

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

FILED

In Re: K.T., B.M., E.M., & E.M.

August 29, 2014

No. 14-0230 (Randolph County 13-JA-34 through 13-JA-37)

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

MEMORANDUM DECISION

Petitioner Father, by counsel Matthew Fair, appeals the Circuit Court of Randolph County's February 11, 2014, order terminating his parental rights to K.T., B.M., E.M.-1, and E.M.-2.¹ The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Melinda Dugas, filed its response in support of the circuit court's order. The guardian ad litem ("GAL"), Heather Weese, filed a response on behalf of the children that also supports the circuit court's order. On appeal, Petitioner Father alleges that the circuit court erred in failing to continue the dispositional hearing and in terminating his parental rights without first granting him an improvement period.

This Court has considered the parties' briefs and the 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 record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

In September of 2013, the DHHR filed an abuse and neglect petition alleging that Petitioner Father failed to provide the children with a clean and safe home, failed to provide the children with proper nutrition, and educational neglect. The petition further alleged that Petitioner Father committed domestic violence in the presence of the children.

As the case proceeded through the preliminary and adjudicatory hearings, Petitioner Father's appointed counsel appeared, but Petitioner Father remained absent. At the adjudicatory hearing in November of 2013, the circuit court found that Petitioner Father had actual notice of the hearing and that he had abandoned the children. By order entered on January 6, 2014, the circuit court adjudicated Petitioner Father as a neglectful parent.

In January of 2014, the circuit court held the dispositional hearing, which Petitioner Father attended. By order entered on February 11, 2014, the circuit court denied Petitioner Father an improvement period and terminated his parental rights. It is from this order that Petitioner Father now appeals.

¹Because two of the children in this case have the same initials, we have distinguished each of them using numbers 1 and 2 after their initials.

The Court has previously established the following standard of review in such cases:

“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).

Upon our review, the Court finds no error in the circuit court’s order denying Petitioner Father’s request for an improvement period or in the termination of Petitioner Father’s parental rights. West Virginia Code § 49-6-12(b)(2) gives circuit courts discretion in granting post-adjudicatory improvement periods upon a showing that the parent will fully participate in the improvement period. The record in this matter supports the circuit court’s denial because Petitioner Father failed to show by clear and convincing evidence that he would fully comply with the terms of a post-adjudicatory improvement period, if one had been granted.

Petitioner Father argues that he satisfied this burden by testifying that he was willing and able to participate in an improvement period, including taking the necessary steps to stop abusing illegal drugs. However, this testimony is insufficient to show that Petitioner Father would fully comply with the terms of an improvement period in light of his failure to acknowledge the underlying conditions of neglect. The circuit court heard evidence that despite having actual knowledge of the proceedings, Petitioner Father consciously chose not to participate in the proceedings until his dispositional hearing. Rather, Petitioner Father sat in a parked car across the street from the courthouse during the adjudicatory hearing. Importantly, the circuit court heard testimony that despite filing a motion for an improvement period, Petitioner Father failed to contact the DHHR in an effort to remedy the conditions of neglect and did not see the children for at least six months.

We have previously 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.

In re Kaitlyn P., 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010) (quoting *W.Va. Dep't of Health and Human Res. v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)). Based upon the evidence above, it is clear that Petitioner Father failed to acknowledge that he neglected his children. As such, it was not error to deny his motion for a post-adjudicatory improvement period. Further, the circuit court found that Petitioner Father abandoned his children. Pursuant to West Virginia Code § 49-6-5(a)(7)(A) "the [DHHR] is not required to make reasonable efforts to preserve the family if the court determines the parent has subjected the child to aggravated circumstances which include abandonment." This same evidence constitutes a circumstance in which there is no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future under West Virginia Code §§ 49-6-5(b)(2) and (4), and circuit courts are directed to terminate parental rights upon this finding and when termination is necessary for the children's welfare pursuant to West Virginia Code § 49-6-5(a)(6). Therefore, it was not error for the circuit court to proceed to termination without first granting Petitioner Father an improvement period.

Finally, Petitioner Father argues that the circuit court erred in denying his motion to continue the dispositional hearing. Petitioner Father states that he needed additional time so that he could confer with his attorney regarding the allegations in the petition. This Court has stated that

we structure our review in accordance with four salient factors that appellate courts consider when reviewing denials of requests for a continuance. First, we consider the extent of [Petitioner Father's] diligence in [his] efforts to be present and to ready [his] defense prior to the date set for the hearing. Second, we consider how likely it is that the need for a continuance could have been met if the continuance had been granted. Third, we consider the extent to which granting the continuance would have inconvenienced or been contrary to the interests of the circuit court, the witnesses, and the other litigants, including the public interest in the prompt disposition of these types of proceedings. Finally, we consider the extent to which [Petitioner Father] might have suffered harm as a result of the circuit court's denial.

In re Tiffany Marie S., 196 W.Va. 223, 235, 470 S.E.2d 177, 189 (1996). "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. Pt. 2 *State v. Bush*, 163 W.Va. 168, 169, 255 S.E.2d 539, 540 (1979). First, the circuit court heard testimony that despite having actual knowledge of these proceedings, Petitioner Father "deliberately" avoided the proceedings until final disposition and failed to contact his attorney. As we noted above, there was evidence that Petitioner Father sat in a parked car across the street from the courthouse during the adjudicatory hearing. As the circuit court noted, Petitioner Father's "[voluntary] decision to absent himself from the proceedings should not provide the basis for a continuance today and it is in the children's best interest to proceed with the Disposition." Importantly, Petitioner Father does not argue that he suffered any harm as a result

of the circuit court's denial. Therefore, we find the circuit court did not abuse its discretion in refusing Petitioner Father's request for a continuance.

For the foregoing reasons, we find no error in the decision of the circuit court and its February 11, 2014, order is hereby affirmed.

Affirmed.

ISSUED: August 29, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II