

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

FILED

June 27, 2011

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

In Re: A.L., C.S., Jr., and A.S.

No. 11-0326 (Barbour County Nos. 10-JA-8, 10-JA-9, 10-JA-10)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Barbour County, wherein the Petitioner Mother's parental rights to her child, A.L., were terminated, along with her custodial rights to her two step-children, C.S., Jr., and A.S. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition. The guardian ad litem has filed her response on behalf of the children. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on February 28, 2011. 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. 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.” Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Petitioner challenges the circuit court's order terminating her parental and custodial rights, alleging two assignments of error. Petitioner argues that the circuit court erred in denying her motions for post-adjudicatory and dispositional improvement periods, and contends that she established

by clear and convincing evidence that she would fully comply with the terms thereof. However, the circuit court found that petitioner's actions in this matter constituted not only chronic abuse and neglect, but also amounted to torture. This matter was initiated when a neighbor filmed Respondent Father smothering one child's mouth and nose with his hand while cussing at the child, threatening to hit him, and also drawing back his fist. The circuit court found that such actions in front of a visitor are indicative of this conduct being the parents' standard behavior, and that petitioner knew or should have know of Respondent Father's actions. Further, petitioner herself engaged in abuse. One of the children who has issues with soiling himself, likely due to prior abuse at the hands of his biological mother from whom he was removed, was forced by petitioner to sit in a bathtub in his soiled clothes for long periods in the dark. This is in spite of West Virginia Department of Health and Human Resources ("DHHR") services instructing petitioner to be more supportive of these problems and to refrain from punishing him. Further, petitioner further participated in locking the children in their rooms and using a hidden walkie-talkie to convince the children that a monster was in the room. These actions were corroborated through in camera hearings with the children. For these reasons and due to the nature of the abuse, the circuit court denied petitioner's motions for improvement periods and found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect.

West Virginia Code § 49-6-5(b)(5) states that "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" means that "the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help" and goes on to state that "[s]uch conditions shall be considered to exist" when "[t]he abusing parent or parents have repeatedly or seriously injured the child physically or emotionally... and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child." In such an instance, West Virginia Code § 49-6-5(a)(6) grants circuit courts the authority to terminate the parental rights of the abusing parent. Further, this Court has previously held that "...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." Syl. Pt. 1, in part, *In re: R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Lastly, the DHHR is not required to make reasonable efforts to achieve reunification in situations where the children have been subjected to aggravated circumstances including torture and chronic abuse pursuant to West Virginia Code § 49-6-5(a)(7)(A). Due to the character and chronic nature of the abuse and neglect at issue, the circuit court's decision to deny petitioner an improvement period was not clearly erroneous.

Petitioner next alleges that she was denied a fair and impartial tribunal because the circuit court made a specific finding at the preliminary hearing that the abuse at issue was “very chilling,” “very disturbing,” and a cause for great alarm, thereby creating the appearance of bias against her. However, it is clear from the record that the circuit court was merely undertaking its duty to determine if the abuse and/or neglect alleged was supported by probable cause, and further whether aggravated circumstances existed that would relieve the DHHR from making reasonable efforts to preserve the family unit. Further, petitioner cites the circuit court’s findings at adjudication that no services available can correct torture, a mean spirit, or a malignant heart. A review of the record indicates that the circuit court was engaging in its assessment as to the reasonable likelihood that the conditions of neglect or abuse could be substantially corrected. Petitioner was provided a full opportunity to be heard, and the circuit court’s specific findings based on the evidence do not demonstrate bias.

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

Affirmed.

ISSUED: June 27, 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