STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.L., M.L., III, and W.L.

No. 11-0756 (Kanawha County 10-JA-147, 148 & 149)

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 Kanawha County, wherein the Petitioner Father's parental rights to the children, B.T., M.L., III, and W.L., 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 his response on behalf of the children.

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 dispositional order, arguing that the circuit court erred in adjudicating him as an abusing parent, in adjudicating the children as neglected, and in terminating his parental rights. All of petitioner's arguments stem from the initial petition filed below, and what he deems as "manifestly inadequate evidence" of the

conditions of abuse and neglect at the time of the petition's filing. Specifically, petitioner argues that the petition filed against him below contained "boilerplate" allegations of failure to provide necessary food, clothing, supervision and housing to his children that Child Protective Services ("CPS") workers in Kanawha County routinely include in all abuse and neglect petitions. Petitioner cites to testimony from CPS workers who admitted that there was no evidence to support the inclusion of these allegations in the petition, contrary to the requirement that the State maintain the burden of proof by clear and convincing evidence that conditions of abuse and neglect existed at the time of the filing of the petition. Syl. Pt. 2, *State v. C.N.S.*, 173 W.Va. 651, 319 S.E.2d 775 (1984). Because he believes that no evidence was presented to establish by clear and convincing evidence that the conditions of abuse and neglect existed at the time of the petition's filing, petitioner argues that the circuit court's decision to terminate his parental rights should be reversed because "[a] juvenile petition which states no facts respecting the improper care or supervision of the parents and contains only conclusory statements is defective." *State v. Scritchfield*, 167 W.Va. 683, 689, 280 S.E.2d 315, 319 (1981). However, petitioner's argument ignores the facts established below, and also demonstrates his inability to comprehend how his actions in this matter endangered his children.

The petition below was filed following allegations that petitioner had sexual intercourse with, and impregnated, his eleven-year-old cousin, and it clearly states that this fact is the basis for the DHHR's belief that the children were abused and/or neglected. This Court has held that "[i]f the allegations of fact in a child neglect petition are sufficiently specific to inform the custodian of the infants of the basis upon which the petition is brought, and thus afford a reasonable opportunity to prepare a rebuttal, the child neglect petition is legally sufficient." Syl. Pt. 1, *State v. Scritchfield*, 167 W.Va. 683, 280 S.E.2d 315 (1981). Petitioner argues that there are no facts alleged in the petition with respect to his having actually abused the children named therein, but this argument only illustrates petitioner's fundamental inability to comprehend the manner in which his actions endangered his children. While it is true that the petition does not contain allegations that petitioner sexually abused his children directly, it plainly alleges that petitioner engaged in an inappropriate sexual relationship with a family member who was only eleven years old.

West Virginia Code § 49-1-3(10)(A)(I) defines a neglected child as one "[w]hose 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." Because the petition was sufficiently specific as to the factual allegations forming the basis of this abuse and neglect proceeding, and because petitioner was informed of the basis for which the petition was brought, the same is legally sufficient.

As for petitioner's allegations that adjudication and termination were improper, the record again makes clear that no error was committed. In the circuit court's order following adjudication, it was found specifically that petitioner's sexual contact with his eleven-year-old relative occurred while the named children were present in the home, and also that petitioner abused illegal substances when his children were present in the home. Again, petitioner's argument fails to acknowledge the potential harm to his children that such conduct presents. While it is true that no evidence was presented during the adjudicatory hearing of petitioner directly sexually abusing his children, it is clear that his actions constitute abuse. Petitioner's actions were so serious, in fact, that West Virginia law absolves the DHHR of its duty to offer services for reunification in such instances. West Virginia Code § 49-6-3(d)(1) states that "the department is not required to make reasonable efforts to preserve the family if the court determines... the parent has subjected the child, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse." Because petitioner engaged in the sexual abuse of a child temporarily in his custody, these actions constitute neglect of his own children due to his failure to provide them with adequate supervision.

Further, the circuit court was presented with a letter petitioner wrote to the victim of his sexual assault, which indicated that he had a continued physical and affectionate relationship with the child, and further that he views an eleven-year-old as someone with which it is appropriate to have a relationship and marry. This raised concerns that petitioner does not understand the boundaries between adults and children. In short, petitioner failed to take responsibility for his actions, leaving termination of his parental rights as the only option at disposition. This Court has held that "in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense." *W. Va. Dep't. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). Therefore, it is clear that the circuit court had sufficient evidence before it upon which to make the appropriate findings that the petitioner was an abusing parent and that the children at issue were neglected. Further, this evidence fully supports the circuit court's decision to terminate petitioner's parental rights to the children.

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