

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

In Re: D.L.

No. 14-0242 (Greenbrier County 13-JA-19)

FILED

August 29, 2014

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

MEMORANDUM DECISION

Petitioner Father, by counsel E. Lavoyd Morgan Jr., appeals the order of the Circuit Court of Greenbrier County, entered February 4, 2014, that terminated his parental rights to his son, four-year-old D.L. The guardian ad litem for the child, Martin V. Saffer, filed a response in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney S.L. Evans, also filed a response in support of the circuit court's order. Petitioner argues that the circuit court erred in terminating his parental rights because the DHHR did not make reasonable efforts to preserve the family and because there were less restrictive alternatives than termination available at disposition.

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 May of 2013, the DHHR filed an abuse and neglect petition against petitioner and D.L.'s mother after one of D.L.'s half-siblings presented at the hospital with unexplained serious injuries. The petition alleged that petitioner had not had contact with D.L. and failed to provide support for his care.¹ At a July of 2013 adjudicatory hearing, petitioner, who had been recently released from incarceration, stipulated to neglecting D.L. through his failure to provide support or have contact with D.L. while petitioner was in prison. The circuit court granted petitioner a post-adjudicatory improvement period and ordered petitioner to participate in life skills and parenting classes, supervised visitation, and Multi-Disciplinary Team ("MDT") meetings; obtain and maintain employment; maintain appropriate housing; demonstrate money management skills and an ability to pay all necessary household bills with money lawfully obtained; pay child support and maintain current payments; submit to random drug and alcohol screens with clean results; and participate in all substance and alcohol abuse assessments and follow a recommended treatment plan. In September of 2013, after finding that petitioner was

¹The abuse and neglect petition itself did not specify, but it appears from the record that petitioner was incarcerated on drug-related charges when the DHHR filed its abuse and neglect petition.

substantially complying with the terms of his improvement period, the circuit court granted an extension to the improvement period.

The case came on for disposition in February of 2014. Petitioner moved for a dispositional improvement period because his evaluating psychologist failed to submit his report to the DHHR prior to the hearing. The psychologist admitted to this delay. Based upon his evaluation of petitioner, he also recommended that petitioner seek counseling and treatment for his substance abuse and receive therapy with regard to parenting. However, two of petitioner's caseworkers testified regarding petitioner's noncompliance with his improvement period. One of the caseworkers testified that although petitioner was diligent with services at the beginning of his improvement period, his parenting services were terminated after he missed three required classes without explanation. This caseworker also testified that petitioner began to miss visitations with his child in the fall of 2013 and last attended a visit in December. The other caseworker testified that petitioner became so inconsistent with his visits that the child began to say that he was "just going to stay here [the foster home]." This caseworker also testified that petitioner refused the DHHR's offer for transportation to and from services and remained unemployed and without an independent home.

Based upon this evidence, the circuit court found that there was no reasonable likelihood that petitioner would substantially correct the conditions of abuse and neglect in the near future. The circuit court terminated petitioner's parental rights by order entered on February 4, 2014. Petitioner now brings this appeal.

This Court has 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 argues that the circuit court's termination of his parental rights was erroneous for two reasons. First, petitioner argues that the DHHR did not make reasonable efforts to preserve the family. He asserts that because the psychological evaluation was not timely submitted, the DHHR could not provide services to assist petitioner with overcoming his substance abuse issues. Second, petitioner argues that there were less restrictive alternatives

available at disposition short of terminating his parental rights. Petitioner asserts that he could have been referred to a community agency for help with his substance abuse. Petitioner argues that, consequently, this Court should reverse the circuit court's termination order and direct it to grant him a dispositional improvement period for further services.

Upon our review of the record, we find no error by the circuit court in terminating petitioner's parental rights without granting a dispositional improvement period. Pursuant to West Virginia Code § 49-6-12(c), a circuit court may grant an improvement period at disposition when the subject parent has demonstrated by clear and convincing evidence that he or she is likely to fully participate in the improvement period. Our review of the record shows that petitioner did not meet his burden. Petitioner isolates one term of his improvement period, i.e., the requirement to follow recommendations from his psychological evaluation, and asserts that the psychologist's delay in submitting the evaluation to the DHHR alone is proof that the DHHR failed to make reasonable efforts to preserve the family. To the contrary, the record shows that the DHHR provided regular services to petitioner. Further, the evaluating psychologist's delay had no bearing on petitioner's failure to participate and complete the terms of his improvement period through the DHHR's services.

West Virginia Code § 49-6-5(b) provides a non-exclusive list of circumstances that a circuit court shall consider when determining whether there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected. Included in that list are circumstances in which the subject parent has not responded to or followed through with a reasonable family case plan. As discussed above, such was the case here. Petitioner failed to consistently keep his appointments to visit with his child and to attend DHHR parenting classes. Further, he did not obtain and maintain appropriate housing or employment. This evidence supports the circuit court's findings and conclusions that there was no reasonable likelihood that conditions of abuse and neglect could be substantially corrected in the near future, and that termination was necessary for the child's welfare. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon such findings.

For the foregoing reasons, we affirm.

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