

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

In Re: D.W., R.W. and N.W.

No. 12-0178 (Barbour County 09-JA-7, 14, &15)

FILED

May 29, 2012

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

MEMORANDUM DECISION

Petitioner Father, by counsel Mary S. Nelson, appeals the Circuit Court of Barbour County's October 5, 2011, order terminating his custodial rights to D.W., R.W., and N.W. The guardian ad litem, Chaelyn Casteel, has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

Having reviewed the appendix and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the appendix presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

“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).

This petition was initiated for the purpose of placing D.W. under DHHR care for inpatient mental health treatment. However, upon further investigation, it became apparent that there were significant abuse and neglect issues in the family; thus, an amended petition was filed, eventually including all three children, as well as Petitioner Father, mother, stepmother, and stepfather as respondents. The amended petition alleged serious and detrimental conflict between Petitioner Father and mother, resulting in emotional abuse of the children. The biological parents stipulated to the

abuse and neglect and began a post-adjudicatory improvement period. Due to the stepfather's failure to admit his role in any abuse and neglect, and due to his failure to cooperate with any services, his custodial rights were terminated. The stepfather's termination has been affirmed by this Court.

Petitioner Father was progressing well in his improvement period until March of 2011, at which time the guardian moved to terminate the improvement period based on allegations of physical abuse perpetrated by Petitioner Father against two of the children. The circuit court interviewed all of the children, in camera, and the children testified to instances of physical abuse by petitioner, as well as his repeated threats to kill himself. Petitioner Father's improvement period was thereby terminated, and the circuit court then moved to disposition of the matter. Petitioner Father requested a dispositional improvement period but did not admit to physically abusing the children, although he admitted hitting one as part of a game and accidentally hitting another in the eye when he was attempting to "pop him in the mouth" for something the child said. The circuit court refused the request for a dispositional improvement period, finding it would be futile since petitioner was not honest concerning the physical abuse and threats of suicide, and because he failed to admit his problems. The circuit court terminated Petitioner Father's custodial rights based upon the in camera findings. Petitioner Father consented to the termination of his custodial rights and to placement of the children with the paternal grandparents. The circuit court found that the testimony showed that the animosity between Petitioner Father and mother severely impaired the children's mental health. The circuit court noted that the case has been pending for almost two years and that there has been little improvement. Mother's custodial rights have likewise been terminated, and the termination has been affirmed by this Court.

On appeal, Petitioner Father argues that the circuit court erred in failing to adjudicate him on the allegations in the amended petition of physical abuse of the children when he was already in an improvement period designed to address only emotional abuse and not physical abuse. Petitioner Father states that he admitted to contributing somewhat to the animosity between himself and the mother, but states that he denied any other abuse. Petitioner Father argues that he participated in the improvement period services and that the services went well until March of 2011, when there were physical abuse allegations against him. Petitioner Father argues that he was never adjudicated as abusive and neglectful relating to these physical abuse allegations and that there was never any "chronic, ongoing physical abuse." Petitioner Father argues that an amended petition should have been filed relating to the physical abuse, which was an isolated event because petitioner was "stressed out and reacted poorly."

The DHHR responds in favor of the circuit court's decision and notes that as there was no second amended petition filed, there was no need for another adjudication in this matter. The DHHR adds that petitioner consented to termination of his custodial rights; therefore, he cannot complain that the circuit court failed to address adjudicatory issues which were never raised.

The guardian also responds in favor of the circuit court's findings, and argues that no second amended petition was filed specifically alleging physical abuse. Therefore, an adjudication on this issue was unnecessary. The guardian also argues that as a result of the children's testimony, the circuit court properly found that petitioner's actions had physically and emotionally endangered the children. Moreover, the guardian notes that petitioner agreed to the termination of his custodial rights and agreed to the children's placement without objection.

Petitioner next argues that the circuit court erred in denying him a dispositional improvement period and in terminating his custodial rights without extending his post-adjudicatory improvement period or granting a new improvement period. Petitioner Father argues that there was a less drastic alternative available because he had remedied his problems with his children's mother, which were the basis of the amended petition to be filed against him. He argues that he could have improved and remedied the physical abuse situation had he been given another improvement period, as he fully participated in his first improvement period.

The DHHR argues in favor of the termination of custodial rights and the denial of another improvement period. The DHHR states that the granting of an improvement period is left to the circuit court's discretion and, although the record shows that Petitioner Father did well in his initial improvement period, the incidents of physical violence and emotional abuse from petitioner's suicidal threats show that "his progress was more superficial than substantive." The DHHR also argues that the prior improvement period addressed all problems and conditions leading to abuse and neglect, not just emotional abuse. Thus, petitioner's request for a specialized improvement period is improper and was properly denied. The DHHR points out that the least restrictive alternative was chosen, which was the termination of only custodial rights.

The guardian argues that petitioner consented to the termination of custodial rights, and that petitioner did not successfully complete his improvement period. The guardian argues that another improvement period to address only the physical abuse is unnecessary, and that it is clear that petitioner "missed the point" of his prior improvement period since he physically and emotionally abused the children during the prior improvement period. The guardian notes that she is troubled that after almost two years of services that petitioner would turn to violence with his children.

Petitioner Father's post-adjudicatory improvement period was terminated due to his physical and emotional abuse of his children. Therefore, in order to receive another improvement period, he must show that he "has experienced a substantial change in circumstances. Further, the [petitioner] shall demonstrate that due to that change in circumstances, the [petitioner] is likely to fully participate in the improvement period" W.Va. Code § 49-6-12(c)(4). First, petitioner failed to successfully complete his first improvement period, which shows that he is not likely to fully participate in another improvement period. Second, this Court finds no merit in Petitioner Father's contention that a separate improvement period was required to deal only with his physical abuse of the children. Petitioner Father was offered extensive services for almost two years, yet still admits

to striking an eye of one of his children while attempting to hit the child in the mouth, because he was under stress. Clearly, Petitioner Father had not fully benefitted from his prior services. This Court finds no error in the circuit court's refusal to grant him a dispositional improvement period.

With regard to the termination of Petitioner Father's custodial rights, this Court has held that

“[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49-6-5 (1977) will be employed; however, 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” Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). In the present case, Petitioner Father actually consented to the termination of his custodial rights and the placement of his children with the paternal grandparents. The record is devoid of any objection to this disposition. Therefore, we find no error in the circuit court's termination of Petitioner Father's custodial rights.

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 of the 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.¹ 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

¹ Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

suitable adoptive home can not be found.” Syl. Pt. 3, *State 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 custodial rights is hereby affirmed.

Affirmed.

ISSUED: May 29, 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