

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

In Re: K.T. and D.T.:

No. 11-0905 (Mercer County 09-JA-175 & 10-JA-145)

FILED

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father appeals the termination of his parental rights to his children K.T. and D.T. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response concurring in the guardian ad litem's 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.

“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.” Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).” Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

The petition in this matter was filed due to drug abuse by the mother, after K.T. was born drug addicted and had to spend extensive time in the hospital. The petition notes that the mother has a prior involuntary termination of parental rights due to drug abuse. After stipulating to neglect, the parents in this matter were granted an improvement period.

However, they failed to comply with services and showed little to no improvement. The day before D.T. was born, the parents' home was raided due to suspicion of drug activity, and the mother was found under the influence. Thereafter, D.T. was born with cocaine in her system. The circuit court terminated Petitioner Father's parental rights, finding that he was addicted to drugs and that there was no reasonable likelihood that the conditions of neglect could be substantially corrected. The circuit court also noted that Petitioner Father has a history of frequent incarcerations, and was incarcerated at the time of the dispositional hearing.

On appeal, Petitioner Father argues that the circuit court judge erred in failing to recuse himself from the case when he had previously prosecuted Petitioner Father in an unrelated criminal matter. Petitioner Father does not present any evidence to substantiate this allegation that the circuit judge was actually the attorney responsible for prosecuting him in the 1990s, but only indicates that the judge worked in the prosecutor's office during that period. However, as the guardian ad litem points out, Petitioner Father never moved to recuse the judge in the underlying case, nor did he mention any potential conflict. This Court has stated that "[o]ur general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Barney v. Auvil*, 195 W.Va. 733, 741, 466 S.E.2d 801, 809 (1995). Upon a review of the record, it appears that Petitioner Father was given fair and impartial hearings. This Court finds no error in the circuit court judge's failure to *sua sponte* recuse himself.

With regard to the termination of Petitioner Father's parental rights, this Court has held that "[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49-6-5 (1977) will be employed; however, 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, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Finally, there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when a parent is addicted to drugs to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning. W. Va. Code §49-6-5(b)(1). Petitioner Father continued to abuse drugs and showed little to no improvement, even with extensive services. He was incarcerated at the time of the dispositional hearing. The children are currently both under the age of three, and one has never resided with either parent. This Court finds no error in the termination of

Petitioner Father's parental rights.

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

Affirmed.

ISSUED: November 15, 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