

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

In Re: R.M.

No. 11-0635 (Ohio County 10-CJA-21)

FILED

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Ohio County, wherein the Petitioner Father's parental rights to his child, R.M., were terminated. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court 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.

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 termination of his parental rights, arguing that it was error to deny him a post-adjudicatory improvement period because he was fully willing to cooperate despite his incarceration, and further that the termination itself was error because it was based solely on his incarceration. However, a review of the record below shows that petitioner did not meet his burden in establishing that he would fully participate

in an improvement period, and further that termination was based upon a number of factors other than the length of petitioner's incarceration.

Petitioner was incarcerated less than a month after the preliminary hearing in the instant abuse and neglect matter, following his entry of a guilty plea to two felony counts of uttering and one felony count of forgery. Petitioner was sentenced to three terms of one to ten years of incarceration to run consecutively, though the sentence imposed for one count of uttering was suspended in lieu of four years of supervised probation. After his incarceration, petitioner moved for a post-adjudicatory improvement period, and testified at the hearing for this motion that he would fully participate in any improvement period granted. In support of this assertion, petitioner testified that, since his incarceration, he had undergone an anger management class, an "Inside Out Dad" program, and also testified as to several classes for which he had enrolled but not yet attended. Petitioner further testified that he had remained sober since his incarceration, and intends to remain so upon release. He also assured the circuit court that he would avail himself of any opportunities for programs during his sentence, and further that he could attend visitations with his daughter if she were brought to the correctional facility. He now argues that it was error for the circuit court to deny his motion for a post-adjudicatory improvement period because he could have fully participated in such improvement period even while incarcerated. A review of the record below, however, shows that petitioner failed to establish by clear and convincing evidence that he would fully participate if granted a post-adjudicatory improvement period.

The circuit court heard testimony from a DHHR representative who expressed concerns over the length of petitioner's sentence, his lack of contact with the child, and the insufficiency of programming available to petitioner. This representative also expressed concerns over the fact that petitioner has not had contact with his other biological children, which indicates he is not an active parent. Further, the extensive nature of petitioner's substance abuse issues were of concern, especially in light of the fact that petitioner has used illegal substances for over twenty-five years without ever having received treatment for this addiction. West Virginia Code § 49-6-12 does not provide a parent with a guaranteed right to an improvement period because the language therein allows a circuit court discretion in granting improvement periods. Further, that code section states that a parent must establish "by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period." W. Va. Code § 49-6-12(a)(2). Simply put, the only evidence petitioner presented to meet his burden were his own assertions that he would avail himself of any opportunity for appropriate programs. The circuit court's decision to deny petitioner a post-adjudicatory improvement period was not clearly erroneous.

Petitioner also challenges the termination of his parental rights, arguing that his incarceration was the sole factor relied upon in reaching this decision. He argues that, but

for his incarceration, he would have received an improvement period to show that he could correct the issues of abuse and neglect, and further that West Virginia law does not allow for a parent to lose his parental rights solely due to a criminal conviction. However, it is clear from the record below that the circuit court considered many factors in terminating petitioner's parental rights, including those listed above related to the denial of petitioner's motion for a post-adjudicatory improvement period. The circuit court also considered the effects in delaying the child's permanency pending petitioner's release, as well as the bond that had formed between the child and her relative placement, which includes a half-sibling. Further, this Court has recently stated that "[a]lthough we have not adopted a per se rule regarding the impact incarceration has on a termination of parental rights decision, we have likewise not said that the facts surrounding a parent's incarceration may never form the basis for terminating parental rights." *In re Cecil T.*, 2011 WL 864950 (W.Va., Mar. 10, 2011). As such, the circuit court's finding that there is no reasonable likelihood that petitioner can correct the conditions of abuse and neglect which led to the removal of the infant in this matter is proper, and supports the termination of petitioner's parental rights.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of petitioner's parental rights is hereby affirmed.

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