

SUPREME COURT OF APPEALS OF WEST VIRGINIA

In re A.B.-1, P.B., J.B., and A.B.-2

No. 21-0297 (W. Va. Oct. 1, 2021) · No. No. 21-0297 · Decided October 1, 2021

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the termination of petitioner mother S.B.’s parental rights to four children. The court held that the circuit court did not abuse its discretion in denying a post-adjudicatory improvement period and properly found no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Evan H. Jenkins; Justice Elizabeth D. Walker; Justice Tim Armstead; Justice John A. Hutchison; Justice William R. Wooton
JURISDICTION	West Virginia
DECIDED	October 1, 2021
DOCKET	No. 21-0297
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner mother appealed the Webster County Circuit Court's order terminating her parental rights following abuse and neglect proceedings.
STANDARD OF REVIEW	Conclusions of law are reviewed de novo; factual findings in an abuse and neglect case are reviewed for clear error. The grant or denial of an improvement period rests within the circuit court's sound discretion.
PRECEDENTIAL VALUE	Unpublished memorandum decision; no substantial question of law and no prejudicial error identified.
PARTIES	S.B., Petitioner Mother v. West Virginia Department of Health and Human Resources, A.B.-1, P.B., J.B., and A.B.-2, by guardian ad litem

TOPICS

- termination of parental rights
- parental rights
- family law procedure
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the circuit court abused its discretion by denying petitioner a post-adjudicatory improvement period.
2. Whether the circuit court clearly erred or otherwise lacked sufficient grounds to terminate petitioner's parental rights.
3. Whether the circuit court was required to use an intervening less restrictive alternative before terminating petitioner's parental rights.

HOLDINGS

1. The circuit court did not abuse its discretion in denying petitioner an improvement period because she failed to demonstrate that she was likely to fully participate in it and the evidence showed that meaningful improvement was unlikely.
2. The circuit court did not err in terminating petitioner's parental rights because there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and termination was necessary for the children's welfare.
3. Termination of parental rights may occur without an intervening less restrictive alternative when the statutory conditions establish that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected.

KEY QUOTATIONS

“In order to remedy the abuse and/or neglect problem, the problem must first be acknowledged.” (5)

“Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] that conditions of neglect or abuse can be substantially corrected.” (6)

FACTUAL BACKGROUND

Petitioner and the children's father had previously completed improvement periods in two abuse and neglect proceedings, after which the children were returned to their care. In the present proceeding, one child disclosed that petitioner choked and struck her, that the parents abused drugs, and that the home was unsafe; the parents tested positive for oxycontin and the children were removed. The circuit court found the disclosures credible, found petitioner's contrary testimony not credible, and determined that petitioner continued to deny the abuse and neglect conditions despite extensive prior services. An evaluating psychologist testified that petitioner's prognosis for attaining minimally adequate parenting skills was extremely poor and that no additional services were likely to correct the conditions.

PROCEDURAL HISTORY

The circuit court adjudicated petitioner as an abusing parent after finding that she engaged in domestic violence, abused drugs, and failed to maintain a fit and suitable home. After a dispositional hearing, the court denied petitioner a post-adjudicatory improvement period and terminated her parental rights upon finding no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and that termination was necessary for the children's welfare. The Supreme Court of Appeals of West Virginia affirmed.

DISPOSITION

affirmed

CASES CITED

- 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)
- In Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996)
- In re Cecil T., 228 W. Va. 89, 717 S.E.2d 873 (2011)
- In re M.M., 236 W. Va. 108, 778 S.E.2d 338 (2015)
- In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996)
- In re Charity H., 215 W. Va. 208, 599 S.E.2d 631 (2004)
- In re Tonjia M., 212 W. Va. 443, 573 S.E.2d 354 (2002)
- In re Timber M., 231 W. Va. 44, 743 S.E.2d 352 (2013)
- In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)
- In re Kristin Y., 227 W. Va. 558, 712 S.E.2d 55 (2011)
- State v. Michael M., 202 W. Va. 350, 504 S.E.2d 177 (1998)
- James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)

OPINION

PER CURIAM.

FILED October 1, 2021 STATE OF WEST VIRGINIA EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS SUPREME COURT OF APPEALS OF WEST VIRGINIA In
re A.B.-1, P.B., J.B., and A.B.-2 No. 21-0297 (Webster County 20-JA-5, 20-JA-6, 20-JA-7, and
21-JA-1) MEMORANDUM DECISION Petitioner Mother S.B., by counsel Andrew B. Chattin,
appeals the Circuit Court of Webster County's March 16, 2021, order terminating her parental
rights to A.B.-1, P.B., J.B., and A.B.-2.

1 The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Patrick
Morrisey and Mindy M. Parsley, filed a response in support of the circuit court's order. The

guardian ad litem (“guardian”), Mary Elizabeth Snead, 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 denying her a post-adjudicatory improvement period and 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. Petitioner and the children’s father have a significant history of Child Protective Services (“CPS”) intervention.

The DHHR filed a petition against the parents in 2013 due to their substance abuse, poor home conditions, and medical neglect of the children. The circuit court adjudicated the parents as abusing and neglecting parents and granted them a post-adjudicatory improvement period, which they successfully completed.

As such, the children were returned to the parents’ custody. Subsequently, in 2018, the DHHR filed another petition against the parents due to substance abuse, poor home conditions, and domestic violence. The circuit court again adjudicated them as abusing and neglecting parents and granted them a post-adjudicatory improvement period. 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).

Because two of the children share the same initials, we will refer to them as A.B.-1 and A.B.-2 respectively, throughout the memorandum decision. 1 The parents also completed these improvement periods, and the children were returned to their custody in May of 2019. Only a few months later, in January of 2020, the DHHR filed the instant abuse and neglect petition against the parents.

According to the DHHR, then fourteen-year-old J.B. disclosed to her school principal that petitioner choked her and hit her with a telephone. The child further disclosed that the parents were abusing drugs, that she had seen a white powdery substance and a straw on a countertop in the home, and that the home smelled of marijuana. J.B. further indicated that she did not feel safe in the home.

Following J.B.'s disclosures, a CPS worker responded to the parents' home and informed them of the referral concerning possible drug use. The parents were agitated during the exchange and frequently went in and out of the paternal grandparents' home, which was next door; they refused to allow the CPS worker or law enforcement into their own home. Eventually, the parents agreed to submit to a drug screen at a local hospital, which was positive for oxycontin.

Thereafter, the CPS worker petitioned for and received a ratification for emergency custody of the children, who were placed with the paternal grandparents with instructions that no contact between the children and the parents was to occur. A few days later, J.B. informed a CPS worker that on the day her parents submitted to a drug screen, they called the paternal grandparents' home and requested that J.B. urinate in a cup and bring it to them so they would not "go to jail." J.B. indicated that the parents had previously asked her to urinate in a cup for them.

J.B. also disclosed that the parents had been to the paternal grandparents' home every day since the children had been removed from the parents' care and told them not to talk to CPS. Lastly, J.B. indicated that she decided to disclose the allegations against the parents because they had become increasingly aggressive with each other and had struck the child P.B.

Based on this information, the DHHR alleged that the parents abused drugs, which negatively affected their ability to provide for the health, safety, and welfare of the children, and that they failed to provide a fit and suitable home.

The circuit court held an adjudicatory hearing in May of 2020. A CPS worker testified regarding the allegations in the petition, including J.B.'s disclosures and the worker's subsequent investigation into the matter.

The CPS worker testified that J.B. reported that petitioner tried to choke her and that the parents abused drugs in the home. The worker further testified that the parents tested positive for oxycontin on the day of the removal. A CPS supervisor also testified regarding J.B.'s disclosures stating that the child said that on the day the children were removed from the home, petitioner asked J.B. to urinate in a cup for her so that she could use J.B.'s urine to pass the drug test, and that the father had asked J.B. to do so on prior occasions.

Petitioner testified that J.B. fabricated the allegations against her and the father because they would not allow her to date an older boy. Petitioner denied choking or hitting J.B. and denied abusing drugs, noting that the screen she submitted to on the day of the children's removal was not sent for laboratory confirmation and that her hair follicle test had not shown traces of any substance.

Petitioner also denied asking J.B. to urinate in a cup so that she could pass a drug screen. 2 Following testimony, the circuit court noted that it had watched J.B.'s Child Advocacy Center

interview and observed that the child was very hostile and angry. It further indicated that it considered her behavior in weighing the credibility of her statements.

The circuit court also noted inconsistencies in the parents' testimony and ultimately determined that J.B.'s disclosures were credible. The circuit court found that the parents accused J.B. of making up the allegations against them because they allegedly angered her by telling her that her boyfriend was too old for her, but there was no evidence to support such an allegation.

The circuit court further found that the parents engaged in domestic violence in the children's presence, abused drugs, and failed to maintain a fit and suitable home. Accordingly, the circuit court adjudicated petitioner as an abusing parent. Subsequently, in October of 2020, petitioner gave birth to A.B.-2, and the DHHR filed an amended petition adding the child to the proceedings.

A.B.-2 was removed from petitioner's custody at that time. The circuit court adjudicated the parents as abusing parents with regard to A.B.-2 in November of 2020. The circuit court held a dispositional hearing in January of 2021.

The DHHR presented the testimony of the parents' counselor, who testified that she provided counseling to petitioner during a prior case and had done so throughout the instant case, addressing issues such as substance abuse, parenting, anxiety, and depression.

The counselor opined that petitioner made some progress throughout the proceedings, was cooperating during the sessions, and was motivated to change her behavior. However, the counselor acknowledged that the parents had been contacting J.B. in violation of the court's order, and that petitioner was urging the child to "tell the truth" by retracting her allegations of abuse.

Moreover, the counselor admitted that she did "not disagree" with a psychologist's determination that petitioner had an extremely poor prognosis of attaining minimally adequate parenting skills. Next, J.B.'s foster mother testified regarding contact between the child and the parents.

The foster mother explained that the parents were prohibited from contacting J.B. but that the child admitted that she and the parents remained in contact via Facebook Messenger. J.B. disclosed that before contact with her parents was prohibited, she attended a supervised visit wherein the father managed to slip a cellphone into her bag unnoticed by the service provider.

The foster mother testified that she searched the child's bag, found the cellphone, and read messages sent to J.B. by the parents. The foster mother stated that the parents were encouraging J.B. to change her story and tell the DHHR that she fabricated the allegations against the parents.

The DHHR also called the evaluating psychologist to testify regarding her evaluations of petitioner, J.B., and A.B.-1. Regarding J.B., the psychologist testified that she diagnosed her with major depressive disorder based on her reported history of suicidal ideation and self-harm, as well as problems related to sleep, worry, and self-esteem. When asked what the cause of these problems

could be, the psychologist stated that “when a child... of her age is having those types of severe behaviors, including the cutting and the suicidal ideation, and those types of things, there’s always a concern for the environment that she was in.” The psychologist further opined that it would be better “in the long run” for J.B. to not return to the parents’ care based upon the number of removals and the fact that the parents failed to rectify the issues leading to the children’s removal over multiple cases and services.

Likewise, the psychologist opined that it would not be in A.B.-1’s best interest to be returned to the parents’ care. The psychologist noted that A.B.-1 was diagnosed with 3 autism and cerebral palsy and required significant care. Further, A.B.-1 needed a stable, consistent home environment that would provide him with the services he needed. Regarding petitioner’s evaluation, the evaluator opined that petitioner blamed others instead of accepting responsibility for her actions, which indicated that she had little motivation to make long-term changes.

The evaluator concluded that, “[g]iven [petitioner’s] lack of accountability, her failure to correct the abuse and neglect present in the previous cases, failure to benefit from services, as well as long- term substance dependence, and lack of significant periods of sobriety,... [petitioner’s] prognosis for improved parenting... is extremely poor.” The evaluator also stated that she was not aware of any additional services that could be provided to petitioner to correct the circumstances of abuse.

The DHHR’s next witness, a service provider, testified that she provided the parents with parenting classes in both the 2018 case and the instant case. The service provider stated that the parents were cooperative and appeared to understand the concepts of the material taught but continued to deny the allegations against them, instead blaming J.B. for the situation.

The service provided further stated that petitioner denied any knowledge of the father giving J.B. a cellphone during a supervised visit. A CPS worker corroborated the service provider’s testimony that petitioner was compliant with services. Petitioner requested a post-adjudicatory improvement period. She testified that she complied with services, remained drug-free throughout the proceedings, and loved her children.

However, petitioner maintained that J.B. fabricated the allegations against her. Petitioner denied that she or the father provided J.B. with a cellphone during a supervised visit and claimed that the child must have stolen the phone out of petitioner’s car. Petitioner acknowledged that she communicated with the child in violation of the court’s order but denied asking the child to change her story; rather, petitioner claimed she asked the child to “tell the truth.” Following respective counsel’s arguments, the circuit court found that the children had been removed from the parents’ care three times and that petitioner failed to accept responsibility for her actions, consistently blaming J.B. for the proceedings.

Further, the issues in the instant case included drug use and poor home conditions, which were identical to the issues in the prior two cases. While the parents accused J.B. of lying throughout the case, the circuit court found that such accusations were contrary to the evidence and further found that petitioner's testimony was "less than credible." Ultimately, the circuit court denied petitioner's request for an improvement period and terminated her parental rights upon 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 necessary for the children's welfare.

Petitioner appeals the circuit court's March 16, 2021, dispositional order. 2 The Court has previously established the following standard of review in cases such as this: "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 2 The father's parental rights were also terminated below.

The permanency plan for the children is adoption. 4 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 without first granting her an improvement period. Petitioner acknowledges that she was adjudicated based upon drug abuse and domestic violence in the home but maintains that there was no drug abuse or domestic violence as alleged. Petitioner testified during the proceedings below that J.B. fabricated the allegations because she was not permitted to date an older boy.

It is uncontroverted that petitioner had no positive confirmed drug use during the entirety of this case and that she complied with all services offered, including counseling, drug screening, and visitation. As such, petitioner contends that the circuit court abused its discretion in not granting her an improvement period prior to terminating her parental rights.

Petitioner avers that there was a reasonable likelihood that she could have corrected the conditions of abuse which led to the filing of the petition, as she was willing to comply with all directives of the circuit court.

In looking at the evidence of petitioner's compliance throughout the case, petitioner argues that the circuit court's findings and the termination of her parental rights was clearly erroneous and contrary to the evidence.

The decision to grant or deny an improvement period rests in the sound discretion of the circuit court. See *In re M.M.*, 236 W. Va. 108, 115, 778 S.E.2d 338, 345 (2015) ("West Virginia law allows the circuit court discretion in deciding whether to grant a parent an improvement period."); Syl. Pt. 6, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("It is within the court's discretion to grant an improvement period within the applicable statutory requirements[.]").

We have also held that a parent's "entitlement to an improvement period is conditioned upon the ability of the [parent] to demonstrate 'by clear and convincing evidence that the respondent is likely to fully participate in the improvement period.'" *In re Charity H.*, 215 W. Va. 208, 215, 599 S.E.2d 631, 638 (2004).

However, the circuit court has discretion to deny an improvement period when no improvement is likely. See *In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002). Further, we have previously held that [i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

In re Timber M., 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted). 5 Contrary to petitioner's argument, we see no error in the circuit court's determination that petitioner was not likely to fully participate in an improvement period.

The circuit court found that petitioner failed to accept responsibility for engaging in domestic violence or the poor home conditions that led to the abuse and neglect of the children. Specifically, petitioner accused J.B. of fabricating the allegations and claimed the child did so because petitioner told her she was not allowed to date an older boy, despite ample testimony and evidence to the contrary.

While petitioner argues that she complied with services, remained drug free, and had a bond with the children, the record establishes that this is petitioner's third CPS case and that she was provided improvement periods with extensive services on two prior occasions, yet regressed to her abusive behavior after the children were returned to her care.

Moreover, the evaluating psychologist testified that petitioner's prognosis for attaining minimally adequate parenting was extremely poor given petitioner's refusal to accept responsibility and her past participation in abuse and neglect proceedings without any lasting significant improvement.

Further, the DHHR maintained that there were no further services that could be offered to assist petitioner in improving her parenting.

Therefore, we find that the circuit court did not abuse its discretion in denying petitioner an improvement period. We likewise find no error in the termination of petitioner's parental rights. 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 children'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 [his or her] own or with help." The record establishes that petitioner demonstrated an inadequate capacity to solve the problems of abuse or neglect on her own or with help.

As noted above, petitioner was provided an improvement period in both of her prior cases, with services such as parenting and adult life skills classes and counseling. However, she reverted to her abusive behavior each time the children were returned to her care. Indeed, the children were returned to petitioner in May of 2019, and the instant petition was filed against her less than one year later, in January of 2020.

While petitioner correctly asserts that she complied with services and tested negative for drugs throughout the proceedings, she denied the allegations of abuse, claimed J.B. was lying, and refused to accept responsibility for her actions.

However, the circuit court found that J.B.'s disclosures of abuse were credible and that petitioner's testimony to the contrary was not credible. Moreover, the evaluating psychologist determined that petitioner's prognosis for attaining minimally adequate parenting was extremely poor and that it was not in the children's best interests to return to her care.

To the extent petitioner claims she should have been granted a post-adjudicatory improvement period prior to the termination of her parental rights, we have held that "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va.

496, 266 S.E.2d 114 (1980). Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). Given petitioner's failure to acknowledge the conditions of abuse and accept responsibility for her actions, we find that the circuit court did not err in terminating her parental rights. Lastly, because

the DHHR has not yet found an adoptive placement for the children, 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 dispositional order.

As this Court has stated, [t]he [twelve]-month period provided in Rule 43 of the West Virginia Rules of Procedure[] 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.

Cecil T., 228 W. Va. at 91, 717 S.E.2d at 875, syl. pt. 6. Moreover, this Court has stated that [i]n determining the appropriate permanent out-of-home placement of a child under [West Virginia Code § 49-4-604(b)(6)], 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 [cannot] 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 its March 16, 2021, order is hereby affirmed. 7 Affirmed. ISSUED: October 1, 2021 CONCURRED IN BY: Chief Justice Evan H. Jenkins Justice Elizabeth D. Walker Justice Tim Armstead Justice John A. Hutchison Justice William R. Wooton 8