardian argues that, in the instant matter, petitioner had opportunities beginning in March 2009 and continuing through the June 2011 date when the DHHR filed its motion to terminate parental rights to ameliorate the conditions that led to the neglect, but chose not to do so. According to the guardian, by the time the review hearing was held on February 14, 2010, petitioner was already incarcerated and was eligible, at best, for a maximum extension of three months to his dispositional improvement period pursuant to West Virginia Code § 49-6-12(g).

Contrary to petitioner’s argument that his improvement period should have been extended for six months to such time as he may possibly be released from incarceration, the guardian states that the aforementioned code section does not allow for that possibility. In short, the guardian argues that the circuit court was correct in denying petitioner an open-ended improvement period designed to accommodate petitioner’s incarceration instead of the children’s best interests because of petitioner’s non-compliance with the terms of the improvement period. According to the guardian, the evidence below showed that termination was based on substantial evidence beyond petitioner’s incarceration, including his failure to obtain stable housing or employment, and his failure to consistently provide for the children over the two and a half years these proceedings were pending. As such, the guardian argues that the circuit court was correct in finding that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future, and that the children’s best interests required termination. The DHHR has also responded, and fully agrees, consents, and joins in the guardian’s response.

“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).

As to petitioner's first assignment of error, we decline to find that the circuit court erred in denying petitioner an extension to his improvement period. In order for petitioner to have obtained an extension to his dispositional improvement period, West Virginia Code § 49-6-12(g) requires the circuit court to find that he had substantially complied with the terms of that improvement period, that the continuation of the improvement period would not substantially impair the DHHR's ability to permanently place the child, and that the extension is otherwise consistent with the children's best interests. As noted above, the evidence presented at disposition was that petitioner had failed to comply with the terms of his improvement period. Specifically, a DHHR case worker testified that petitioner failed to obtain stable housing, failed to maintain employment, and failed to meet the children's basic needs. Based on this non-compliance alone, the circuit court was within its discretion to deny petitioner an extension to his improvement period for failure to meet any of the goals set forth by the DHHR. However, as noted at disposition, petitioner was also incarcerated on unrelated charges at the time. As noted above, West Virginia Code § 49-6-12(g) allows for a maximum extension of three months, and petitioner's request to have his improvement period extended until such time as he was released from incarceration was simply not possible in light of this statutory requirement. For these reasons, the circuit court did not err in denying petitioner an extension to his dispositional improvement period.

As to his allegation that termination was improper, the circuit court below found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected. Based upon the facts and evidence expressed above, the Court concurs in this finding. West Virginia Code § 49-6-5(b)(3) states that circumstances in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected include situations 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 designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child." As noted above, the evidence at disposition established that petitioner failed to meet the goals of his improvement period. This Court has 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, 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). While petitioner is correct that we have previously held that a parent does not automatically lose custody of a child because of incarceration, the Court finds that petitioner’s incarceration in this matter was only one factor considered in the context of a potential extension to his dispositional improvement period, and that the circuit court had ample evidence before it upon which to base termination. For these reasons, the circuit court’s decision to terminate petitioner’s parental rights was not error, and we decline to disturb this decision on appeal.

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 Proceedings<sup>2</sup> 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 petitioner’s parental rights is hereby affirmed.

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<sup>2</sup>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:** April 16, 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