# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**In Re: B.F., B.F. Jr., and E.F.**

**No. 12-0079** (Mercer County 11-JA-92-DS - 94-DS)

**FILED**
**June 25, 2012**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

## MEMORANDUM DECISION

Petitioner Father's appeal, by counsel John Earl Williams Jr., arises from the Circuit Court of Mercer County, wherein his parental, custodial, and guardianship rights to his three children were terminated by order entered on December 23, 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.

According to the representations of the parties, the abuse and neglect proceedings below were initiated upon the following allegations: that the children were living with petitioner and Respondent Mother in a bus; that the parents were relying on the children's paternal grandfather for support and basic needs; that the parents were using drugs intravenously; that the children had witnessed an overdose; and, that the paternal grandfather had sexually abused B.F. Both parents waived their right to a preliminary hearing, and the matter was adjudicated on August 1, 2011. Petitioner contested adjudication, and the guardian ad litem represents that petitioner testified that he did not believe B.F.'s allegations of sexual abuse by the paternal grandfather. The circuit court ultimately found that petitioner had used intravenous drugs as recently as the day prior to adjudication and that both parents needed to enter long-term inpatient substance abuse treatment. The children were also adjudicated as neglected due to this conduct. Ultimately, the circuit court terminated petitioner's parental, custodial, and guardianship rights without granting an improvement period because of the petitioner's failure to participate in services offered.

On appeal, petitioner alleges that the circuit court erred in failing to grant him an improvement period, and in terminating his parental rights.[1] In support, petitioner argues that "'[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child

[1]Petitioner's counsel notes that he is submitting this appeal on his client's behalf pursuant to the United States Supreme Court decision of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

merely by reason of having been convicted of one or more charges of criminal offenses.' Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970)." Syl. Pt. 7, *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000). Further, citing our holding in Syllabus Point 10 of *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002), petitioner argues that the circuit court should have reviewed his performance in determining whether the circumstances of the case justified the return of the children. In short, petitioner argues that he should have been granted an improvement period prior to termination of his parental rights, and that the circuit court's failure to provide an improvement period constitutes error.

The guardian ad litem responds and argues that the circuit court did not err in either denying petitioner an improvement period or in terminating his parental, custodial, and guardianship rights based upon the evidence concerning petitioner's drug addiction and failure to take any steps to remedy the conditions of neglect. Further, the guardian argues that petitioner refused to admit that his child had been sexually abused and also did not express a willingness to protect the child from the abuser. As such, termination was clearly in the children's best interests, according to the guardian. The guardian argues that circuit courts are granted discretion in determining if an improvement period is appropriate, and that petitioner's refusal to acknowledge the conditions of neglect constitutes grounds to deny an improvement period. Further, the guardian argues that not only did petitioner fail to obtain the inpatient substance abuse therapy required of him, but he was also actively engaged in criminal activities during such time as he should have been demonstrating his willingness to comply with an improvement period. For these reasons, the guardian argues that the circuit court's termination should be affirmed. The DHHR responds and fully joins in, and concurs with, the guardian's response.

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." 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).

Upon our review of the appendix, the Court finds no error in either the circuit court's denial of an improvement period or in its decision to terminate petitioner's parental rights. To begin, the

appendix shows that the circuit court was clear that petitioner's parental rights would be terminated if he did not contact the DHHR to obtain long-term inpatient substance abuse treatment. However, the transcript of the December 5, 2011, hearing shows that not only did petitioner fail to attend that hearing, he had not taken any steps to undergo the substance abuse treatment required of him. In fact, the record shows that petitioner had failed a drug screen shortly before the final hearing below. Further, the transcript from the final hearing notes that counsel for the State previously presented evidence of petitioner's criminal behavior during the pendency of the abuse and neglect proceedings, and also notes newer criminal allegations that arose just prior to the hearing. Based upon all of the evidence presented below, it is clear that petitioner failed to establish that he was likely to fully participate in an improvement period as required by West Virginia Code § 49-6-12(a)(2). This includes petitioner's ongoing drug abuse, and also his failure to acknowledge the basic allegations of neglect in the proceedings below.

This Court had previously held as follows:

> "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 re Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Based upon this holding and the evidence below, it is clear that the circuit court did not err in denying petitioner an improvement period. Further, this same evidence supports the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in the near future. West Virginia Code § 49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where

> [t]he 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, petitioner was directed to enter long-term inpatient substance abuse treatment, with the DHHR's assistance, prior to the December 5, 2011, dispositional hearing. However, petitioner not only failed to attend the hearing, he also failed to take steps to participate in these services. As such, the circuit court did not err in proceeding to disposition pursuant to West Virginia Code § 49-6-5(a)(6), or in terminating petitioner's parental, custodial, and guardianship rights.

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.[2] 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, custodial, and guardianship rights is hereby affirmed.

Affirmed.

**ISSUED**: June 25, 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

---

[2] 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.