

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

In Re: J.M., C.H., B.H., and C.H. Jr.:

No. 12-0244 (Barbour County 11-JA-1 through 11-JA-4)

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father files this appeal, by counsel Alvie Qualls II, from the Circuit Court of Barbour County, which terminated Petitioner Father's parental rights to C.B.H., B.H., and C.H. Jr.¹ by order entered on November 22, 2011. The circuit court subsequently entered an order denying Petitioner Father's motion for post-termination visitation on June 12, 2012. The guardian ad litem for the children, Karen Hill Johnson, has filed a response on behalf of the children supporting the circuit court's orders. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of termination. Petitioner Father has replied to these responses.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record, 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 is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

DHHR filed the petition in this case in January of 2011, based on allegations of substance abuse and domestic violence in the home. The petition outlined Petitioner Father's admissions to drug and alcohol use, child J.M.'s reports of witnessing physical altercations between her mother and Petitioner Father, and Petitioner Father's physical abuse against J.M. The petition further outlined that Petitioner Father was arrested in early January of 2011, and that part of the children's neglect was due to their parents leaving them in the care of adults who had their parental rights terminated to their own children. During these proceedings, the circuit court found that the children's parents had been involved in domestic violence, drug use, and past Child Protective Services ("CPS") cases. After finding that it was not reasonably likely that substantial improvements could be made to the abuse and neglect conditions, the circuit court terminated Petitioner Father's parental rights, denied his motion for an improvement period, and subsequently denied post-termination visitation.

¹ J.M. is not one of Petitioner Father's biological children. Petitioner Father and J.M.'s mother were living together at the initiation of this case. The circuit court only terminated Petitioner Father's parental rights to his biological children, C.H., B.H., and C.H. Jr., who are the only children involved in this appeal. All children were the subject children of a prior appeal in this Court, Case Number 11-1165, in which their mother appealed the circuit court's order terminating her parental rights to them. We affirmed this termination in a memorandum decision issued in March of 2012.

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).

Petitioner Father appeals and asserts five assignments of error. Petitioner Father first argues that the circuit court erred in finding that imminent danger existed at the time DHHR filed the petition that initiated this case. He argues that the circumstances at home did not meet the definition of “imminent danger” set forth in West Virginia Code § 49-1-3(8). Second, Petitioner Father argues that the circuit court erred in denying his motion for a post-adjudicatory improvement period after he admitted to the allegations in DHHR’s petition, except the physical abuse against J.M., and admitted to not meeting with DHHR workers due to the mother cancelling appointments. Petitioner Father argues that his admissions reflect his ability to improve. Petitioner Father further asserts that he would comply with court orders for necessary changes and treatment to become a better parent. Petitioner Father asserts that there was evidence that supports his ability to reasonably correct abuse and neglect conditions and, therefore, the circuit court erred in termination.

Third, Petitioner Father argues that the circuit court erred in finding that terminating his parental rights would be in the children’s best interests. He contends that the burden for terminating his parental rights was not met and that his voluntary participation in programs demonstrated that he would be able to improve the abuse and neglect conditions. Lastly, Petitioner Father argues that the circuit court erred when it determined that post-termination visitation by Petitioner Father with the minor children would not be in their best interests. The circuit court denied visitation based on the lack of an emotional bond between the children and Petitioner Father, the children’s lack of maturity to make a request for visitation, Petitioner Father’s failure to rectify the long history of underlying abuse and neglect conditions, and the children’s lack of contact with Petitioner Father in nearly a year. The circuit court also found that post-termination visitation could be disruptive to the children. With the exception of the circuit court’s finding that the children and Petitioner Father have not had contact, Petitioner Father contends that these findings were in error. He attributes, in part, that his lack of contact with his children is due to his counsel’s failure to file a timely appeal. Petitioner Father further argues that

the circuit court erred because it denied post-termination visitation in a summary order, rather than taking evidence and hearing arguments pursuant to *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Petitioner Father asserts he was never given the opportunity to present a case for this issue and was not notified of any hearing on this issue, as in *In re Tyler D.*, 213 W.Va. 149, 578 S.E.2d 343 (2003).

The guardian ad litem and DHHR respond and argue that the circuit court did not err in terminating Petitioner Father's parental rights or in its findings and rulings in these proceedings. Both revisit the circumstances which led DHHR to file the petition and the circuit court finding imminent danger to warrant entering the order for the petition. Both the guardian and DHHR argue that the circuit court did not err in denying Petitioner Father's motions for an improvement period or post-termination visitation. Petitioner Father did not fully accept responsibility for his involvement in the children's abuse and neglect. DHHR adds that any delay in filing petitioner's appeal does not override the children's best interests in achieving permanency and stability. Both conclude that Petitioner Father presents nothing in his appeal that demonstrates that the circuit court's order was erroneous. Petitioner replies by arguing that he was denied effective assistance of counsel in the proceedings. He recognizes that this Court has declined to find ineffective assistance of counsel in abuse and neglect proceedings, but argues that this issue should be addressed in abuse and neglect proceedings in the same manner as other cases with the same constitutional standing and due process concerns.

A review of the record supports the circuit court's orders terminating Petitioner Father's parental rights, denying him an improvement period, and denying him post-termination visitation with his children. Under West Virginia Code § 49-6-3(b), the circuit court found imminent danger to initiate this case. We find no error in this finding. Moreover, the record reflects that the circuit court considered Petitioner Father's progress, or lack thereof, in determining whether to grant an improvement period, terminate his parental rights, and to grant or deny post-termination visitation. "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened" Syl. Pt. 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 Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). We have also held the following:

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code* [§] 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code* [§] 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

Syl. Pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). With regard to post-termination visitation, we have held as follows:

When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been

established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). The circuit court made sufficient findings in its order to deny post-termination visitation. *See State v. Michael M.*, 202 W.Va. at 359, 504 S.E.2d at 186. Further, although Petitioner Father argues that his counsel did not timely file an appeal, he was ultimately able to do so and present assignments of error for our review. Based on our review and the circumstances of this case, we find no error.

For the foregoing reasons, we affirm the circuit court's order terminating Petitioner Father's parental rights to C.H., B.H., and C.H. Jr.

Affirmed.

ISSUED: November 19, 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