

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

In Re: K.S. :

No. 11-0411 (Barbour County 07-JA-4)

FILED

**October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Barbour County, wherein the Petitioner Father's parental rights to his child, K.S, were terminated. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition.¹ The guardian ad litem has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR") has also filed a response.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. The case is mature for consideration. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Petitioner Father challenges the circuit court's order terminating his parental rights to his child, K.S. He asserts two assignments of error. First, he argues that the circuit court erred in terminating his parental rights while he was incarcerated. Second, he asserts that the circuit court erred in failing to hold a meaningful dispositional hearing because the Petitioner Father was unable to participate through no fault of his own. Accordingly, the Petitioner Father requests that this Court overturn the circuit court's order of termination.

As reflected in its final order terminating the Petitioner Father's parental rights, the circuit court considered the Petitioner Father's criminal history, his relationship with his child, and his present use of drugs and alcohol. In its final order, the circuit court made findings that not only was the Petitioner Father incarcerated, but also that his lengthy criminal history included drug charges and sexual offense charges resulting in repeated incarcerations; he has had little, if any, direct contact with the child since he and the child's

¹ The Court notes that the circuit court case files also include transcripts of all proceedings through November 18, 2008, i.e., the dispositional hearing of the child's mother.

mother divorced in 2001;² and that although he was ordered to pay child support, he never has. The circuit court further found that the Petitioner Father continued to use illegal drugs and alcohol, continued to be involved in criminal activities resulting in repeated incarcerations, and that, overall, his behavior worsened throughout the years. Moreover, the court found that during brief periods in which the Petitioner Father was not incarcerated, he still did not involve himself in the child's life. In reviewing all of these factors, the circuit court found that the Petitioner Father effectively abandoned the child, constituting aggravated circumstances. Accordingly, the circuit court concluded that based on these findings, there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future and that the Petitioner Father "has demonstrated an inadequate capacity to solve the problems of abuse or neglect with services on his own or with help." The court further concluded that the welfare of the child required the termination of the Petitioner Father's parental rights.

By the Order Denying Request for Change of Appointed Counsel, entered on August 24, 2010, the record reflects that at the July 26, 2010, dispositional hearing, the circuit court made attempts to contact the Petitioner Father to participate by telephone. The Petitioner Father was currently incarcerated in federal prison as a result of violating his probation because he had been caught using heroin. On the morning of the hearing, the circuit court's law clerk attempted four times to contact the counselor who was to make arrangements for the Petitioner Father to participate by telephone. No answer was received. The circuit court itself attempted to contact the counselor from the bench. This attempt also received no answer. The Petitioner Father's attorney subsequently attempted to call the counselor and also other members at the facility, such as the guard station. No answers were received by these attempts either. As discussed herein, the circuit court thereafter made findings and conclusions to terminate the Petitioner Father's parental rights.

"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

² This final order also reflects that this divorce was based on the Petitioner Father's cruelty towards the child's mother. The circuit court also took this history into consideration in terminating the Petitioner Father's parental rights.

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 the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code* [§] 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code* [§] 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Petitioner Father first argues that the circuit court erred in terminating his parental rights to K.S. while he was incarcerated. In support, he cites the case of *In re Brian James D.*, 209 W.Va. 537, 550 S.E.2d 73 (2001), arguing that "incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights." *Id.* at 540, 550 S.E.2d at 76. In support, the Petitioner Father asserts that when he was not incarcerated, his contact with his child was limited due to home confinement or restrictions on his travel by his parole officer. In response, the child's guardian ad litem and the DHHR both support the circuit court's order of termination, arguing that the circuit court did not base its decision to terminate the Petitioner Father's parental rights only on his incarceration. Also in *In re Brian James D.*, this Court further acknowledged that "an individual's incarceration may be considered along with other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect." *Id.* at 540-41, 550 S.E.2d at 77-78.³ *See also In re Emily*, 208 W.Va. 325, 342, 540 S.E.2d 542, 559 (2000). The record here shows that the circuit court's findings were not only based on the Petitioner Father's incarceration. In determining whether he would be able to remedy the conditions of abuse and neglect, the circuit court had considered other areas of the Petitioner Father's life and relationship with his child.

The Petitioner Father also argues that the circuit court erred in failing to conduct a meaningful dispositional hearing because the Petitioner Father was not present through no fault of his own. In support, the Petitioner Father argues that the Court stated in *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999), that parties to an abuse and neglect proceeding must be given meaningful opportunity to introduce evidence

³ In *In re Brian James D.*, this Court found that the record showed that the allegations of abuse and neglect against the appellant stemmed solely from his arrest and that his parental rights were terminated for this reason alone. *In re Brian James D.*, 209 W.Va. 537, 541, 550 S.E.2d 73, 77 (2001). Due to these circumstances, this Court reversed and remanded the circuit court's termination of the appellant's parental rights. *Id.* at 542, 550 S.E.2d at 78. These are not the circumstances in the instant case.

in support of their respective positions before the court makes its final decision. A review of the record here supports that the circuit court, along with the Petitioner Father's counsel, made several attempts to contact the Petitioner Father to participate at the hearing by telephone. Additionally, as raised by the DHHR in its summary response and supported by the court's findings, the Petitioner Father had been released from prison and had he not violated his probation, he could have been present in person at the hearing. As such, the Petitioner Father's own actions led to his incarceration and absence at the dispositional hearing. Nevertheless, although the Petitioner Father was unable to attend in person, he was represented by his counsel. The Petitioner Father's counsel represented the Petitioner Father's position and was provided the opportunity to introduce substantive evidence. Given the circumstances, it was in the child's best interest for the circuit court to continue with the hearing to reach a result and establish permanency for the child.⁴

For the foregoing reasons, this Court finds no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: October 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

⁴ A review of *In the Matter of George Glen B., Jr.* shows that the circumstances in that case elicited this Court to reverse and remand the circuit court's order because mandated hearings, e.g., a preliminary hearing, had not occurred and evidence was not taken before the circuit court made its findings and conclusions. *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 444, 518 S.E.2d 863, 872 (1999). Such were not the circumstances in the instant matter.