

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

In Re: R.B.

No. 11-0608 (Cabell County No. 09-JA-95)

FILED

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Cabell County, wherein the Petitioner Great-Aunt's custodial and guardianship rights to the child, R.B., were terminated. The appeal was timely perfected by counsel, with a portion of the record from the circuit court accompanying the petition. The guardian ad litem has filed his response on behalf of the child, R.B..

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 April 11, 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 custodial and guardianship rights, alleging two assignments of error. Petitioner argues that the West Virginia Department of Health and Human Resources ("DHHR") failed to make reasonable efforts to achieve reunification. Specifically, she alleges that the DHHR did not comply with the requirements of West

Virginia Code § 49-6D-3, which states that “[t]he family case plan is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems.” She further argues that the record shows the DHHR was struggling to find services that specifically set forth a “listing of specific, measurable, realistic goals to be achieved,” as required by West Virginia Code § 49-6D-3(a)(1). Petitioner admits, however, that she did receive services from the DHHR, and the record demonstrates that the subject child’s complex medical needs created difficulty in establishing specific services to achieve reunification. The circuit court found that the child at issue is severely mentally challenged, suffers from cerebral palsy and seizure disorders, cannot use the bathroom on his own, has limited range of motion, and requires frequent breathing treatments daily. These numerous medical problems are most likely going to continue to worsen as he ages. Further, this matter was initiated following the child’s admittance to the hospital because of severe malnourishment, fever, and respiratory problems leaving the child critically ill and semi-conscious. Though already using a feeding tube, the child eventually required a tracheotomy, which will likely be necessary for the rest of his life. Medical testimony below established that care of the tracheotomy will require strict adherence to sterile protocol.

Petitioner argues that her rights should not have been terminated when she had no clear path to follow to achieve reunification. The circuit court, however, found that the DHHR did comply with its duty to formulate a proper family case plan, and that a major part of that plan was that petitioner would be able to physically care for the child’s mental and physical needs. Petitioner admits that the DHHR provided her with services, including visitations with the child, in-home services with Family Options, multiple medical evaluations, and education services regarding proper care for the child. Ultimately, the circuit court found that the DHHR had made reasonable efforts to achieve reunification through the services provided, and made great efforts to locate additional services for the family. Aside from the specific services that petitioner received, the DHHR also attempted to coordinate intensive long-term services to assist petitioner in keeping the child in her home. However, it became apparent that daytime services in the home would not suffice in assisting petitioner, and no services could be provided at all hours of the day. The Court finds that the record demonstrates that the DHHR made reasonable efforts to achieve reunification in this matter and that the circuit court’s finding regarding the same is not clear error.

Petitioner next alleges that the circuit court erred in finding that there is no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future, arguing that she was actively participating in her improvement period and continuing to seek services and assistance even up through disposition. Because she was cooperating with all services provided and was willing to work with any subsequent services found, petitioner

argues that the circuit court's finding was error. However, petitioner's argument ignores the fact that she proved to be incapable of caring for the child's extreme medical needs throughout the proceedings below, even causing the child's condition to deteriorate to the point of hospitalization after visitations because of her inability to properly execute the education services she had received. The circuit court found that the petitioner's mishandling of the child put him in significant mental and physical danger, that petitioner and her ex-husband often bickered during visitation, and that the child showed extreme agitation during these visits. Further, petitioner herself was hospitalized on the same day as the child's hospitalization that gave rise to these proceedings, due to her own respiratory problems and possible drug overdose. The circuit court found that petitioner's medical records showed she had been hospitalized eleven times in a five year period for respiratory failure requiring intubation and mechanical ventilation, with at least five of these admissions being attributed to drug overdose. Further, Respondent Ronald R., petitioner's ex-husband who also assists in caring for the child, is physically ill and suffers from cancer so severe that he has been referred for Hospice care and receives dialysis three times weekly due to his failing kidneys. The circuit court found that, "due to factors which [petitioner and Respondent Ronald R.] cannot control, such as their health and age, [petitioner and Respondent Ronald R.] must take measures to care for themselves and allow someone else to take over caring for the minor child who has such demanding special needs."

West Virginia Code § 49-6-5(b) 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." 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). The circuit court found that petitioner undoubtedly loved the child and had admirably cared for him for twelve years. However, taking into account the physical conditions of the child, the petitioner, and Respondent Ronald R., the circuit court could not see how, even with additional assistance or possible care givers, petitioner could care for the child and keep him in good health. The Court finds no error in the circuit court's finding that the conditions of abuse and neglect could not be substantially corrected in the near future.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of petitioner's custodial and guardianship 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 Menis E. Ketchum
Justice Thomas E. McHugh