

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

In re: S.S. and K.S.

No. 16-0726 (Kanawha County 14-JA-288 & 15-JA-31)

FILED

November 21, 2016

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

MEMORANDUM DECISION

Petitioner Father M.S., by counsel Edward L. Bullman, appeals the Circuit Court of Kanawha County’s June 24, 2016, order terminating his parental rights to eight-year-old S.S. and one-year-old K.S.¹ The West Virginia Department of Health and Human Resources (“DHHR”), by counsel S.L. Evans, filed its response in support of the circuit court’s order. The guardian ad litem (“guardian”), Jennifer R. Victor, filed a response on behalf of the children also in support of the circuit court’s order. On appeal, petitioner alleges that the circuit court erred in relying on economic conditions in reaching disposition, terminating his parental rights, and denying post-termination visitation.²

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.

In September of 2014, the DHHR filed an abuse and neglect petition that alleged petitioner and the mother engaged in domestic violence in the home. Additionally, the DHHR alleged that S.S., then six years old, told a school counselor that petitioner digitally penetrated

¹Consistent 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, the Court notes that the proceedings below concerned an additional child, T.S., who is now deceased.

²We note that West Virginia Code §§ 49-1-1 through 49-11-10 were repealed and recodified during the 2015 Regular Session of the West Virginia Legislature. The new enactment, West Virginia Code §§ 49-1-101 through 49-7-304, has minor stylistic changes and became effective on May 20, 2015. In this memorandum decision, we apply the statutes as they existed during the pendency of the proceedings below. It is important to note, however, that the abuse and neglect statutes underwent minor stylistic revisions and the applicable changes have no impact on the Court’s decision herein.

her. During a later interview, the child disclosed that petitioner had done so on multiple occasions.³ As such, the DHHR removed the child from the home under a protection plan.⁴ Despite being advised of the child's disclosure, the mother continued her relationship with petitioner. Accordingly, the DHHR alleged that petitioner and the mother failed to provide the child with necessary food, clothing, shelter, supervision, medical care, or education, and further alleged that they abused the child by knowingly or intentionally inflicting, or attempting to inflict, physical, mental, or emotional injury. Petitioner later waived his right to a preliminary hearing. The circuit court additionally ordered that petitioner have no contact with the mother.

During an adjudicatory hearing in November of 2014, petitioner stipulated to domestic violence and drug use. As such, the circuit court found petitioner to be an abusing parent. Petitioner then moved for a post-adjudicatory improvement period. The circuit court granted petitioner's motion and ordered petitioner to comply with services that included domestic violence counseling, adult life skills and parenting education, supervised visitation, random drug screens, family therapy, and psychiatric treatment if recommended. Around this time, petitioner tested positive for multiple drugs on two occasions.

The mother gave birth to K.S. in February of 2015. The DHHR filed an amended petition to include this child that same month. However, the circuit court allowed the parents to keep K.S. in their care, although it warned them that the child would be removed upon a positive drug screen. Shortly thereafter, the circuit court required petitioner to attend outpatient drug treatment.

The DHHR filed a second amended petition in May of 2015 that alleged that the parents continued to abuse drugs and failed to cooperate with drug screens. According to the petition, both parents tested positive for opiates and K.S. tested positive for opiates at birth. The circuit court held an adjudicatory hearing on the amended petitions in July of 2015, during which it admitted into evidence positive drug screens for morphine from each parent. The circuit court found that both parents had substance abuse problems that negatively affected their ability to parent the children and caused them to abuse and neglect K.S.

In October of 2015, the circuit court held a review hearing and admitted into evidence additional drug screens from both parents that were positive for morphine. Despite this evidence, the circuit court granted the parents extensions to their improvement periods. The parents also sought assistance obtaining suitable housing, as neither parent has stable housing and had recently spent time in a homeless shelter despite employment. The circuit court ordered the DHHR to provide the parents with first month's rent and security deposits.

In January of 2016, the DHHR filed a third amended complaint in regard to newly born T.S. The following month, the DHHR filed a fourth amended petition in regard to this child. According to the DHHR, the child was born prematurely on January 9, 2016. The infant tested positive for morphine upon birth and also suffered from birth defects, some of which may have

³The allegations of sexual abuse were never substantiated and neither parent was adjudicated on any issue of sexual abuse.

⁴Neither K.S. nor T.S. was born at this time.

been due to a genetic defect and not solely due to a lack of prenatal care and drug abuse. T.S. eventually passed away in February of 2016. That same month, the circuit court held a preliminary hearing on the fourth amended complaint, during which it found that the mother failed to obtain prenatal care despite knowledge of her pregnancy. The circuit court further found that petitioner knew the mother was pregnant and that she failed to obtain appropriate prenatal care. The circuit court also found that the parents were presently homeless.

In March and April of 2016, the circuit court held dispositional hearings, during which it admitted additional drug screens from both parents that were positive for morphine and opiates. Ultimately, the circuit court found that petitioner abused controlled substances to the extent that his parenting skills were seriously impaired. As such, the circuit court found there was no reasonable likelihood petitioner could substantially correct the conditions of abuse and neglect and that termination of his parental rights was necessary for the children's welfare. By order entered on June 24, 2016, the circuit court terminated petitioner's parental rights to the children. It is from the dispositional order that petitioner appeals.

The Court has previously established the following standard of review:

“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).

To begin, the Court finds no merit to petitioner's argument that the circuit court terminated his parental rights upon economic conditions. Petitioner is correct that West Virginia Code § 49-1-201 defines a neglected child, in part, as one

[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, *when that refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian*[.]

(emphasis added). However, petitioner's argument on appeal ignores the fact that the circuit court substantially based termination upon his substance abuse issues that are wholly unrelated to

any alleged lack of financial means. While petitioner argues that there was no evidence that his substance abuse affected his ability to parent, the Court disagrees. On the contrary, petitioner specifically stipulated to the fact that his substance abuse affected his ability to properly parent the children. Moreover, the circuit court specifically found that petitioner had “a substance abuse problem that negatively affected [his] parenting abilities and caused [him] to abuse and neglect [the] children.” As such, it is clear that the circuit court based termination, in part, upon allegations entirely unrelated to any alleged lack of financial means. Additionally, to the extent that the circuit court did consider the fact that petitioner never obtained suitable housing, it further found that his failure to obtain such housing occurred “despite the DHHR’s offered financial assistance.” Accordingly, it is clear that the circuit court specifically considered the failure to obtain housing only inasmuch as the DHHR offered to provide petitioner the financial means to obtain such housing. As such, the Court finds no merit to petitioner’s argument that the circuit court erroneously based termination of his parental rights upon an alleged lack of financial means.

Next, the Court finds no error in the circuit court’s termination of petitioner’s parental rights. In support of this argument, petitioner alleges that he remedied the underlying domestic violence issues that necessitated the children’s initial removal from the home. Again, the Court finds this argument to be without merit. While it is true that domestic violence in the home formed the basis of the DHHR’s initial petition, petitioner’s argument ignores the fact that several additional issues of abuse and neglect arose throughout the proceedings, such that the DHHR filed four amended petitions to address this issues. In reaching termination of petitioner’s parental rights, the circuit court did not rely on any allegations concerning domestic violence in the home. However, several other issues of abuse and neglect persisted throughout the proceedings. Specifically, the circuit court based termination of petitioner’s parental rights upon the fact that petitioner “continued to abuse drugs throughout the entirety of this case[.]” in addition to the fact that he also “did not cooperate with . . . random drug screens.” Finally, the circuit court found that petitioner “offered inconsistent efforts and interests” during the proceedings and failed to take responsibility for his actions.

Ultimately, the circuit court found that petitioner abused or was addicted to controlled substances to the extent that his parenting skills were seriously impaired, in addition to the fact that he failed to respond to or follow through with the recommended or appropriate treatment that would have improved his capacity for proper parenting. Pursuant to West Virginia Code §§ 49-4-604(c)(1) and (3), these situations constitute circumstances in which there is no reasonable likelihood the conditions of abuse and neglect can be substantially corrected, as the circuit court found below. The circuit court also found that termination of petitioner’s parental rights was necessary for the children’s welfare. Pursuant to West Virginia Code § 49-6-604(b)(6), circuit courts are directed to terminate a parent’s parental rights upon such findings. Accordingly, we find no error in the circuit court’s termination of petitioner’s parental rights.

Finally, the Court finds no error in the circuit court denying petitioner post-termination visitation with the children. We have previously held as follows:

“When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation

or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 11, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). Upon our review, it is clear that the petitioner failed to establish a close emotional bond with either child. Specifically, the evidence shows that K.S. was removed from petitioner's custody as an infant. Moreover, at one point during the proceedings below, S.S. stated that she feared petitioner and did not want to return to his home. As such, it is clear that continued contact with petitioner would not be in the children's best interests, and we find no error in the circuit court denying post-termination visitation.

For the foregoing reasons, we find no error in the circuit court's June 24, 2016, order, and we hereby affirm the same.

Affirmed.

ISSUED: November 21, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Allen H. Loughry II