

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

FILED

August 29, 2014

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

In Re: E.S., N.S., & T.S.

No. 14-0305 (Kanawha County 12-JA-223, 12-JA-224, & 12-JA-225)

MEMORANDUM DECISION

Petitioner Father, by counsel Tracie Greene, appeals the Circuit Court of Kanawha County's February 28, 2014, order terminating his parental rights to E.S., N.S., and T.S. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Sandra Evans, filed its response in support of the circuit court's order. The guardian ad litem ("GAL"), Robin Louderback, filed a response on behalf of the children that also supports the circuit court's order. On appeal, Petitioner Father alleges that the circuit court erred in terminating his parental rights because he successfully completed his 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 decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

In September of 2012, the DHHR filed a petition for abuse and neglect against Petitioner Father and the biological mother after E.S. tested positive for opiates, marijuana, and cocaine shortly after he was born.¹ The petition also alleged that Petitioner Father committed domestic violence in the presence of the children and failed to provide the children with necessary food, clothing, supervision, and housing. On November 29, 2012, the circuit court held an adjudicatory hearing. After hearing testimony concerning the DHHR's allegations, the circuit court adjudicated Petitioner Father as an abusive and neglectful parent.

By order entered on March 28, 2013, the circuit court granted Petitioner Father a post-adjudicatory improvement period. Thereafter, periodic review hearings were held in May and June of 2013. After considering the testimony, the circuit court continued Petitioner Father's improvement period for ninety days. Prior to the September 2013 review hearing, the DHHR filed a "Court Summary" recommending that Petitioner Father's improvement period continue. However, the DHHR stressed the importance that Petitioner Father obtain appropriate employment in order to pay for child care. During the September review hearing, the circuit court also heard proffers from counsel consistent with the DHHR's recommendation. Based on

¹Petitioner Father's older children, N.S. and T.S., were also born with drugs in their systems.

the DHHR's recommendation and counsels' proffers, the circuit court continued Petitioner Father's improvement period and scheduled another review hearing for November of 2013.

On November 7, 2013, the circuit court heard conflicting proffers from counsel that Petitioner Father complied with his post-adjudicatory improvement period. The circuit court set a dispositional hearing and reminded Petitioner Father that he must maintain employment before the DHHR could recommend reunification.

In January of 2014, the circuit court held a dispositional hearing, during which it terminated Petitioner Father's parental rights. The circuit court heard testimony that Petitioner Father failed to remedy the condition of abuse and neglect that necessitated the filing of this petition. Specifically, DHHR worker Kimberly Starcher testified that despite participating in counseling services, Petitioner Father committed domestic violence against the children's mother in December of 2013, and continued to allow her around the children despite the fact that her parental rights were previously terminated.² Ms. Starcher also testified that Petitioner Father failed to establish appropriate child care for the children. It is from this dispositional order that Petitioner Father now appeals.

The Court has previously established the following standard of review in such cases:

“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 Father argues that the circuit court erred in terminating his parental rights after he substantially completed his improvement period. However, we find no error in this regard. Importantly, even if Petitioner Father had fully complied with the terms and conditions of his improvement period, that, standing alone, would be insufficient to achieve reunification with his children. As we have recently held, “[i]n making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an

²By order entered on September 23, 2013, the mother's parental rights to these children were terminated. The mother did not appeal the termination of her parental rights to this Court.

improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.” Syl. Pt. 4, *In re: B.H. and S.S.*, 233 W.Va. 57, 754 S.E.2d 743 (2014). Furthermore, “courts 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).

As stated above, Petitioner Father was adjudicated as an abusive and neglectful parent for committing acts of domestic violence. Importantly, while the circuit court heard testimony that Petitioner Father participated in his improvement period, Ms. Starcher testified that despite receiving services, Petitioner Father committed domestic violence against the children’s mother in December of 2013. Ms. Starcher also testified that Petitioner Father failed to attend counseling from “mid October until December.” The circuit court also heard testimony that Petitioner Father failed to establish child care for his children. Importantly, it is clear from the record that Petitioner Father fails to recognize that he failed to remedy the conditions of abuse and neglect when he committed domestic violence against the children’s mother. This evidence constitutes a circumstance in which there is no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future under West Virginia Code § 49-6-5(b)(3). Circuit courts are directed to terminate parental rights upon this finding and when termination is necessary for the children’s welfare, pursuant to West Virginia Code § 49-6-5(a)(6).

Finally, the Court finds no merit in Petitioner Father’s argument that the circuit court erred in terminating his parental rights based on his lack of employment, which was not alleged in the petition for abuse and neglect. The record before us shows that as early as September of 2013, the DHHR stressed the importance that Petitioner Father obtain appropriate employment, which imputed knowledge to him of the conditions that needed to be met to complete his improvement period.

For the foregoing reasons, we find no error in the decision of the circuit court and its February 28, 2014, order is hereby affirmed.

Affirmed.

ISSUED: August 29, 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