

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

FILED

September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: B.H., A.H., A.H. and J.H.

No. 12-0303 (Putnam County 11-JA-15 through -18)

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Brenden Long, arises from the Circuit Court of Putnam County, wherein Petitioner Mother's parental rights were terminated by order entered on February 8, 2012. The children's guardian ad litem, Jeff Woods, filed a response on behalf of the children in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William Bands, filed a response joining in and concurring with the guardian ad litem's response.

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 is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

DHHR filed the petition in the instant case against the children's parents in May of 2011, based on allegations of the parents' extensive history of domestic violence, and their exposure of their children to this violence; the parents' physical and verbal abuse against the children; Petitioner Mother's failure to protect her children, as evidenced, for example, by her numerous petitions for domestic violence protective orders against the children's father followed by subsequent motions to dismiss these petitions; the family's extensive history with Child Protective Services ("CPS") dating back to 2005; and the numerous times the parents were evicted from their homes due to unpaid rent. The most recent domestic violence incident that preceded the petition of the instant case resulted in an ambulance transporting Petitioner Mother to the hospital. The children's father had reportedly beaten and dragged Petitioner Mother to the floor and had beaten her until she was unconscious. One of the children witnessed this incident and threw a flower pot at his father and attempted to pull his father off of Petitioner Mother out of fear that the father would severely hurt her or kill her. An on-site investigation revealed blood on the kitchen floor and blood splatters on the grass in the front yard. At the time DHHR filed this petition, the father's whereabouts were unknown; he had fled the scene of this incident before law enforcement completed the investigation. The petition further discussed the parents' failure to comply with services offered by CPS throughout the years. Following this petition, the circuit court found probable cause for abuse and neglect at the June of 2011 preliminary hearing and subsequently placed the children in temporary custody with their maternal grandmother. The adjudicatory hearing was held in August of 2011 and neither parent contested the adjudication that their children were abused and neglected. In September of 2011, the circuit court granted each parent a post-adjudicatory improvement period, but revoked their improvement periods in

December of 2011 after finding that they both failed to submit to any drug screens. At the dispositional hearing in January of 2012, the parents filed renewed motions for post-adjudicatory improvement periods. The circuit court denied these motions and in its February 8, 2012, termination order, it terminated both parents' parental rights after finding that they continued to use drugs and engage in domestic violence, failed to participate in any sort of substance abuse treatment, and that their substance abuse seriously impaired their parenting. Petitioner Mother appeals this decision, arguing two assignments of error.

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).

On appeal, Petitioner Mother argues that the circuit court erred by denying her renewed motion for a post-adjudicatory improvement period because she made substantial changes in her circumstances after her initial improvement period was revoked. In support, Petitioner Mother cites to West Virginia Code §§ 49-6-12(b)(4) and (c)(4) and argues that in her written renewed motion for post-adjudicatory improvement period, she made substantial changes that warranted another improvement period. Petitioner Mother asserts that she gained new employment; became willing to be drug screened, as demonstrated by appearing for her January 11, 2012, drug screen; was able to quit using heavy drugs on her own; admitted at the dispositional hearing that the only drug that may still be in her system might be marijuana from approximately three weeks ago; became willing to participate in out-patient drug treatment; became willing to divorce her husband; and made the decision to improve for the sake of her children and fully participate in the improvement plan. Petitioner Mother argues that due to these changes, the circuit court clearly erred when it denied her renewed motion for post-adjudicatory improvement period. She asserts that these substantial changes demonstrate that she would likely fully participate in a further improvement period.

Petitioner Mother also argues that the circuit court clearly erred in terminating her parental rights when she was presently willing to fully participate in a further improvement period. In support, she cites to West Virginia Code §§ 49-6-5(a)(6), (b), and (c) in arguing that there was a reasonable likelihood that the conditions of abuse and neglect could be substantially

corrected in the near future. Petitioner Mother reiterates some of the reasons she asserted in her argument that the circuit court erred in denying her renewed motion for improvement period. She further asserts that there were no new allegations of domestic violence since the instant case began and that at the January 13, 2012, hearing, she expressed her willingness to start treatment and drug screens. Petitioner Mother argues that accordingly, her parental rights to her children should be reinstated and that her renewed motion for post-adjudicatory improvement period should be granted.

The guardian ad litem responds, contending that the circuit court did not abuse its discretion in denying Petitioner Mother's renewed motion for post-adjudicatory improvement period or in terminating her parental rights to the subject children. The guardian argues that the circuit court properly terminated Petitioner Mother's parental rights pursuant to West Virginia Code § 49-6-5(a)(6), which directs that a circuit court may terminate the parental rights of an abusing parent when it finds that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future. Here, although Petitioner Mother expressed a willingness to participate in a drug rehabilitation program, she did not previously participate in offered services. She continually made professions of her willingness to participate in services, but did nothing more than continue to fail to participate in offered services, use drugs, and expose her children to circumstances contrary to their best interests. The guardian further asserts that Petitioner Mother's visits with her children throughout this case were sporadic, at best. The guardian argues that due to Petitioner Mother's unfulfilled promises and her need for behavioral and substance abuse treatment, the circuit court did not err in its decision and its order should be affirmed. DHHR filed a response concurring with the guardian's response.

The Court finds that the circuit court did not err in denying Petitioner Mother's renewed motion for post-adjudicatory improvement period or in terminating Petitioner Mother's parental rights. Pursuant to West Virginia Code §§ 49-6-12(f) and (h), a circuit court is mandated to terminate a parent's improvement period if it finds that the parent has failed to comply with the terms of the improvement period and under the scope of West Virginia Code § 49-6-12, the circuit court has the discretion to grant or deny a parent's written motion for improvement period. The parent must demonstrate by clear and convincing evidence that he or she will likely fully participate in the improvement period. Moreover, the Court has held as follows: "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened" Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Further, the Court has also held that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). A review of the circuit court disposition order provides the circuit court's findings and conclusions which support its decision to deny Petitioner Mother's renewed motion for improvement period and to terminate Petitioner Mother's parental rights. Although Petitioner Mother's renewed motion for post-adjudicatory improvement period outlines her plans to begin employment and begin drug treatment, Petitioner Mother cites no other evidence to support her argument that the circuit court erred in denying her renewed motion for post-adjudicatory

improvement period or evidence that refutes the circuit court's findings and conclusions in its disposition order. Based upon a review of the record, the Court finds no error by the circuit court in its denial of further improvement period or in the termination of Petitioner Mother's parental 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 twelve months of the date of the disposition order. As this Court has stated,

[t]he [twelve]-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 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 parental rights is hereby affirmed.

Affirmed.

ISSUED: September 7, 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