

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

In Re: L.E.

No. 14-0425 (Kanawha County 13-JA-243)

FILED

August 29, 2014

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

MEMORANDUM DECISION

Petitioner Father, by counsel Jason S. Lord, appeals the Circuit Court of Kanawha County's April 10, 2014, order terminating his parental rights to L.E. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed its response in support of the circuit court's order. The guardian ad litem, Paul K. Reese, filed a response on behalf of the child supporting the circuit court's order. On appeal, petitioner alleges that the circuit court erred in finding clear and convincing evidence of abuse or neglect, and in failing to grant 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 order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In October of 2013, the DHHR filed an abuse and neglect petition alleging aggravated circumstances against the mother due to a prior involuntary termination of parental rights to older children. As to petitioner, the DHHR alleged that he failed to provide the child with financial support of any kind, as well as appropriate food, clothing, shelter, and supervision. The petition further alleged that the child tested positive for methadone at birth. The DHHR filed an amended petition on December 30, 2013, to include additional information about the mother's prior involuntary termination of parental rights and the domestic violence in which petitioner participated that directly led to that prior termination. This included the fact that one of the mother's older children was injured during the incident when struck in the head. In February of 2014, a second amended petition was filed adding more information about the domestic violence incident and also alleged that both parents had substance abuse issues, as evidenced by their failure to attend mandatory drug screens.

In February of 2014, the circuit court held an adjudicatory hearing. Jennifer Pickens, a Child Protective Services ("CPS") manager, testified on the DHHR's behalf. According to her testimony, petitioner failed to attend supervised visitation regularly and to submit to court-ordered drug screens. Further, petitioner was unable to assume custody of the child when she was removed from the mother and remained unable to do so because of a lack of suitable housing. The circuit court ultimately adjudicated petitioner as an abusing parent due to his

neglect of the child, insomuch as he failed to “supply her with necessary food, clothing, shelter, supervision, medical care, or education”

In April of 2014, the circuit court held a dispositional hearing. Testimony established that petitioner failed to attend a psychological evaluation as ordered and further failed to submit to additional drug screens. Because the circuit court ordered that visitation could resume only upon petitioner’s completion of these requirements, petitioner did not see the child during this period. Ultimately, the circuit court terminated petitioner’s parental rights. 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).

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 finding clear and convincing evidence of petitioner’s neglect of the child, or in denying him an improvement period.

While petitioner argues that the first petition in this matter contained no allegations against him and that all the evidence in support of his adjudication as an abusing parent concerned incidents that occurred after the petition’s filing, these contentions are not supported by the record. The initial petition alleged that petitioner failed to supply the child with financial support of any kind or with appropriate shelter, conditions which persisted throughout the pendency of the proceeding below. Pursuant to West Virginia Code § 49-1-3(11)(A)(i), a neglected child is one

[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child’s parent . . . to supply the child with necessary . . . shelter . . . , when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian.

At the adjudicatory hearing, the evidence established that petitioner could not take custody of his child because he did not have a suitable home, and petitioner provided no evidence that this lack of a home was due, primarily, to his lack of financial means. In fact, on appeal, petitioner alleges

that he was employed during these proceedings, which is why he was unable to attend certain services. As such, it is clear the circuit court had sufficient evidence upon which to find that the child, L.E., was neglected and that petitioner is an abusing parent.

As to petitioner's allegation that the circuit court erred in denying him an improvement period, the Court finds no error in this regard. West Virginia Code § 49-6-12 provides circuit courts discretion in granting improvement periods upon the finding that the parent is likely to fully participate in the same. In this matter, it is clear that the circuit court did not err in denying petitioner an improvement period because our review of the record shows that petitioner could not satisfy this burden, especially in light of his failure to comply with the conditions the circuit court imposed below.

At the outset of the proceedings, the circuit court required the parents to submit to drug screens and also awarded them visitation with the child. Prior to adjudication, petitioner failed to report to multiple drug screens as ordered and only sporadically visited with the child. In fact, because he failed to comply with the drug screens, the circuit court ordered that all other services cease until such time as petitioner complied. However, following adjudication, petitioner not only continued to disregard the circuit court's orders in regard to drug screens, but he also failed to report for a court-ordered psychological test so that he could resume visitation with the child.

While petitioner argues he never received the certified mail containing the information and documents necessary to undergo the psychological testing, the record indicated that this was due to petitioner's own failure to provide the DHHR with an accurate mailing address. Following the February 14, 2014, hearing during which the psychological evaluation was ordered, a DHHR employee spoke to petitioner and confirmed his address. However, when the certified letter from the DHHR regarding the psychological evaluation was returned to the DHHR, a worker called petitioner to inquire about any change in address. The worker spoke with petitioner's mother, with whom he had been living, who indicated that petitioner had not lived at that address for over a month.

As such, petitioner's own failure to comply with services, including updating the DHHR to any change in contact information, directly resulted in petitioner's failure to undergo psychological testing and prevented him from resuming services. This is especially true in light of a DHHR employee advising petitioner that documents would be forthcoming in the mail following the February 14, 2014, hearing. Further, we have previously held that "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened" Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011) (quoting Syl. Pt. 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E. 114 (1980)). Given that petitioner failed to comply with the minimal conditions the circuit court imposed at the beginning of the proceedings, it is clear that he could not show, by clear and convincing evidence, that he was likely to fully participate in an improvement period. For these reasons, the circuit court did not err in denying petitioner an improvement period before proceeding to disposition.

For the foregoing reasons, we find no error in the decision of the circuit court and its April 10, 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