

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

In Re: S.L.

No. 14-0645 (Raleigh County 12-JA-122)

FILED

October 20, 2014

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

MEMORANDUM DECISION

Petitioner Father, by counsel David W. Kirkpatrick, appeals the Circuit Court of Raleigh County's June 5, 2014, order terminating his parental rights to S.L. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed its response in support of the circuit court's order. The guardian ad litem, Amber R. Easter, filed a response on behalf of the child supporting the circuit court's order. Intervenor below and the child's maternal grandmother, L.B., by counsel Winifred L. Bucy, also filed a response in support of the circuit court's order. Petitioner also filed a supplemental appendix. On appeal, petitioner alleges that the circuit court made erroneous findings of fact and erred in denying him a dispositional 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 order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In September of 2012, the DHHR filed an abuse and neglect petition arising from the death of the child's mother. According to the petition, upon discovering that the child's mother was deceased, petitioner left the four-month-old child alone in bed with the mother and walked to the mother's parents' house to tell them their daughter was dead. Petitioner was thereafter unavailable for several hours until he arrived at the hospital, having made no arrangements for the child's care. The petition further alleged that petitioner had a history of substance abuse and had a pending Child Protective Services ("CPS") case related to drug abuse at the time of the petition's filing. After one continuance and testimony from several witnesses, petitioner later waived a preliminary hearing.

That same month, the multidisciplinary team ("MDT") convened and petitioner was advised that he would need to participate in grief counseling, drug screens, and a psychological evaluation. In November of 2012, the circuit court held an adjudicatory hearing, during which petitioner stipulated to the allegations in the petition and requested a post-adjudicatory improvement period, which was granted. The next month, petitioner executed a family case plan that required him to submit to random drug screens, demonstrate appropriate parenting skills, attend grief counseling, obtain appropriate housing, obtain employment, obtain transportation,

provide the child with basic necessities, and attend a consultation with a neurologist. The case plan was to be completed by June 7, 2013.

In an attempt to facilitate petitioner's substance abuse treatment, he had an interview at Amity Detox and Treatment Center ("Amity"), an inpatient treatment facility, in January of 2013. Although a bed opened at Amity in February of 2013, petitioner refused the same and advised Amity he did not need assistance. That same month, the circuit court held a review hearing and was advised that petitioner was not progressing, but the DHHR moved to maintain the status quo. At an MDT meeting in March of 2013, petitioner was allowed to attend the LEARN Center ("LEARN"), a different inpatient treatment program, and it was agreed that LEARN would determine whether petitioner needed further inpatient or outpatient treatment. Thereafter, in May of 2013, the circuit court granted petitioner a three month extension to his improvement period after being advised petitioner was enrolled in a rehabilitation program.

In August of 2013, the circuit court held a review hearing, which petitioner did not attend. The circuit court was informed that petitioner completed the LEARN Center program, but failed to obtain appropriate housing, had not provided proof of employment, and had not yet seen a neurologist. The circuit court granted petitioner additional time to comply with the family case plan by ordering the MDT to arrange for the neurological evaluation and verify petitioner's employment. In November of 2013, the circuit court held another review hearing on petitioner's improvement period. During the hearing, the circuit court was advised that petitioner's improvement period had expired, and the DHHR argued petitioner had not successfully completed the same. The matter was then set for disposition.

In December of 2013, petitioner filed a motion for a dispositional improvement period and argued that he scheduled an appointment with a neurologist and would seek grief counseling in order to comply with an improvement period. Thereafter, the circuit court held a series of dispositional hearings beginning in January of 2014 and culminating in March of 2014. Petitioner did not attend the initial dispositional hearing because he had been arrested that morning for third offense driving under the influence and driving on a revoked license. Ultimately, the circuit court terminated petitioner's parental rights.

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). Upon our review, the Court finds no error in the circuit court’s findings of fact or in its denial of petitioner’s motion for a dispositional improvement period.

To begin, petitioner alleges that the circuit court erred in finding that he refused to enter a long-term drug treatment program, failed to address his substance abuse issues, and consistently objected to substance abuse treatment. In support, petitioner argues that he enrolled himself in substance abuse treatment at the LEARN Center and completed the same, and that he provided negative drug screens throughout the proceedings below. While the Court recognizes that petitioner did complete treatment at the LEARN Center, we find this argument to be without merit. First, it is undisputed that petitioner refused to enter Amity, a long-term inpatient substance abuse treatment facility. And while he completed treatment at the LEARN Center, there is dispute as to whether this constituted long-term or short-term treatment and whether the treatment he received there was sufficient to fully address his substance abuse issues. Further, the record clearly shows that petitioner did not comply with the ordered drug screens, as testimony established that petitioner did not consistently report for the screens.

Additionally, it is clear that petitioner failed to address his substance abuse problems despite treatment. This is evidenced by petitioner’s arrest for third offense driving under the influence on the morning of the first dispositional hearing. According to testimony from law enforcement, petitioner was under the influence of alcohol while driving to his wife’s grave. Petitioner claimed that he was going to the grave to “to talk to [his deceased wife] about the upcoming [dispositional] hearing and to get her permission to date the woman who accompanied him on that visit.” Therefore, it is clear that petitioner failed to address his substance abuse issues as evidenced by his continued abuse of alcohol. Finally, the record is clear that petitioner consistently objected to substance abuse treatment. As noted above, petitioner declined entry to the Amity program because he felt he did not need assistance. Further, upon his intake at the LEARN Center, petitioner indicated that he did not have a substance abuse problem and did not need assistance. As such, it is clear that the circuit court’s findings in this regard were not clearly erroneous and were supported by substantial evidence.

Next, petitioner alleges that the circuit court erred in finding that he refused to submit to a neurological evaluation, arguing that the circuit court failed to consider the fact that he initially reported to a neurologist, but was turned away due to a prior history with that doctor. Petitioner further argues that he did ultimately obtain a neurological evaluation. However, petitioner’s argument on this issue completely disregards the fact that he was ordered to undergo this evaluation as early as December of 2012, and did not actually complete the same until January of 2014, after the first of the dispositional hearings. The record shows that the lengthy delay in petitioner’s compliance with this requirement was caused by his own refusal to submit to the same.

While it is true that petitioner initially visited a neurologist but was turned away because of his prior history with the doctor, the fact remains that on two separate occasions, the DHHR

provided him with a list of potential neurologists to visit and also with a medical card to facilitate the visit. Despite DHHR assistance, petitioner refused to submit to a neurological evaluation for approximately one year. Further, the record shows that the purpose of this evaluation was so that services could be offered based upon the neurologist's recommendations. However, because of petitioner's willful and lengthy delay in obtaining the neurological evaluation, no services could be offered based on the neurologist's recommendations. Therefore, it is clear that the circuit court had ample evidence upon which to base its finding that petitioner "refus[ed] to have a neurological evaluation completed," his eventual compliance with this requirement notwithstanding. Further, there is no evidence to support petitioner's contention that the circuit court failed to consider the evidence of his attempt to visit a neurologist or his eventual completion of a neurological evaluation, all of which was appropriately submitted to the circuit court below.

Petitioner next argues that the circuit court erred in finding that he failed to make substantial progress toward compliance with the family case plan. While petitioner argues that testimony established that completion of a home study was the only barrier to reunification in his case at the time of the dispositional hearing, this argument is a misstatement of the evidence below. It is true that a court summary from August of 2013 stated that completion of a home study on petitioner's home was the only barrier to reunification, but subsequent testimony from the author of that study indicated that additional barriers existed, including petitioner's failure to attend grief counseling and submit to a neurological evaluation. Petitioner argues that the lack of these issues in the August of 2013 court report "prov[e]s that neither of these elements w[ere] deemed essential to successful[] completion of [his] Family Case Plan," but the record establishes that this is not the case.

Simply put, petitioner's argument on this issue misstates the evidence and minimizes the deteriorations in the conditions of abuse and neglect that necessitated the petition's filing that occurred between the date that the court summary was authored and the dispositional hearing. As stated above and in spite of the specific language included in the court summary, other barriers to petitioner's reunification with his child included his failure to submit to a neurological evaluation, his failure to complete grief counseling, and his overall lack of motivation toward completing the terms of the family case plan. Further, the evidence clearly shows that petitioner's substance abuse issues persisted as evidenced by his arrest for driving under the influence and his failure to submit to drug screens. As such, it is clear that the circuit court had ample evidence upon which to find that petitioner had not substantially complied with the terms of the family case plan and we find no error in this regard.

Finally, the Court finds no error in the circuit court denying petitioner's motion for a dispositional improvement period. West Virginia Code § 49-6-12(c)(4) allows circuit courts discretion in granting a parent a dispositional improvement period after having previously granted an improvement period when the parent shows that "since the initial improvement period, the respondent has experienced a substantial change in circumstances." Here, it is clear that petitioner could not satisfy this burden. While it is true that petitioner complied with the family case plan in some respects, he ultimately failed to substantially comply as outlined above. Further, the initial petition was based, in part, on petitioner's substance abuse. The evidence throughout the proceedings established that even though petitioner attended substance abuse

treatment, he continually “denied and [has] not made sufficient effort to positively change his behaviors which led to the filing of the [p]etition” As such, it is clear that the circuit court did not abuse its discretion in denying petitioner’s motion for a dispositional improvement period, especially in light of petitioner’s failure to establish a substantial change of circumstances since his post-adjudicatory improvement period.

For the foregoing reasons, we find no error in the decision of the circuit court and its June 5, 2014, order is hereby affirmed.

Affirmed.

ISSUED: October 20, 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