

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

In Re: J.W.:

No. 11-0772 (Harrison County 10-JA-15-1)

FILED

October 25, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Harrison County, wherein the Petitioner Mother's parental rights to J.W. were terminated. The appeal was timely perfected by counsel, with an appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed a response. The guardian ad litem for the child has filed a response. The guardian ad litem for the Petitioner Mother has also filed 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 Mother challenges the circuit court's order terminating her parental rights. She asserts that the circuit court improperly denied her motion for a post-adjudicatory improvement period.

In terminating the Petitioner Mother's parental rights to J.W.,¹ the circuit court considered past abuse and neglect proceedings in which the Petitioner Mother's parental rights had been terminated for two children prior to J.W. The Forensic Psychiatric Evaluation of the Petitioner Mother by Dr. Khan² and other matters from these proceedings

¹ The Court notes that the child's father was also a respondent parent in the proceedings below. He voluntarily relinquished his parental rights and did not submit any response in this matter.

² The record in this appeal does not provide a first name for Dr. Khan. The Court also notes that Dr. Khan's last name is inconsistently spelled "Khan" and . . .

were made a part of the record. Dr. Khan's report provided that the Petitioner Mother "did not possess an ability to parent in 2005 and still does not possess that ability in 2011." Moreover, he outlined numerous findings and deficits of the Petitioner Mother, all of which the court reiterated in its April 5, 2011, order. Some of these findings included: major depressive disorder, recurrent moderate; alcohol abuse in remission; mild mental retardation; borderline personality disorder; previous history of child neglect; significant history of mental illness; significant history of past substance abuse; unsafe home environment for the children; ongoing tobacco use; home was not well equipped for winter and was quite cold; not aware of the possibility of carbon monoxide poisoning; showed little interest or involvement with the child; and was unable to answer or demonstrate first aid when presented with hypothetical emergency scenario. The circuit court order stated that "Dr. Kahn's opinion was, with reasonable medical certainty, [Petitioner Mother] does not have the adequate capacity to appropriately parent her child alone, or with the child's father."

The transcript of the March 14, 2011, hearing shows that Court Appointed Special Advocate ("CASA") Representative Loretta Cogar argued that termination of the Petitioner Mother's parental rights is appropriate because there had not been enough improvement. The transcript also reflects that both guardians ad litem argued that termination of the Petitioner Mother's parental rights would be in her best interest and in the child's best interest. The Petitioner Mother's guardian ad litem stated on the record that although the Petitioner Mother had made attempts to improve, she still does not have the ability to properly parent.

Based on opinions provided by Dr. Khan and other parties present, coupled with the court's review of the Petitioner Mother's past history in abuse and neglect proceedings, the circuit court held that "there is no reasonable likelihood that the conditions of abuse and neglect that existed at the time of the emergency taking of the infant can be corrected in the near future." It further held that, "Termination is [sic] this matter is in the best interest of the child due to the need of continuity of care and caretakers for the child and other mitigating factors." Concurrently, it also found that "continuation in the home of the [Petitioner Mother] is not in the best interest of the infant child and reasonable efforts have been made to prevent the removal of the child, but were unsuccessful." Accordingly, the circuit court entered an order on April 5, 2011, terminating the parental rights of the Petitioner Mother to the child, J.W.

. . . "Kahn" in different filings of this record. Because the transcript of the March 14, 2011, proceeding spells his name as "Khan," the Court shall use this spelling throughout this decision, unless using a quote where it is spelled "Kahn."

“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 Mother argues that the circuit court erred in finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future. She contends that the court “relied entirely” on Dr. Khan’s report when sufficient evidence, outside of Dr. Khan’s evaluation, presents otherwise. In response to the Petitioner Mother’s assertion, the DHHR points out that the circuit court considered other matters in this case, including “all prior proceedings of this matter and also regarding [past abuse and neglect cases with this Petitioner Mother].” Indeed, a review of the appendix indicates that the circuit court considered the opinions of the guardians ad litem and CASA. Despite the Petitioner Mother’s argument that sufficient evidence outside of Dr. Khan’s evaluation supports her likelihood of substantially correcting the conditions of neglect or abuse, neither the transcript nor any other document in the appendix supports this argument or refutes the court’s findings. A review of the March 14, 2011, transcript shows that the Petitioner Mother did not call any witnesses for her case, did not enter any documents into evidence, and did not testify herself.

The Petitioner Mother further asserts that termination here was unnecessary because a post-adjudicatory improvement period could have also provided adequate protection to the child through limited visitation or custody rights. She requests that the Court consider the bond between a biological parent and her child in finding the circuit court in error. In response to this assertion, the guardians ad litem and DHHR all support the circuit court’s order terminating the Petitioner Mother’s parental rights and the denial of a post-adjudicatory improvement period. This Court has 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 [1977] 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) [1977] 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).

The record reveals that the circuit court considered the Petitioner Mother's history with the abuse and neglect proceedings of two prior children, in which her parental rights were terminated. The court considered this history with Dr. Khan's psychological evaluation of the Petitioner Mother and the opinions shared by the Petitioner Mother's guardian ad litem, the child's guardian ad litem, and CASA. In conjunction with these opinions that the Petitioner Mother does not have the ability to parent, the circuit court held that the best interests of the child required termination of the Petitioner Mother's parental rights. The circuit court held that there is no reasonable likelihood that the conditions of abuse and neglect that existed at the time of the emergency taking of the infant child can be corrected in the near future. A review of the submitted appendix provides that evidence of such was clear and convincing.

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

Affirmed.

ISSUED: October 25, 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