

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

In Re: J.M., A.M., and S.M.:

No. 11-0695 (Clay County No. 10-JA-66, 68, 69)

FILED

September 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Clay County, wherein the Petitioner Father's parental rights to his three children, J.M., A.M., and S.M., were terminated. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The guardian ad litem has filed his response on behalf of the children. The Department of Health and Human Resources (DHHR) has also submitted a 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. The case is mature for consideration. 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.

The Petitioner Father challenges the circuit court's order terminating his parental rights to his three children. He raises two assignments of error. First, he argues that the circuit court improperly considered a past abuse and neglect case from Roane County. Second, the Petitioner Father also argues that the circuit court did not have enough evidence before it to determine whether there is no reasonable likelihood that the Petitioner Father will substantially correct the conditions creating the neglect in the near future. The Petitioner Father argues that due to these two errors, the circuit court's termination was improper.

On August 7, 2010, the Petitioner Father and the subject children's stepmother, V.M., engaged in domestic violence in the subject children's presence. During this incident, the Petitioner Father stabbed and cut V.M. with a key and one of the subject children, S.M., had attempted to intervene. The CPS petition was filed shortly after this incident. Thereafter, the circuit court ordered that DHHR offer various services to the Petitioner Father, such as domestic violence counseling, parenting classes, and adult life skills classes. The circuit court ordered that the Petitioner Father comply with these services.

In its final decision of January 25, 2011, the circuit court made findings that although the Petitioner Father had received notice of the dispositional hearing, he failed to appear for the hearing;¹ that the Petitioner Father has a pattern and history of domestic violence and CPS involvement; that services had been offered to the Petitioner Father and he failed to comply with these services, make significant progress, or comply with a reasonable family case plan and the circuit court's orders; that there is no substantial likelihood that the Petitioner Father will correct the conditions of abuse or neglect; that the Petitioner Father is unwilling to correct the conditions of abuse or neglect; and that the safety and welfare of the subject children are threatened by the Petitioner Father. Accordingly, the circuit court ordered termination of the Petitioner Father's parental rights and directed that he also no longer have any direct or indirect contact with the subject children. Further, the circuit court ordered that he pay child support, in the amount as determined by the Bureau of Child Support Enforcement.

In reviewing the facts of this case and consequently, the conclusions of law which the circuit court has drawn, this Court considers: "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 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 Court has also held that "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Petitioner Father argues that the circuit court improperly considered a past abuse and neglect case from Roane County. In this argument, the Petitioner Father asserts the court erred in accepting proffers of evidence or evidence from these proceedings without first reviewing it for validity and authority. The record does not provide these documents, nor are

¹ The Petitioner Father only appeared by his counsel.

any transcripts included in the record to reflect any discussion of any Roane County cases.² A review of the record provides that the circuit court did not make findings in the Adjudicatory Order or in the Dispositional Hearing Order as to the Petitioner Father's past involvement with specific abuse and neglect proceedings. By order dated January 6, 2011, the circuit court had ordered that the Circuit Clerk of Roane County provide certified copies of any and all child abuse and/or neglect case files, as well as any and all domestic case files, concerning the parties "upon request by any attorney of record in this matter." However, the only document provided in the record subsequent to this order is the Dispositional Hearing Order, entered on January 25, 2011. No mention of the Petitioner Father's involvement in any Roane County case is discussed in this order. Consequently, it does not appear that the circuit court based its decision to terminate parental rights on what may or may not have happened with the Petitioner Father in any Roane County cases.

Next, the Petitioner Father argues that the cases of *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 172 (1999), and *In re Maranda T.*, 223 W.Va. 512, 678 S.E.2d 18 (2009), support his argument that the circuit court terminated his parental rights with insufficient evidence. He cites the Court's holding that, "[w]hen a parent's intellectual incapacity is a factor in the possible termination of parental rights, *Billy Joe M.* requires that termination of rights should only occur after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance." *In re Maranda T.*, quoting Syl. Pt. 4, *in part*, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 172 (1999). Accordingly, the Petitioner Father argues that pursuant to these cases, the circuit court should have first determined whether the Petitioner Father could adequately care for his children with intensive long-term assistance before terminating his parental rights.

In response, the children's guardian ad litem points out that unlike *In re Billy Joe M.* and *In re Maranda T.*, the circuit court here did not base its termination on the Petitioner Father's intellectual capacity. Rather, the circuit court based its termination on the Petitioner Father's failure to cooperate with DHHR in its services. A review of the circuit court's final order supports the guardian ad litem's position. As previously discussed herein, the circuit court found that the Petitioner Father failed to comply with DHHR services or make any significant progress. The circuit court further made findings that consequently, the Petitioner Father is unable to correct conditions of abuse or neglect and poses a threat to the subject children. Accordingly, the circuit court terminated the Petitioner Father's parental rights to these children. Without accounting for the Petitioner Father's intellect, the cases of *In re*

² The Notice of Appeal indicates that the Petitioner Father did not request the Court to review any transcripts of these proceedings.

Billy Joe M. and *In re Maranda T.* are inapplicable to the case at bar. The circuit court properly based its decision on sufficient evidence presented at these proceedings.

For the foregoing reasons, this Court finds no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: September 26, 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