

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

In Re: N.K.

No. 14-0527 (Ohio County 13-CJA-05)

FILED

October 20, 2014

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

MEMORANDUM DECISION

Petitioner Father, by counsel Peter Kurelac III, appeals the Circuit Court of Ohio County's April 3, 2014, order terminating his parental rights to his one-year-old daughter, N.K. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee Niezgoda, filed its response in support of the circuit court's order. The guardian ad litem, Gerasimos Sklavounakis, filed a response on behalf of the child supporting the circuit court's order. On appeal, Petitioner Father alleges that the circuit court erred in terminating his parental rights based solely on his incarceration without 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 order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In 2008, Petitioner Father pled guilty to one count of daytime burglary without breaking and one count of conspiracy, and was sentenced to prison for two to fifteen years. In 2012, Petitioner Father was released on parole, during which N.K. was conceived. In June of 2012, Petitioner Father violated his parole and returned to prison.

In January of 2013, the DHHR filed an abuse and neglect petition against N.K.'s biological mother because N.K. tested positive for cocaine shortly after she was born.¹ The petition also alleged that the biological mother had a long history of drug use, including using drugs during her pregnancies; abandonment; and two prior involuntary terminations in 2002 and 2008.² Thereafter, in November of 2013, the DHHR filed an amended petition for abuse and neglect against Petitioner Father alleging that he failed to provide the child with financial, emotional, or physical support. The DHHR also alleged that Petitioner Father was currently incarcerated and had an extensive criminal history, including a prior incarceration for eight years

¹At the time the abuse and neglect petition was filed against the biological mother, Petitioner Father was not believed to be N.K.'s biological father and was not included as a party to the original petition. Since then, paternity testing has determined that Petitioner Father is, in fact, N.K.'s biological father.

²The child's biological mother is not part of this appeal.

for drugs and obstructing official business in the State of Ohio. The amended petition also stated that Petitioner Father had a history of fleeing and obstructing police officers, domestic battery, and battery on a police officer.

In December of 2013, the circuit court held an adjudicatory hearing, upon which it found Petitioner Father to be a neglecting parent for failing to have contact with his child and for failing to protect her from her biological mother. In April of 2014, the circuit court held a dispositional hearing and terminated Petitioner Father's parental rights. It is from this dispositional order that Petitioner Father 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, this Court finds that the circuit court did not err in denying Petitioner Father a post-adjudicatory improvement period. Pursuant to West Virginia Code § 49-6-12(b)(2), a circuit court has discretion to grant a post-adjudicatory improvement period if the parent “demonstrates, by clear and convincing evidence, that [he or she] is likely to fully participate in the improvement period” The record is clear that Petitioner Father failed to satisfy this burden. Petitioner Father's only evidence in support of his argument was that the circuit court focused only on his incarceration. He argues that because he was released on parole on March 1, 2014, he could fully participate in any services that the DHHR provided.

Our review of the record reveals that, in denying Petitioner Father's motion for a post-adjudicatory improvement period, the circuit court relied upon several factors in determining that Petitioner Father was unlikely to fully participate. These factors included his lack of contact with N.K. and two other minor children. Importantly, Petitioner Father admitted to the circuit court that he participated in rehabilitation services while he was incarcerated, but that none of the programs worked. As noted above, Petitioner Father's arguments in support of his motion for an improvement period were highly speculative in regard to his ability to fully participate. 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.2d 114 (1980)). For these reasons, we find no error in the circuit court's decision to deny Petitioner Father a post-adjudicatory improvement period.

Finally, the Court finds no error in the circuit court's decision to terminate Petitioner Father's parental rights. While Petitioner Father argues that the circuit court erred in terminating his parental rights in violation of Syllabus Point seven of *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000),³ His argument ignores our admonition that "while an individual's incarceration may be a criterion in determining whether his/her parental rights should be terminated, other factors and circumstances impacting his/her ability to remedy the conditions of abuse and neglect should also be considered when making such a disposition." *Id.* at 342, 540 S.E.2d at 559. (Emphasis in original.)

This Court has held that

[w]hen no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

Syl. Pt. 3, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

In this case, the circuit court terminated Petitioner Father's parental rights based on many factors. These factors included Petitioner Father's failure to have any type of relationship with N.K. or his other children; his extensive criminal history, including a record for distribution of crack cocaine within 1000 feet of a school; possession of heroin; multiple domestic batteries; and probation and parole violations. Petitioner Father testified that he had been in jail for twelve of the last twenty years, was involved in criminal activity since he was eighteen years old, and failed to benefit from rehabilitative services while he was incarcerated. As such, it is clear that the circuit court did not base termination of Petitioner Father's parental rights solely upon his incarceration.

The Court also finds no merit to Petitioner Father argument that he should have been entitled to a less restrictive dispositional alternative because he was granted parole after the dispositional hearing. Importantly, the circuit court heard testimony that Petitioner Father admitted that he failed to benefit from numerous rehabilitative services while incarcerated. As such, the circuit court found that there was no reasonable likelihood that petitioner could correct

³“A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.’ Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970).”

the conditions of abuse or neglect in the near future and that termination was necessary for the child's welfare. West Virginia Code § 49-6-5(a)(6) directs circuit courts to terminate parental rights upon such findings.

For the foregoing reasons, we find no error in the decision of the circuit court and its April 3, 2014, order is hereby affirmed.

Affirmed.

ISSUED: October 20, 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