

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

FILED

August 29, 2014

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

In Re: A.W., D.B., T.D., & M.M.

No. 14-0239 (Kanawha County 12-JA-251 through 254, & 12-JA-260)

MEMORANDUM DECISION

Petitioner Mother, by counsel Edward L. Bullman, appeals the Circuit Court of Kanawha County's February 11, 2014, order terminating her parental rights to A.W., D.B., T.D., and M.M.¹ The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William P. Jones, filed its response in support of the circuit court's order. The guardian ad litem, Jeff C. Woods, filed a response on behalf of the children supporting the circuit court's order. The father of M.M., by counsel W. Jesse Forbes, filed a response supporting the circuit court's order. On appeal, petitioner alleges that the circuit court erred in terminating her parental rights without granting an additional improvement period and in denying her post-termination visitation with the children.

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 order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In November of 2012, the DHHR filed an abuse and neglect petition based upon allegations that petitioner engaged in domestic battery and violence toward the children and one of the children's fathers, as well as truancy and neglect. Specifically, the petition alleged that petitioner was convicted criminally of physical violence against her child, A.W., and served seventy-three days in jail as a result. The incident for which petitioner was convicted involved dragging A.W. by the hair across a street and hitting him in the head with a closed fist. The petition further described an incident between petitioner and M.M.'s father in which petitioner threw the father's prosthetic leg out of a window and beat him so severely that he suffered broken ribs and was hospitalized. The petition described a second incident of violence against M.M.'s father in which petitioner bit off his index finger in the presence of the children. The petition further alleged that petitioner caused her children to be truant from school; encouraged A.W. to steal; failed to obtain necessary medical, dental, and optometry services for the children; failed to provide adequate and clean clothing for the children; and would come home drunk and angry. Finally, despite two of the children having severe asthma, the petition alleged that

¹The proceedings below involved a fifth child who was not petitioner's biological child. As such, the Court will not address any of the circuit court's rulings in regard to this child.

petitioner maintained eleven dogs and smoked in the home, resulting in filthy conditions including dog urine on the floor and furniture.

In December of 2012, the circuit court held a preliminary hearing, during which petitioner stipulated to educational neglect and inappropriate discipline. The circuit court accepted the stipulation and adjudicated the children as abused and neglected. The circuit court then granted petitioner a post-adjudicatory improvement period, requiring her to participate in parenting and adult life skills training, anger management counseling, supervised visitation with the children, complete a psychological evaluation and follow all recommendations, and to find and maintain stable employment. Subsequently, the circuit court held multiple review hearings in March, April, and May of 2013, and each time permitted petitioner's improvement period to continue, even granting increased visitation with a goal of reunification in petitioner's home. In fact, at the last review hearing in May of 2013, the parties agreed that petitioner would be given weekend and overnight visitation with the children.

However, in July of 2013, the circuit court held a review hearing, during which a DHHR employee testified that petitioner's improvement period should be terminated because of her poor attendance at meetings, visitations, and classes. Additionally, the employee testified about an incident in which petitioner's brother was involved in a shooting outside petitioner's home and was wanted by authorities for allegedly shooting a man in the face. The employee was concerned that the brother had not been apprehended and posed a risk to the children. The circuit court found that the improvement period had expired and set the matter for disposition, with services to continue in the interim. In September of 2013, the circuit court held a dispositional hearing and heard testimony from multiple service providers concerning petitioner's noncompliance during the improvement period. Ultimately, the circuit court terminated petitioner's parental rights to all her children and denied her post-termination visitation with A.W., D.B., and T.D.² It is from the dispositional order that petitioner appeals.

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).

²The circuit court did grant petitioner post-termination with M.M. at the discretion of that child's non-abusing father.

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 proceeding to termination of petitioner's parental rights without granting an additional improvement period or in denying post-termination visitation with A.W., D.B., and T.D.

Petitioner argues that she should have been entitled to an additional improvement period prior to termination of her parental rights because she made substantial progress and that it was error to deny her an additional improvement period based solely upon her brother's actions. However, this argument misstates both the evidence presented at disposition and the basis of the circuit court's ruling. While it is true that petitioner was initially compliant such that the circuit court extended her improvement period and increased visitation with the children, the record from the July 25, 2013, review hearing and the dispositional hearing shows an overarching pattern of noncompliance by petitioner.

During the July of 2013 review hearing, the DHHR moved to terminate petitioner's improvement period due to non-compliance. In support, the DHHR provided testimony that petitioner was not consistent in attending her parenting and therapy sessions as she was always late, failed to show up, or was not home when she was supposed to be. The employee further testified that petitioner often failed to attend or was late to visitations. When petitioner was informed visitation would be moved back to the DHHR's office because of the concerns regarding her brother's whereabouts, petitioner became angry and cussed at the DHHR employee.

Further evidence of petitioner's noncompliance was introduced at the dispositional hearing, including evidence that petitioner had changed residences without informing the DHHR, that a second parenting provider was assigned to petitioner after the first provider closed her case due to missed classes, and that petitioner stopped attending individual therapy and refused to undergo a psychological evaluation. No less than three separate service providers testified to petitioner's noncompliance and her pattern of appearing for services later and later before eventually not appearing at all. Further, several providers testified to the overall lack of progress petitioner made in regard to remedying the underlying issues of abuse and neglect, their concerns over returning the children to petitioner with these issues still outstanding, and the fact that petitioner's home was no safer than at the initiation of the proceedings.

Pursuant to West Virginia Code § 49-6-12(c)(2), a circuit court may grant a parent a dispositional improvement period when the parent "demonstrates, by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period" Here, the record is clear that petitioner could not satisfy this burden, as her compliance with the post-adjudicatory improvement period deteriorated significantly during its pendency. Based upon the evidence above, the circuit court specifically found that petitioner "failed to comply substantially with the terms and conditions of her improvement period and failed to benefit from the services offered." Moreover, the circuit court found that petitioner "failed to demonstrate that she is likely to comply with the terms and conditions of a dispositional improvement period." As such, the circuit court did not err in denying the same.

Further, the circuit court did not err in proceeding to termination of petitioner's parental rights because this same evidence established that petitioner "has not responded to or followed through with a reasonable family case plan or other rehabilitative efforts . . . designed to reduce or prevent the abuse or neglect of her children." Pursuant to West Virginia Code § 49-6-5(b)(3), this constitutes a situation in which there is no reasonable likelihood that the conditions of abuse or neglect can be corrected, and the circuit court additionally found that termination of petitioner's parental rights was necessary for the children's welfare. West Virginia Code § 49-6-5(a)(6) directs circuit courts to terminate parental rights upon these findings.

Finally, the circuit court did not err in denying petitioner post-termination visitation with A.W., D.B., and T.D. We have held that

"[w]hen 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).

Syl. Pt. 8, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010). The record here is clear that continued visitation between petitioner and the children would be detrimental to their wellbeing. In the proceedings below, the circuit court was presented with evidence that visitation often did not go well. In fact, at least two of the children were acting out before and after visitations with the mother, exhibiting severe outbursts that lasted hours and banging their heads on the floor and other objects. Further evidence established that A.W., D.B., and T.D. all expressed that they did not wish to attend visitation with petitioner, and some of the children even attempted to physically prevent their transportation to visitation. As such, it is evident that the circuit court did not err in finding that post-termination visitation would be detrimental to the children's wellbeing and in denying the same.

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