

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

In Re: D.H.:

No. 11-0560 (Hardy County No. 09-JA-5)

FILED

September 13, 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 child D.H. 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 child. The Department of Health and Human Resources ("DHHR") has filed its 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. 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).

The petition in this matter was filed after three children were found in deplorable conditions and were removed from the home. Petitioner Father is the father of one of the children, D.H., who was approximately 3 weeks old upon her removal. Less than a month before D.H.'s birth, Petitioner Father was convicted of fraudulently obtaining welfare benefits and placed on probation after receiving a suspended sentence. The abuse and neglect petition was filed, and approximately three months later Petitioner Father was incarcerated for violations of his probation. Petitioner Father was then incarcerated

throughout the remaining proceedings. To date, he has visited D.H. on no more than three occasions and she has never resided with him. The mother stipulated to the allegations in the petition, and was given an improvement period. She continued to comply with the improvement period, and was granted an extension. However, in December 2010, she chose to voluntarily relinquish her parental rights. DHHR then moved to amend its petition to add specific allegations of abandonment against Petitioner Father, as he was still incarcerated, and had never provided emotional or financial support to D.H. Petitioner Father was adjudicated as neglectful due to the abandonment, and his parental rights were subsequently terminated. At the time of termination, D.H. had been in foster care for twenty months. The circuit court found that Petitioner Father is presently unwilling or unable to provide for D.H.'s needs, as he has only seen her three times in her life, has been incarcerated for most of the child's life, has failed to provide financial or emotional support, and the child is in need of permanency. The court found that "[t]he child cannot wait for him under these specific set of circumstances." Finally, there is no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future and the child needs continuity in care and caretakers. Adoption is found to be in the best interest of the child. Both the DHHR and the guardian ad litem argue in favor of termination in the best interest of the child.

On appeal, Petitioner Father first argues that the circuit court erred in ruling that a conviction on a criminal offense and subsequent incarceration constitutes abandonment in an abuse and neglect case. Pursuant to the relevant code provision:

(10)(A) "Neglected child" means a child:

(i) Whose 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 such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

(ii) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian...

W.Va. Code § 49-1-3(10)(A)(i) and (ii). Although Petitioner Father argues that his incarceration was not "willful abandonment," it is nevertheless clear that during his incarceration and even prior to his incarceration, Petitioner Father was not providing D.H. with food, clothing, shelter, medical care, education or supervision. Furthermore, Petitioner Father's own criminal actions and failure to successfully comply in the terms of his probation

caused his incarceration. Thus, this Court finds no error in the circuit court's adjudication of D.H. as a neglected child due to abandonment.

Petitioner Father also argues that the circuit court erred in allowing the mother's improvement period to exceed statutory limits and then in allowing DHHR to use this as grounds for neglect. Petitioner Father states that D.H.'s stay in foster care only exceeded the prescribed fifteen month period because the circuit court erroneously allowed extensions to the mother's improvement period, and then used the fact that the child was in foster care for said period as a reason to terminate Petitioner Father's parental rights. Pursuant to West Virginia Code § 49-6-5b:

(a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:

(1) If a child has been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect or the date which is sixty days after the child is removed from the home;

In the present case, when the mother relinquished her rights, D.H. had been in foster care for over fifteen months. Thus, upon moving for termination, the DHHR argued that the child had been in foster care longer than the statutory time period. The record shows that the mother was complying with her improvement period and was working toward her goals. This Court also notes that Petitioner Father was actually incarcerated for longer than the fifteen month time period and therefore, even if the mother's improvement period were not extended, Petitioner Father could not have sought custody and the child would still have been in foster care longer than the statutory limits. This Court finds no error in allowing the mother to have an extended improvement period under the facts of this case.

Finally, Petitioner Father argues that the circuit court failed to follow the test in *In re: Cecil T.*, No. 35659, 2011 WL 864950 (W.Va. Mar. 10, 2011), as no factors other than Petitioner Father's incarceration were raised at the disposition hearing. *In re: Cecil T.* states in Syllabus Point 3:

When no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future,

the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

No. 35659, 2011 WL 864950 (W.Va. Mar. 10, 2011). *In re: Cecil T.* also recognized that “this Court has never held that incarceration can not be the sole basis for terminating parental rights.” *Id.* It is clear that the circuit court considered that the child had never resided with her father, had spent all but three weeks of her life in foster care, and had no bond with Petitioner Father. Importantly, Petitioner Father was still incarcerated at the time of the disposition, and even if he had been granted an improvement period, it could not begin until he was released. The circuit court specifically noted D.H.’s need for permanency. This Court finds that the circuit court did not violate the principles of *In re: Cecil T.* in this case.

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: 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