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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* A.M.-1, K.M., and E.L.**

No. 20-0822 (Ohio County 19-CJA-51, 19-CJA-52, and 19-CJA-53)

MEMORANDUM DECISION

Petitioner Mother A.M.-2, by counsel Michael B. Baum, appeals the Circuit Court of Ohio County's September 23, 2020, order terminating her parental rights to A.M.-1, K.M., and E.L.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem, Joseph J. Moses, filed a response on behalf of the children also in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in terminating her parental rights.

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.

The DHHR filed a child abuse and neglect petition against petitioner and the father of A.M.-1 and K.M. in March of 2019 alleging that the father was driving a vehicle while under the influence of drugs with petitioner and the children present.[2] The DHHR alleged it initially received a referral that petitioner, the father, and A.M.-1, K.M., and E.L., the three children named in this appeal, were found in a car on the road outside of a local bar with both parents slumped over and

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). Additionally, because one of the children and petitioner share the same initials, we will refer to them as A.M.-1 and A.M.-2, respectively, throughout the memorandum decision.

[2]After the petition was filed, testing confirmed the father was under the influence of fentanyl and marijuana.

unresponsive.[3] According to the petition, a witness later reported observing the father driving erratically, eventually crossing the center line and coming to a stop in the road. The witness also reported to the police that both parents were slumped forward in the car with the children in the back seat. According to the petition, after the witness honked her horn to awaken petitioner and the children's father petitioner exited the vehicle and began arguing with the witness while the father remained in the car, slumped over the steering wheel. Upon their arrival, police found the father unable to concentrate, falling asleep, and incapable of walking without leaning on the hood of the police cruiser. A law enforcement officer arrested the father for child endangerment and driving a vehicle while impaired. The DHHR also alleged that petitioner was arrested for possession of marijuana. According to the petition, petitioner allowed the father to operate the vehicle knowing his severe state of impairment, thereby endangering the safety of the children. Under questioning from law enforcement regarding the father's impairment, petitioner allegedly replied that she did not know what the father did in his "spare time." The DHHR also alleged that petitioner and the father had a history of domestic violence and that the father is a registered sex offender, stemming from a 2001 conviction for third-degree sexual assault. Finally, the DHHR alleged that petitioner frequently left M.K., an older child not at issue on appeal, unsupervised and failed to monitor his mental health. According to the petition, law enforcement officers did not feel comfortable leaving the children in petitioner's care at that time, and the children were placed with another family member under a temporary protection plan.

The circuit court held a preliminary hearing in April of 2019. A witness who observed the father's erratic driving that led to the parents' eventual arrests testified consistent to the allegations in the petition. Next, a law enforcement officer testified consistent with the allegations in the petition, including that petitioner told him that the father was perfectly fine, that neither parent was using drugs, and that petitioner had been charged at the time with possession of marijuana. Finally, a Child Protective Services ("CPS") worker testified that the children reported to her that their parents were slumped over in the vehicle, they heard a horn honk, and petitioner exited the vehicle and began arguing with "some lady." The CPS worker also testified that she interviewed petitioner, who stated she had not noticed anything wrong with the father until she heard the honking. The CPS worker also testified that petitioner denied that she was slumped over in the car. The CPS worker further testified that petitioner claimed to be unfamiliar with the father's drug usage and that the marijuana found in the car was not hers as proven by the fact that it was found under her seat and not on her person. After hearing the evidence, the circuit court found probable cause that the children were in imminent danger and that the DHHR should retain physical and legal custody of the children.

The next month, the circuit court held an adjudicatory hearing wherein the father stipulated to substance abuse issues and driving the children in March of 2019 after smoking marijuana. The father also stipulated that he pled guilty to domestic violence against petitioner in 2017. The circuit court accepted the father's stipulations, adjudicated him as an abusing and neglecting parent, and granted him a post-adjudicatory improvement period. Petitioner proceeded to a contested adjudicatory hearing, and the circuit court took judicial notice of evidence presented at the

[3]The DHHR alleged that the father of E.L. had not seen the child since 2013, failed to provide for the child, and was $3,500 in arrears in owed child support. The father later relinquished his parental rights to the child.

preliminary hearing. The DHHR also moved to admit bodycam footage taken by police at the scene of the March 23, 2019, incident into evidence, which the circuit court granted. Petitioner offered no evidence and chose not to testify. Following the presentation of evidence, the circuit court adjudicated petitioner as an abusing and neglecting parent. After the hearing, petitioner filed for a post-adjudicatory improvement period.

The circuit court held a status hearing in June of 2019, where the DHHR informed the court that the multidisciplinary team ("MDT") had discussed the terms of petitioner's potential improvement period. Later that month, the circuit court granted petitioner's motion for a post-adjudicatory improvement period with its terms and conditions to include the recommendations stemming from petitioner's psychological evaluation. Additionally, the circuit court explained that petitioner needed to "demonstrate responsibility and insight into the reported concerns for her children . . . [and] to demonstrate her commitment to providing safety and protection."

In August of 2019, the circuit court held a status hearing where the DHHR informed the court that petitioner denied a substance abuse problem despite testing positive for controlled substances on multiple occasions and rendering fifteen diluted samples. The circuit court held another status hearing in October of 2019 wherein it was reported that both petitioner and the father continued to test positive for drugs. At this hearing, the DHHR reported that petitioner had accumulated twenty-nine positive drug screens while the father had fifty-eight positive screens. Both parents claimed any positive results stemmed from their use of CBD oil, and the circuit court directed that they cease using the same. However, the circuit court noted it did not believe CBD oil was causing the parents' positive screens. The DHHR also informed the court that petitioner claimed to test positive for opiates because of a valid prescription. However, the circuit court found that the dates for the prescription did not line up with the dates on which she tested positive for opiates. The circuit court scheduled a dispositional hearing for November of 2019.

In November of 2019, the DHHR filed a case plan recommending termination of parental rights of both parents. However, petitioner moved the court to allow her to participate in family treatment court. The next month, the circuit court granted petitioner's request. In January of 2020, the circuit court held a status hearing where all parties agreed to postpone the scheduled dispositional hearing until the parties contacted the circuit court to reschedule the hearing following petitioner's completion of the family treatment court program. The parties appeared for another status hearing in February of 2020 wherein it was reported that petitioner was making progress in the family treatment court program.

However, in May of 2020, the circuit court entered an order dismissing petitioner from the family treatment court program due to her failure to accept responsibility for her behavior, her failure to understand how her drug usage affected any possible reunification with her children, and her failure to communicate and collaborate with the family treatment court case coordinator and DHHR caseworker. Petitioner appealed her dismissal from the family treatment court program. In July of 2020, a specially assigned circuit court judge held a hearing regarding petitioner's dismissal from that treatment program. Following a full evidentiary hearing, the acting circuit court judge found sufficient evidence to support petitioner's removal from the program as previously ordered.

In August of 2020, it was reported that petitioner's oldest child M.K., who is not at issue on appeal, was placed in a treatment facility in Iowa following the recommendations of a psychosexual evaluation after less restrictive treatments failed to help the child address his behaviors and issues, including allegations of the child making sexual threats toward others.[4] Petitioner denied the child had any issues.

The final dispositional hearing was held in September of 2020. Petitioner asked the circuit court to preserve her parental rights and grant her a disposition pursuant to West Virginia Code § 49-4-604(c)(5), while the DHHR moved for the termination of her parental rights. The family treatment court coordinator testified that petitioner admitted during her intake to abusing drugs for each of the previous thirty days upon her arrival. However, the coordinator testified that petitioner failed to take responsibility for her continued drug abuse issues and demonstrated little to no insight as to how her behaviors led to the removal of the children. The coordinator further testified that although petitioner had some initial compliance in the program, she eventually stopped complying and became extremely adversarial with her and the DHHR caseworker. The DHHR caseworker testified that petitioner demonstrated noncompliance with services, denied her substance abuse issues, and failed to cooperate with the treatment team and family treatment court coordinator. The caseworker also testified that petitioner seemed unconcerned about M.K.'s outbursts and inappropriate behavior and blamed the caseworker for raising such concerns. Finally, the caseworker testified that petitioner dismissed concerns about A.M.-1 rapidly gaining weight. The caseworker testified that the DHHR and foster parents were recommending the child see a nutritionist, and petitioner expressed no support for that recommendation and dismissed concerns of the child's weight gain. The caseworker testified that her lack of concern about the children violated a term of her improvement period to "provide for her children's physical, emotional, and health needs at all times." Based on those issues, the DHHR recommended termination of petitioner's parental rights.

The circuit court concluded that petitioner failed to understand and acknowledge her issues and failed to acknowledge her children's needs and behavioral issues. The circuit court further found that petitioner tested positive for controlled substances on several occasions and maintained an adversarial relationship with members of the treatment team. The circuit court terminated petitioner's parental rights upon finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse or neglect in the foreseeable future and that termination of her parental rights was in the best interest of the children. Petitioner appeals the September 23, 2020, dispositional order.[5]

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

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[4]Petitioner does not appeal the disposition as it pertains to M.K. Based upon evidence of the child's wishes and in furtherance of his best interests, the circuit court terminated petitioner's custodial rights only to that child.

[5]The father of A.M.-1 and K.M. had his parental rights terminated below. The father of E.L. voluntarily relinquished his parental rights. The permanency plan for the children is adoption in their current foster home.

> "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 argues that the circuit court erred in terminating her parental rights rather than granting her a less-restrictive alternative. Petitioner argues that she acknowledged her issues at various points in the proceedings, was granted a post-adjudicatory improvement period, and made substantial improvements in the matter. According to petitioner, she was able to "maintain employment, maintain housing, budget her bills, address her mental health issues, engage in parenting classes, and maintain sobriety." As such, petitioner argues it would have been in the best interests of the children to grant her a disposition pursuant to West Virginia Code § 49-4-604(c)(5).[6] We disagree and find no error in the circuit court's termination of petitioner's parental rights.

This Court has held 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 re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Further,

> [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 improvement period

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[6]West Virginia Code § 49-4-604(c)(5) provides that a circuit court may

> [u]pon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court.

> 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.*, 233 W. Va. 57, 754 S.E.2d 743 (2014); *see also In re Frances J.A.S.*, 213 W. Va. 636, 646, 584 S.E.2d 492, 502 (2003) ("The question at the dispositional phase of a child abuse and neglect proceeding is not simply whether the parent has successfully completed his or her assigned tasks during the improvement period. Rather, the pivotal question is what disposition is consistent with the best interests of the child."). Lastly, we note that West Virginia Code § 49-4-604(c)(6) provides that circuit courts are to terminate parental rights upon finding that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that termination is necessary for the child's welfare. West Virginia Code § 49-4-604(d) provides that a circuit court may find that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected when the abusing parent has "demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help."

In this case, the circuit court did not err in finding that petitioner failed to successfully complete her improvement period. Although petitioner made some initial progress by securing housing and employment, and completing an outpatient drug treatment program, she continued to test positive for controlled substances, to deny her drug abuse despite positive drug screens, and to refuse further substance abuse treatment. Additionally, despite having failed to abide by the terms and conditions of her improvement period, petitioner was granted a second opportunity to correct the conditions of abuse and neglect but eventually stopped complying with her family treatment court program and became uncooperative and aggressive with staff members. Indeed, the circuit court stated that petitioner was discharged from the family treatment court after six months due to her "lack of a general understanding of how her choices have impacted reunification with her children, failure to accept responsibility, [and her] failure to effectively and properly communicate and collaborate" with the treatment court case coordinator and CPS worker. While petitioner asserted she was unfairly discharged from the treatment court, she received a full evidentiary hearing before a specially appointed circuit court judge, who ruled that her discharge was proper because of her lack of compliance and cooperation.

It is also evident that the petitioner failed to fully acknowledge the conditions of abuse and neglect. While petitioner admitted to using drugs every day for thirty days prior to her intake assessment for family treatment court, she later minimized her drug use, denied any subsequent drug usage, and failed to utilize the services available to treat her substance abuse issues. Further, petitioner failed to acknowledge other issues that affected her ability to safely parent the children. Petitioner minimized the serious psychiatric issues of her oldest child, M.K., and ignored other issues such as A.M.-1's dramatic weight gain. Instead, the CPS caseworker testified that petitioner blamed the family treatment court coordinator and foster mother for the issues with her children rather than attempt to address them.

Petitioner also alleges that the termination of her parental rights was not discussed with the children and testimony at the dispositional hearing "clearly illustrates that the children want to maintain a relationship" with petitioner. Petitioner points to the circuit court considering the wishes of M.K., who was fifteen years old. M.K. requested that the circuit court preserve petitioner's

parental rights, and the court terminated petitioner's custodial rights only as to that child. West Virginia Code § 49-4-604(c)(6)(C) requires that "the court shall give consideration to the wishes of a child 14 years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." The record shows, however, that A.M.-1, K.M., and E.L. were only eleven, ten, and eight years old, respectively, at the time of the dispositional hearing, and petitioner fails to cite to any portion of the record demonstrating that the children were of an age of discretion such that the circuit court should have considered their wishes. Accordingly, we find no error in the circuit court's termination of petitioner's parental rights given her failure to remedy the conditions of abuse and neglect and the children's tender ages.

In sum, while petitioner made some changes in order to comply with the requirements of her improvement period, she did not modify her behavior or make sufficient improvement to justify the return of the children to the home. "We have recognized that it is possible for an individual to show compliance with specific aspects of the case plan while failing to improve . . . [the] overall attitude and approach to parenting." *In re B.H.*, 233 W. Va. at 65, 754 S.E.2d at 751 (additional quotations and citations omitted). Such is the case here. While petitioner completed some aspects of her improvement period and complied for some time with the family treatment court, "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." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Despite petitioner's participation in an improvement period and her completion of certain requirements, we find that sufficient evidence existed to support the circuit court's finding that there was no reasonable likelihood that petitioner could correct the conditions of abuse and neglect in the near future and that termination was in the children's best interests. Accordingly, for the reasons set forth above, we find no error in the circuit court's termination of petitioner's parental rights to the children.

For the foregoing reasons, we find no error in the decision of the circuit court, and its September 23, 2020, order is hereby affirmed.

Affirmed.

ISSUED: June 3, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton