

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

In Re: M.H.

No. 11-0751 (Mingo County 11-JA-8)

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 Mingo County, wherein the Petitioner Father's parental rights to the child, M.H., 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).” Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

Petitioner challenges the circuit court's final dispositional order, arguing that the circuit court erred in terminating his parental rights, in denying him a post-dispositional improvement period, and in denying him post-termination visitation. However, a review of the record shows that the circuit court's decision on all three of these issues was made in

accordance with the best interest of the child, was supported by the evidence presented below, and did not constitute clear error.

To begin, petitioner argues that it was error to deny him a post-dispositional improvement period. Petitioner argues that the record clearly shows that he was denied an improvement period because he is a Texas resident, and that the DHHR did not offer services when ordered. He argues that the DHHR simply relied on petitioner's home state to provide services, but delayed the start of services by failing to contact Texas in a timely manner. As a result, petitioner argues that he was not able to show compliance and improvement. The record below, however, shows that the circuit court was presented with evidence that petitioner's own lack of an address, multiple health problems, and relocation to Arkansas caused the delay in receiving services from the state of Texas. After the preliminary hearing, the petitioner was hospitalized in Arkansas, and then returned to Texas after failing to find employment. Once in Texas, petitioner had open heart surgery and was again hospitalized until approximately the end of February. Based upon these issues, the DHHR was not able to provide Texas agencies with petitioner's information in time for services to be rendered prior to disposition in March.

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, in order to receive a post-dispositional improvement period, 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(c)(2). In the matter below, the petitioner did not make an effort to visit the subject child, despite visitation being an option if he were to travel to West Virginia, which he did on at least one occasion. This Court has held that the level of interest a parent shows in visiting with a child who is out of the home is "an extremely significant factor for the circuit court to review" because "[a] parent who consistently demonstrates a desire to be with his child obviously has far more potential for being a nurturant and committed parent than one whose interest in being with his child is erratic." *In Interest of Carlita B.*, 185 W.Va. 613, 628, 408 S.E.2d 365, 380 (1991). Based upon the record provided, it is apparent that petitioner did not satisfy his clear and convincing burden in regard to his willingness to participate in a post-dispositional improvement period. Therefore, the circuit court's decision to deny petitioner the same was not clearly erroneous.

Petitioner next argues that termination was inappropriate because the evidence did not support this termination. Specifically, petitioner argues that the Respondent Mother in this matter has mental health issues and that her testimony concerning alleged domestic violence perpetrated by petitioner is unreliable. He argues that Respondent Mother's testimony concerning his alleged actions in this matter was nothing more than a self-serving attempt to justify her leaving the state of Texas in violation of her probation. Petitioner further

argues that the child's statements concerning domestic violence, substance abuse, and other issues are similarly unreliable because Respondent Mother had a six-month period with the child after she left petitioner within which to tell the child lies about the petitioner and his conduct. Because he believes that this evidence was insufficient to support termination, petitioner now argues that the circuit court erred in employing the most drastic alternative at disposition, in contradiction to this Court's holding in Syllabus Point 2 of *In re Tiffany P.*, 215 W.Va. 622, 600 S.E.2d 334 (2004).

As this Court has previously held, "in the context of abuse and neglect proceedings, the circuit court is the entity charged with weighing the credibility of witnesses and rendering findings of fact." *In re Emily*, 208 W.Va. 325, 339, 540 S.E.2d 542, 556 (2000) (citing Syl. Pt. 1, in part, *In re Travis W.*, 206 W.Va. 478, 525 S.E.2d 669 (1999)). Elaborating on the circuit court's role in these types of proceedings, the Court held that it "cannot set aside a circuit court's factual determinations unless such findings are clearly erroneous." *Id.* A review of the record shows that the circuit court was presented with testimony from Respondent Mother about the domestic violence perpetrated by petitioner. Further, evidence was presented that the child provided statements concerning petitioner's domestic violence, and the fact that petitioner discussed the transportation of illegal substances in his presence. Additionally, testimony was presented concerning both parents' serious medical neglect of the child by failing to follow through with his orthodontia treatment. The child was forced to remain in his braces without further visits to his orthodontist for adjustments and treatment, which resulted in his teeth being in a worse condition than they were prior to the braces being attached. The petitioner's serious neglect of the child's medical needs by forcing him to remain in braces that were not being adjusted for a period of one to two years has placed the child in a position in which he will now require serious medical attention to remove the braces, and will likely lose some of his teeth in the process.

The circuit court was the entity tasked with weighing the credibility of these witnesses, and the evidence supports the subsequent findings of fact. Because the findings of fact do not constitute clear error, they cannot be set aside herein. These findings of fact further support termination of parental rights as the appropriate disposition. This Court has 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." Syl. Pt. 1, in part, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). In this matter, the child at issue had already been subjected to serious medical neglect, and the circuit court found that continuation in petitioner's home was not in the child's best interest. Further, the child himself stated that he supported termination of both petitioner and Respondent Mother's parental rights so that he could be adopted. Lastly, the circuit court found that the petitioner did not have a stable living environment and could not adequately care for the child. Based upon the evidence below, including the subject child's

own desire to have petitioner's parental rights terminated, the circuit court's termination was not clear error, and constitutes the least restrictive dispositional alternative.

Lastly, petitioner argues that the circuit court erred in denying him post-termination visitation, arguing that the circuit court did not make the requisite finding that such visitation would be detrimental to the child's well being in accordance with Syllabus Point 5 of *In re Christine L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Petitioner argues that denying visitation will be detrimental to the child because of the strong bond that exists between the two.

This Court has held that "[w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). The circuit court properly applied the requisite standard, and also properly considered the child's wishes as they related to post-termination visitation. As such, the Court finds no error in the denial of post-termination visitation.

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