

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

In Re: A.M., E.M., and A.K.

No. 14-0267 (Nicholas County 13-JA-56, 13-JA-58, and 13-JA-59)

FILED

August 29, 2014

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

MEMORANDUM DECISION

Petitioner Father filed this appeal by counsel, Harley E. Stollings, from an order entered February 21, 2014, in the Circuit Court of Nicholas County that terminated Petitioner Father's parental rights to ten-year-old A.M., eight-year-old E.M., and fifteen-year-old A.K. The guardian ad litem for the children, Cammie L. Chapman, filed a response in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney, Angela Alexander Walters, also filed a response in support of the circuit court's order. Petitioner argues that the circuit court erred in terminating his parental rights without granting him an improvement period and by finding that he abandoned the children. Petitioner also argues that termination was improper because the children's primary custodians remained the same before and after termination.

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 August of 2013, the DHHR filed an abuse and neglect petition against petitioner, the children's mothers, and a boyfriend of one of the mothers. The petition alleged that the children's physical and mental health were being harmed and threatened by petitioner's refusal, failure, and inability to supply them with the necessary food, clothing, shelter, supervision, medical care, and education due to his incarceration. Petitioner had been released from incarceration at the time the DHHR filed its abuse and neglect petition.¹ The petition alleged that upon his release from incarceration, petitioner had made no attempt to contact his children or provide them support in any way. The petition also alleged that petitioner lacked a bond with his children, had abandoned his parental rights, and lacked safe and suitable housing.

After the adjudicatory hearing in October of 2013, the circuit court found that petitioner was released twice on parole during his ten-year period of incarceration, but returned to prison both times after violating his parole. The circuit court also found that petitioner abandoned the children because he was unable to provide the children with safe and suitable housing and had

¹Petitioner was incarcerated from 2003 until 2013 on an unlawful wounding conviction.

not provided his children with financial or emotional support. The circuit court did not grant petitioner an improvement period at this or any other point in the proceedings below.

Following the dispositional hearing in November of 2013, the circuit court terminated petitioner's parental rights. The circuit court found that petitioner had not been involved in his children's lives for approximately ten years due to his incarceration; had been unable to provide for his children's needs; and had no safe and suitable housing. The circuit court also found that petitioner failed to contact the DHHR to request services and that, during his releases on parole, he made no efforts to form a bond with the children or provide them any support. The circuit court concluded that the children had developed bonds with their caregivers over the past several years and that there was no reasonable likelihood that petitioner would substantially correct the conditions of neglect and abuse in the near future. The circuit court terminated petitioner's parental rights by order entered in February of 2014, with optional visitation between fifteen-year-old A.K. and petitioner, at A.K.'s discretion. Petitioner now appeals the termination of his parental rights.

This 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).

On appeal, petitioner asserts ten assignments of error, which may be summarized into three arguments. First, petitioner argues that the circuit court's termination on the ground that he abandoned the kids was error because he sought communication with each of his children. Petitioner asserts that there was testimony before the circuit court that petitioner spoke with the children and their caregivers on the phone. Second, petitioner argues that he should have been granted an improvement period rather than having his parental rights terminated. Lastly, petitioner argues that the circuit court erred in terminating his parental rights because termination did not change the children's custody arrangements.

Upon our review of the record, we find no error by the circuit court in terminating petitioner's parental rights. “Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the

health and welfare of the children.’ Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).” Syl. Pt. 2, *In re Timber M.*, 231 W.Va. 44, 743 S.E.2d 352 (2013). First, we find no error with the circuit court’s finding that petitioner abandoned his children. We have recognized the following:

“A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality abandonment, or other dereliction of duty . . . the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.”

Syl., in part, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d 798 (1969). Petitioner’s assertion that he had telephone contact with each of the children is without support. Our review of the record reveals no evidence that petitioner ever spoke with the children before or during the pendency of this matter, including during his releases on parole. Nor does the record offer any indication that petitioner provided any financial, medical, or emotional support to the children. Further, the circuit court’s orders do not reflect any testimony that petitioner regularly kept in touch with the children or provided for their care. Rather, the circuit court’s orders clearly show that petitioner was without a home for himself and the children and without any means to support the children.

Next, we find no error with the circuit court’s denial of an improvement period. Pursuant to West Virginia Code § 49-6-12, a circuit court may grant a parent an improvement period if the parent has filed a written motion that demonstrates that he or she would likely fully participate with the terms of an improvement period. We have also held as follows: “Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period.” Syl. Pt. 2, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991). The record does not reveal that petitioner filed a written motion for an improvement period. Regardless, there is no evidence in the record to indicate that petitioner proved by clear and convincing evidence that he was likely to fully participate with terms of an improvement period. Our review of the record reveals no error by the circuit court in its finding that petitioner abandoned his children through his failure to make efforts to create bonds with them and to provide for their needs. Consequently, we find no error in its decision to deny petitioner an improvement period.

Under West Virginia Code § 49-6-5(b)(4), a parent’s abandonment of his or her children constitutes a circumstance in which there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected. The evidence contained in the appellate record supports the circuit court’s termination of petitioner’s parental rights based on his abandonment of the children and the children’s best interests. 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