

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

**In Re: K.M.**

**No. 11-0834** (Webster County 10-JA-25)

**FILED**

January 18, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

This appeal arises from the Circuit Court of Webster County, wherein the Petitioner Mother's parental rights to her child, K.M., were terminated. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed his response on behalf of the child.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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 is appropriate under Rule 21 of the Revised Rules.

“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.” Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).” Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010). Petitioner challenges the order terminating her parental rights, arguing that the circuit court failed to follow the procedural mandates of the Rules of Procedure for Abuse and Neglect Proceedings, and further that it was error to terminate her parental rights without first requiring a family/child case plan to be filed. A review of the record, however, shows that the applicable rules were followed, that petitioner's continued drug abuse left the circuit court with no choice but to terminate

her parental rights, and further that the lack of a family and/or child case plan amounts to harmless error under the particular facts of the case-at-bar.

In regard to her first assignment of error, petitioner argues that the circuit court failed to follow the procedural mandates of the Rules of Procedure for Child Abuse and Neglect Proceedings. Specifically, she alleges that she requested drug treatment, but was denied the same. Without DHHR resources, petitioner argues that she was without the funds to obtain treatment on her own. She cites to this Court's prior holding that "[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001). Petitioner readily admits her failures, but did request help to overcome addiction. She argues that because there was time left in her improvement period, and the subject child was residing with his non-abusing father and not in danger, the circuit court therefore defeated the main purpose of the statutes that is preservation of the family. However, a review of the record indicates that, despite receiving counseling and parenting services from the DHHR, petitioner failed to acknowledge her substance abuse problems.

Shortly after receiving a post-adjudicatory improvement period, petitioner tested positive for controlled substances, including marijuana and opiates, on four separate occasions and also failed to report for testing on one other occasion. Further, upon questioning, the circuit court noted that petitioner "stated she will not give up marihuana [sic] and sees nothing wrong with its continued use." Petitioner's argument fails to take into account her repeated failure to comply with the terms of her improvement period and her inability to acknowledge the problem leading to her neglect of the child. This Court has held that "in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense." *West Virginia Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)." *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Petitioner's statements concerning her continued abuse of controlled substances and her unwillingness to cease such abuse clearly illustrate that she refused to acknowledge the problem giving rise to the neglect in this matter. As such, the circuit court was within its discretion to revoke her improvement period, and the same does not constitute a disregard of the procedural mandates of the Rules of Procedure for Child Abuse and Neglect Proceedings.

As to her second assignment of error, petitioner argues that the circuit court erred by failing to require that a family or child case plan be developed as required by Rule 28 of the Rules of Procedure for Child Abuse and Neglect Proceedings and West Virginia Code § 49-6-5(a). While it is true that this Court has stressed the importance of the filing of a case plan on numerous occasions, we decline to find that the absence of such case plan in this matter warrants reversible error. As we have held, “[t]he purpose of the family case plan . . . is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.’ Syl. Pt. 5, [in part], *State ex rel. W.Va. Dep’t. Of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).” Syl. Pt. 3, in part, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001). A review of the record shows that the family’s problems were clearly identified and that logical steps had been taken to resolve or lessen the same. In granting petitioner a post-adjudicatory improvement period, the circuit court directed petitioner to remain drug and alcohol free, subject herself to random drug screens, and continue participating in services with the DHHR. Simply put, petitioner knew that her continued drug abuse was the root cause of her adjudication as neglectful, and the DHHR had taken steps to remedy that problem through counseling. Petitioner was aware of the “logical steps” necessary to resolve her issues, including not abusing controlled substances, appearing for drug screens, and continuing her participation in DHHR services.

However, petitioner failed to comply with the terms of her improvement period and further precipitated termination by blatantly declaring that she saw nothing wrong with her substance abuse and would continue with the same. Per West Virginia Code § 49-6-5(b)(1), the circuit court was correct in finding that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially correct in the near future, as such conditions are considered to exist when the abusing parent has habitually abused controlled substances or drugs to the extent that their parenting skills have been seriously impaired. As such, the failure of the circuit court to direct the development of a family and/or child case plan in this matter constitutes harmless error.

This Court reminds the circuit court of its duty to establish permanency for [the children] Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for [the children] within eighteen months of the date of the disposition order. As this Court has stated, “[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.” Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that “[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.” Syl. Pt. 3, *State of West Virginia v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, “[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.” Syl. Pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of petitioner’s parental rights is hereby affirmed.

Affirmed.

**ISSUED:** January 18, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh