STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.H.:

No. 11-0528 (Mingo County No. 11-JA-1)

FILED
September 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

In this action, Petitioner Father appeals the termination of his parental rights to A.H. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her response on behalf of the child. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

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).

This petition was filed after A.H., then 2 months old, suffered a skull fracture. Petitioner Father continuously claimed no knowledge of how the injury occurred, while mother gave varying stories, including that Petitioner Father had pushed her down while she was holding A.H., that mother had dropped the child while attending to the needs of a different child, and that mother had slipped on a porch and fallen while holding A.H. A

domestic altercation had occurred, at which time the police were called, and mother told the officers that Petitioner Father had pushed her down while she was holding A.H. The hospital found evidence of a prior skull fracture as well as the current injury. Petitioner Father's stepdaughter told caseworkers that Petitioner Father and mother often used drugs and engaged in domestic violence in the home, and the night of A.H.'s injury, both parents were under the influence of drugs, and Petitioner Father had pushed mother while she was holding A.H., causing both to fall and A.H.'s head to hit the floor. Petitioner Father was adjudicated as a neglecting parent. Although he cooperated in drug screens, testing negative every time, and underwent a psychiatric evaluation, the circuit court found that due to the severe injuries of A.H., and due to the significant domestic violence between Petitioner Father and mother, the parents "are not likely to change." The circuit court terminated Petitioner Father's parental rights and denied post-termination visitation.

On appeal, Petitioner Father argues that the circuit court erred in denying Petitioner Father an improvement period when he demonstrated by clear and convincing evidence that he was likely to fully participate in an improvement period. The circuit court has the discretion to refuse to grant an improvement period when no improvement is likely. This Court stated that "...in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense." *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). In this case, the circuit court noted this Court's statement that "[p]arental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993). Throughout the proceedings, Petitioner Father maintained that he had no knowledge as to how his infant daughter suffered not one but two skull fractures, and maintained that there was no domestic violence in the home, although his wife and his stepdaughter indicated that there was. Furthermore, Mother at one time stated that the second skull fracture was caused by Petitioner Father pushing her down while A.H. was in her arms, causing A.H. to strike her head. The stepdaughter corroborates this story. Although Petitioner Father cooperated with the DHHR, it is clear that he never acknowledged the abuse and neglect in the home and therefore there was no reasonable likelihood that the conditions of neglect or abuse would be substantially corrected. Both the guardian ad litem and the DHHR argue that termination of Petitioner Father's parental rights without an improvement period was proper.

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights without an improvement period, and the circuit court's order is hereby affirmed.

Affirmed.

ISSUED: September 13, 2011

CONCURRED IN BY:

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

DISSENTING:

Justice Menis E. Ketchum