

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

FILED

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

In Re: S.H., D.H., G.H. III, and B.H. :

No. 11-0499

(Marion County 05-JA-52, 53, 54, 55, & 06-JA-53, 54, 55, 56)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Marion County, wherein the Petitioner Mother's parental rights to her children, S.H., D.H., G.H. III, and B.H., had previously been terminated and the circuit court dismissed her subsequent motion to vacate this termination. The appeal was timely perfected by counsel, with a reproduction of the entire circuit court record accompanying the petition. The guardian ad litem filed a response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR") also filed a response. The Petitioner Mother submitted a reply to these responses.

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. 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 Mother challenges the circuit court's order dismissing her motion to vacate her termination. In her petition, she raises four assignments of error. Among her four assignments of error, her primary argument is that the circuit court erred in concluding that the Petitioner Mother lacks standing to pursue modification of disposition under *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007). Petitioner Mother argues that the circuit court failed to consider the recognition in *In re Cesar L.* that while a person whose parental rights were involuntarily terminated generally lacks standing as a "parent" to pursue a modification of disposition, egregious circumstances might justify reinstating an individual's parental rights.

The history behind the abuse and neglect proceedings of this case began in 2005. In August 2005, the Petitioner Mother was indicted of four counts of computer fraud and one count of conspiracy to commit a felony. The circuit court did not accept a guilty plea from her and subsequently, the circuit court returned the Petitioner Mother to Lakin Correctional Center for Women to await trial. During this time at Lakin, the children's father called the Petitioner Mother, confessing that he had sexually abused their two daughters. Subsequently,

an abuse and neglect petition based on allegations of the father's sexual abuse was filed in October 2005. After learning of this abuse, the Petitioner Mother entered an *Alford* guilty plea in November 2005 in hopes of returning home to her children. The circuit court accepted her plea and placed her on home confinement in lieu of serving her sentences in prison. At the adjudicatory hearing of the October 2005 petition, the circuit court granted the Petitioner Mother a post-adjudicatory improvement period so that she could participate in services. The circuit court terminated the parental rights of the children's father in April 2007.

In April 2006, the Petitioner Mother was divorced from the children's father. From this divorce, she gained full-time physical custody of the children and DHHR maintained legal custody of the children. In August 2006, the Petitioner Mother's Child Protective Services ("CPS") worker Laura Murray received notification from the Petitioner Mother's home confinement officer that he had filed a petition to revoke her home confinement. This petition was based on allegations that the Petitioner Mother left the state without permission, which the Petitioner Mother denied. Upon visiting the Petitioner Mother's apartment, Ms. Murray learned that the Petitioner Mother had left for Florida with her children. Another abuse and neglect petition was filed in August 2006, based on the Petitioner Mother's decision to remove her children from West Virginia. At the hearing on the motion to revoke the Petitioner Mother's home confinement, the circuit court decided to continue the Petitioner Mother on home confinement, but on a twenty-four-hour lockdown. At the adjudicatory hearing of the August 2006 petition, the circuit court granted the Petitioner Mother a six-month post-adjudicatory improvement period.

In January 2007, the circuit court heard another motion to revoke the Petitioner Mother's home confinement. This motion was based on the Petitioner Mother leaving her home to clean a shop she planned to open. She maintained that she received permission to do so, whereas her home confinement officer maintained otherwise. Consequently, the circuit court reinstated the Petitioner Mother's underlying sentence in prison. In February 2007, the circuit court granted the Petitioner Mother's motion for reconsideration of this sentence and instead of serving more than forty years, the circuit court ordered that she serve eleven to fifteen years at the North Central Regional Jail.

After the June 1, 2007, dispositional hearing, the circuit court terminated the Petitioner Mother's parental rights to her four children by an order entered in October 2007. The Petitioner Mother petitioned for appeal of this termination to this Court in February 2008, which this Court refused in March 2008. In August 2008, the Petitioner Mother filed a habeas petition with the circuit court. After a hearing on this petition in February 2009, the circuit court granted the Petitioner Mother habeas relief by an order entered in July 2009. Consequently, the Petitioner Mother was released from incarceration. In June 2010, the

Petitioner Mother filed a Motion and Memorandum of Law to Vacate Termination Order, which the circuit court denied by an order entered in November 2010.

In its order dismissing the Petitioner Mother's motion to vacate her termination, the circuit court concluded that the Petitioner Mother lacked standing to make this motion pursuant to Syllabus Point 6 of *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007), in which this Court stated, "A person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a 'parent,' pursuant to W.Va. Code § 49-6-6 (1977) (Repl.Vol.2004), to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated." Inclusive in this order, the circuit court made findings that the Petitioner Mother had her parental rights terminated to the subject children in October 2007; that at this termination, the Petitioner Mother had a criminal conviction, which was later overturned by writ of habeas corpus; and that in the time in between her termination and the overturning of her conviction, two of her four children were adopted. However, the circuit court's prior dismissal order as to D.H. and G.H. III reflects their placement is a legal guardianship, not adoption.

In her petition for appeal of the court's order dismissing her motion to vacate termination, the Petitioner Mother primarily argues that the circuit court erred in concluding that the Petitioner Mother does not have standing to move for modification of disposition because *In re Cesar L.* provides that egregious circumstances can justify reinstating a person's parental rights. In the guardian ad litem's response to the Petitioner Mother's petition for appeal, the guardian ad litem submits that after the petitioner's petition for appeal was filed, the guardian ad litem made a motion to the circuit court to explore the possibility of reunification, which the circuit court granted. The guardian ad litem also submits in her response that therapeutic visitation is appropriate.

The Petitioner Mother asserts that the facts of her case rise to the level of egregiousness recognized in *In re Cesar L.* The Court concludes that *In re Cesar L.* supports the circuit court's decision to dismiss and, given the circumstances, it is not necessary to reach the issue of egregious circumstances in this case. In light of the guardian ad litem's motion to explore the possibility of reunification that was granted by the circuit court, the merits of the parties' arguments for any modification of disposition will be heard by the circuit court. The Court makes no determination as to the merits of these issues.

For the foregoing reasons, this Court affirms the decision of the circuit court to dismiss the Petitioner Mother's motion to vacate her termination.

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