

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

In Re: G.D., J.D., K.D., N.D., and S.D.

No. 11-1561 (Mercer County 10-JA-104-WS, 10-JA-105-WS,
10-JA-106-WS, 10-JA-107-WS & 10-JA-108-WS)

FILED

May 29, 2012

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

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Gerald R. Linkous, arises from the Circuit Court of Mercer County, wherein his parental rights to his children, G.D., J.D., K.D., N.D., and S.D., were terminated by order entered on October 17, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Julie M. Lynch, has filed her response on behalf of the children.

This Court has considered the parties' briefs and the appendix 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 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 based upon Respondent Mother entering Southern Highlands Community Mental Health Crisis Center for substance abuse treatment pursuant to her criminal probation status. At that time, Respondent Mother left the children with a caretaker on the pretense that the petitioner would be moving in with this individual to care for the children. However, petitioner did not arrive, and Respondent Mother subsequently left treatment to care for the children. Thereafter, Respondent Mother was arrested and placed in Southern Regional Jail as a result of a violation of the terms of her probation. According to a prior Mercer County Family Court order, petitioner was to have no contact with the children at issue, and was thus precluded from caring for them during Respondent Mother's incarceration. At adjudication, petitioner stipulated to neglect as alleged in the petition and was granted a post-adjudicatory improvement period. However, he failed to comply with the requirements of this improvement period, and the circuit court eventually terminated his parental rights. It is from this order that petitioner appeals.

On appeal, petitioner argues that the circuit court abused its discretion by terminating his parental rights while the Respondent Mother was still participating in an improvement period, and also that the decision to deny his counsel's motion for a continuance of the dispositional hearing due to petitioner's absence was an abuse of discretion. Specifically, petitioner argues that the decision to terminate his rights was not the least restrictive alternative at disposition because he could have been granted a dispositional improvement period while the Respondent Mother participated in her

own dispositional improvement period. Further, petitioner argues that the circuit court's decision foreclosed the possibility of terminating only his custodial rights, which may have been in the children's best interests if Respondent Mother were to achieve reunification. Petitioner notes that none of the children at issue are under three years of age in support of his argument. As to his second assignment of error, petitioner argues that no one would have been harmed by continuing the dispositional hearing because the permanency plan for the children would not have been affected. He further argues that the decision to proceed with the hearing in his absence prevented him from having a meaningful opportunity to be heard, which is a fundamental right in abuse and neglect proceedings.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that petitioner's assignments of error are without merit, especially in light of his complete abandonment of every aspect of the applicable family case plan during his improvement period. The guardian argues that under West Virginia statutory law and case law, petitioner's entitlement to an improvement period rests entirely on his compliance with the terms of the case plan, which he failed to do, and not upon Respondent Mother's success in her improvement period. The guardian argues that petitioner failed to even initiate work on a single goal from the plan; that he only visited the children once during the proceedings below; that he was unreliable when it came to even basic telephonic communication; that he stopped attending court hearings in January of 2011; and, that he did not appear to contest disposition despite notification of the hearing. As for petitioner's request for a continuance, the guardian argues that petitioner's failure to appear for disposition was merely further evidence of his utter disinterest in participating in the process of reunification with his children. The DHHR fully agrees, consents, and joins in the response of the guardian.

“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 Court finds no merit in either of petitioner's assignments of error. To begin, petitioner has completely misstated the standard by which a parent demonstrates that he or she is entitled to an improvement period. Improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. In order to obtain an improvement period, the parent must prove, by clear and convincing evidence, that he or she is likely to fully participate in the same. A review of the evidence below shows that petitioner could not satisfy such a burden in requesting

an improvement period at disposition. As noted in the dispositional order, the circuit court granted petitioner a post-adjudicatory improvement period, and the family case plan required him to participate in counseling, substance abuse screening, parenting education, a psychological evaluation, and visitation with the children. The circuit court found that not only had petitioner failed to follow through with the reasonable family case plan or other rehabilitative efforts, he had failed to even initiate cooperation with the same. For these reasons, the circuit court did not err in denying petitioner an improvement period at disposition.

Further, based on the findings above, the circuit court was also within its discretion to proceed to termination of petitioner's parental rights. West Virginia Code § 49-6-5(a)(6) states, in relevant part, as follows:

Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, [a circuit court may] terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

As defined in West Virginia Code § 49-6-5(b)(3), no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future shall be considered to exist in the following circumstance:

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.

Based upon the evidence, it is clear that the circuit court was correct in terminating petitioner's parental rights because of his failure to follow through with, or even initiate, any of the services offered. As to petitioner's argument that the circuit court erred in denying a continuance of the dispositional hearing until such time as he could attend, we do not agree. While it is true that West Virginia Code § 49-6-5(a) directs that a parent in an abuse and neglect proceeding must be given an opportunity to be heard during a dispositional hearing, petitioner's right in this regard was not violated. The record reflects that petitioner was represented by counsel during the proceedings below and that the parties had notice of the dispositional hearing. It was petitioner who chose not to attend the dispositional hearing. For these reasons, the circuit court did not err in proceeding to termination in petitioner's absence.

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.¹ 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 petitioner’s parental rights is hereby affirmed.

Affirmed.

ISSUED: May 29, 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

¹ 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.