

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

FILED

November 9, 2012

released at 3:00 p.m.

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

In Re: Miranda W.

No. 12-0383 (Mason County 10-JA-1)

MEMORANDUM DECISION

The petitioner herein and respondent below, Teddy W.¹ (hereinafter “father”), appeals from an order entered February 27, 2012, by the Circuit Court of Mason County. By that order, the circuit court terminated the father’s parental rights to Miranda W. (hereinafter “Miranda”). The appeal was timely perfected by counsel, with the appendix record accompanying the petition. The West Virginia Department of Health and Human Resources (hereinafter “the DHHR”) filed its response, and the guardian ad litem filed a response on behalf of the minor child. Based upon the parties’ written submissions and oral arguments, the portions of the record designated for our consideration, and the pertinent authorities, we find that the circuit court’s decision to terminate the father’s parental rights to Miranda should be affirmed. This Court further finds that this case presents no new or significant questions of law. Therefore, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

The pertinent facts of this abuse and neglect case began on January 14, 2010, when Miranda was five months of age. She was removed from her father’s custody while she was being treated in the hospital.² The DHHR filed a petition for abuse and neglect against the father based upon the prior termination of his parental rights to his children living in Ohio,³ as well as against Miranda’s mother due to the prior termination of her parental

¹“We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties.” *State ex rel. West Virginia Dep’t of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

²The lower court’s order found that, at the time, five-month-old Miranda was placed in the home of her foster parents, she had not received any medical shots, she resisted being held, she did not cry, she laid listlessly, and she had severe cradle cap.

³The Court of Appeals Fourth Appellate District in Vinton County, Ohio,
(continued...)

rights to a child in Wayne County, West Virginia. At the adjudication in the presently-pending case regarding Miranda, on April 26, 2010, the father stipulated to neglect based upon his prior involuntary termination of parental rights to his three older children.

A multi-disciplinary team meeting (hereinafter “MDT”) was held on May 19, 2010, wherein it was indicated that the father had been attending all visitations and had a good attachment to his daughter. The MDT had only two recommendations for the father’s improvement period: (1) cooperate in and complete parenting services and (2) maintain weekly visits with his daughter. These recommendations were adopted by the circuit court in a subsequent order. Thereafter, on June 11, 2010, the mother’s parental rights were terminated, and the father was granted a post-adjudicatory improvement period.

However, following a week of overnight, unsupervised visitation with the father in late summer 2010, the foster family testified that the child displayed negative behaviors. The overnight visitations were canceled in favor of supervised visitation. At some point around this time, the father was convicted of DUI, and his service provider expressed concerns about alcohol abuse due to his slurred speech in the evenings.

The father’s exercise of his right to visitation and his participation in treatment services became sporadic in July or August, and in October he disappeared altogether for approximately three months. In December 2010, the DHHR filed a motion to revoke the father’s improvement period, alleging that the father was not able to be reached and that he had missed numerous scheduled visitations. On December 6, 2010, a hearing was held on the DHHR’s motion to revoke. It was recognized that the father was without counsel during this time period;⁴ thus, the circuit court thereafter appointed new counsel to represent the father, and the ruling on the motion to revoke his improvement period was delayed. During the January 21, 2011, hearing on the DHHR’s motion, the circuit court granted an extension of the father’s improvement period because of his prior counsel’s withdrawal and disbarment, and because the court found that he was attempting to meet all aspects of his improvement period.

³(...continued)

upheld the termination of the father’s parental rights to three children in 2003 in Case No. 02CA574.

⁴At the inception of the case, the father was appointed legal counsel; however, he decided to retain his own attorney. By order entered September 27, 2010, the father’s counsel withdrew from the case; he was subsequently disbarred.

In a report from the MDT meeting on March 9, 2011, the DHHR reversed its position and sought reunification of the father and Miranda based upon the father's full compliance with all requirements placed on him regarding services and visitation. Service providers noted that the father was very compliant, that the child had a bond with him, and that the father provided food and diapers for the visits. Subsequently, on March 21, 2011, the foster parents filed a motion to intervene,⁵ which was granted. On February 27, 2012, the circuit court issued an order terminating the father's parental rights.

On appeal to this Court, the father argues that the circuit court erred when it terminated his parental rights to Miranda insofar as he has remedied the conditions that resulted in termination of his parental rights to his other children, that he successfully completed his improvement period, and that the intervenor role of the foster parents was improper. The DHHR agrees with reunification of the father and Miranda based on its assertion that the father successfully completed his improvement period. Conversely, the guardian ad litem and the intervenor foster parents contend that the circuit court was correct in its findings, asserting that the father did not successfully complete his improvement period and did not remedy the issues that resulted in the prior termination of his parental rights.

Generally, “[t]his Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).” Syl. pt. 1, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). Specifically, in considering the proper placement for the child, we are reminded that “[q]uestions relating to . . . custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused.” Syl., in part, *Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977). Further, “[i]n . . . custody matters, we have traditionally held paramount the best interests of the child.” Syl. pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

We first address the father's contention that he successfully corrected the conditions that resulted in the loss of his parental rights in Ohio. The applicable law states:

(b) As used in this section, “no reasonable likelihood that conditions of neglect or abuse can be substantially corrected” shall mean that, based upon the evidence before the court, the

⁵Initially, the foster parents promoted reunification of Miranda with her father. However, once the father disappeared, abandoning his daughter to their care and neglecting to visit her, they moved to intervene, which request was granted on April 4, 2011.

abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive: . . . (6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills[.]

W. Va. Code § 49-6-5(b)(6) (2012) (Supp. 2012).⁶ With specific regard to a parent's mental incapacity, this Court has provided guidance as follows:

Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement.

Syl. pt. 4, *In re Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173 (1999)

In this case, it was found that

[the father] has an inadequate capacity to solve problems on his own regarding his children. [He] has a mental deficiency which existed in the prior termination case in . . . Ohio, and continues to exist today, over such a long period of time that he has not sufficiently improved the adequacy of his parenting skills.

Even if the father had the ability to correct the inadequacies, he fails to admit that there were any past problems; therefore, he cannot remedy the same. *See West Virginia Dep't of Health & Human Res. v. Doris S.*, 197 W. Va. 489, 498, 475 S.E.2d 865, 874 (1996) (stating that failure to acknowledge existence of problem results in making problem untreatable and improvement period an exercise in futility at child's expense).

⁶While the relevant statutes relied on herein were amended in 2012, no substantive changes relevant to the issues in this case were made between the old and the new versions.

Significantly, the father cannot articulate why his rights to his children in Ohio were terminated. Further, he is unable to state why the subject minor child in the current case, Miranda, was being treated in the hospital at the time she was removed from his custody. The testimony also revealed that overnight visits had to be discontinued because of Miranda's infestation with lice every time she left her father's home. This condition parallels the conditions that commenced the termination proceedings in the Ohio courts. Another corollary with the Ohio proceedings is the fact that Miranda's behavior would deteriorate after visits with her father. Like the children in Ohio, Miranda's behavior became very aggressive after visits, she stopped eating, she began crying all night, and she would bang her head on the wall. Thus, we agree with the lower court's determination that "[t]he evidence shows that [the father] completely neglects his responsibilities even under court scrutiny in a pending child abuse and neglect case. The conditions that existed 8 years ago [during the Ohio termination proceedings] still exist today." The father was unable to correct the conditions that resulted in the termination of his parental rights in Ohio, just as he has been unable to correct such long-standing conditions with regard to Miranda.

Second, we address the father's contention that he successfully completed his improvement period; thus, he argues, termination of his rights was inappropriate. In our review, we are not limited to the father's success or failure with respect to the offered services. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). Moreover, this Court has instructed that,

[a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and *whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.*

Syl. pt. 6, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) (emphasis added). According to W. Va. Code § 49-6-12(f) (2012) (Supp. 2012),

[w]hen any respondent is granted an improvement period pursuant to the provisions of this article, the department shall monitor the progress of such person in the improvement period. When the respondent fails to participate in any service mandated by the improvement period, the state department shall initiate action to inform the court of that failure. When the department demonstrates that the respondent has failed to participate in any

provision of the improvement period, the court shall forthwith terminate the improvement period.

The father initially was granted a six-month improvement period. During the pendency of that time, in July 2010, the father began not attending visitation with Miranda. Further, a service provider expressed concern about the father's use of alcohol⁷ and stated that the father had ceased attendance at parenting classes. Through December 2010, the father was unable to be contacted, and he did not show up for services and/or visitations with his child. Based on the father's failures to comply, the DHHR filed a motion in December 2010 to terminate his improvement period, and, further, moved to terminate his parental rights. At the hearing on the motion to terminate, it was agreed that the father's attorney had withdrawn as counsel in September 2010 and had lost his license to practice law in October 2010. Because the father had been without the assistance of counsel for a brief period, the underlying court granted a three-month extension to the improvement period.⁸ While the father did exercise some visitation rights thereafter, and did attend another parenting class, the testimony of the foster parents shows that the child returned numerous times from overnight visits with the father with head lice. Moreover, there was testimony that the child's behavior deteriorated after visitations with the father and improved with a lack of association with the father.

As previously explained, the lower court, through the first presiding judge, granted a three-month extension to the improvement period based upon the departure of the father's counsel from the case. "A court may extend any improvement period . . . for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period[.]" W. Va. Code § 49-6-12(g) (2012) (Supp. 2012). However, the subsequent circuit court judge, who is the current judge, found the extension to have been granted in error:

It is clear that [the father] had not substantially complied with the conditions of the post-adjudicatory improvement period as of the end of the initial, 6 month period. He abandoned visitation with Miranda[,] and he abandoned parenting services. His whereabouts were not known to the service provider or to the DHHR. The connection or nexus between these

⁷A recommendation was made for an alcohol-abuse evaluation; however, no such evaluation was made a part of the court file.

⁸The circuit judge, on July 29, 2011, disqualified himself from the case, and it was reassigned to the current circuit court judge.

shortcomings - - abandoning the opportunity to see his daughter and services - - and the disbarment of his lawyer in September, [sic] 2010, is not demonstrated by the evidence. In other words, did he need a lawyer to continue to visit Miranda and establish or continue his relationship with her? Did he need a lawyer to continue availing himself of parenting services . . . ? The answer is plainly “no” to each question.

Based on the foregoing, we agree with the circuit court’s determination that “[t]he unjustified disappearance of the father . . . for more than 50% of the six month improvement period is inconsistent with a finding that he had substantially complied with the conditions of [the] improvement period. . . . the extension of the improvement period should not have been granted.” Further, it was not appropriate to consider only a five-month period of time, as the father’s shortcomings over the entire seventeen-month period are relevant. Therefore, we agree that “the return of Miranda to her father . . . is not justified under **all** of the circumstances of the case.” (Emphasis added).

Finally, we address the father’s argument that the foster parents should not have been granted intervenor status. Under W. Va. Code § 49-6-2(c) (2012) (Supp. 2012), “the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.” *See also* Syl. pt. 1, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999) (“The foster parents’ involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with *Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.” Syllabus point 1, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996).”). We find no error with granting the foster parents intervenor status as they maintained custodial responsibility of, and cared for, Miranda for all but the first five months of her life.

Based on the foregoing, the lower court did not abuse its discretion in terminating the father’s parental rights based on all of the circumstances of the case. Accordingly, the February 27, 2012, order is affirmed.

Affirmed.

ISSUED: November 9, 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