

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

**In Re: B.D.**

**No. 11-0798** (Monongalia County 10-JA-7)

**FILED**

January 18, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

This appeal arises from the Circuit Court of Monongalia County, wherein the Petitioner Father's parental rights to his child, B.D., 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.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

"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 order terminating his parental rights, arguing that it erred by not holding a full evidentiary dispositional hearing as required by the West Virginia Code and the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. He further alleges that the circuit court failed in other respects to ensure that the process established by the rules for the disposition of abuse and neglect cases were substantially complied with such that the disposition order should be vacated. However, the record shows that petitioner received the full evidentiary

hearing to which he was entitled on the issue of disposition, and further that any alleged procedural deficiencies did not prejudice petitioner and do not warrant vacating the dispositional order on appeal.

In regard to his first assignment of error, petitioner argues that the circuit court erred by terminating his parental rights without holding the required full and fair dispositional hearing. He argues that the circuit court took evidence on his motion for an improvement period, but failed to take evidence on the elements of termination. The DHHR never called any witnesses or introduced any evidence to support their request to terminate petitioner's parental rights. Further, he argues that the state did call a caseworker from Ohio's equivalent of the DHHR, but this was solely to rebut petitioner's request for an improvement period. This case worker testified only to petitioner's conduct with other children, not the one at issue in this matter. For these reasons, petitioner argues that the order terminating his parental rights should be vacated. However, petitioner's argument ignores the fact that the circuit court, in the interest of judicial economy, is not precluded by applicable rules or statutes from hearing evidence related to both petitioner's motion for an improvement period and termination simultaneously.

West Virginia Code § 49-6-5(a) entitles parents to a hearing on disposition, and provides that "[t]he court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard." In this matter, petitioner admits that the issues regarding his motion for an improvement period were "specifically and thoroughly addressed," and it is the Court's position that the hearing on this issue was sufficient to comply with the applicable statutes and rules, and also to support termination below. Specifically, in conducting a hearing on both the issue of a possible improvement period and also termination, the circuit court considered the following: the severity of the abuse at issue, which concerned a newborn infant suffering a fractured skull, tibia, and multiple ribs; the petitioner's inability to even begin treatment for the issues of abuse for a period of four to twenty years due to pending criminal charges for the abuse at issue; and, petitioner's history of noncompliance with services resulting in a prior termination of parental rights. Based upon all of this evidence, the circuit court was correct in finding that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and in terminating petitioner's parental rights.

As to his second assignment of error, petitioner argues that the circuit court unduly delayed disposition in the proceedings below, failed to consider the child's paternal grandmother for placement by denying his motion for appointment of counsel for the grandmother, and also failed to ensure that a child case plan was filed pursuant to Rule 28 of the Rules of Procedure for Child Abuse and Neglect Proceedings. To begin, there is no authority that requires a circuit court to appoint counsel for a relative seeking placement of a child in an abuse and neglect proceeding. Likewise, there is no evidence in the record to

indicate that the paternal grandmother was not being considered as a potential placement, and the record in fact illustrates that she was free to intervene as a pro se litigant. As such, the Court finds no merit in petitioner's argument as it relates to the circuit court's denial of his motion for appointment of counsel for the paternal grandmother.

Further, a review of the record indicates that petitioner objected only to the admission of the case plan without authenticating testimony on the record at the dispositional hearing. Petitioner made no substantive objections to the case plan, meaning that the circuit court had no substantive issues to address pursuant to Rule 28 of the Rules of Procedure for Child Abuse and Neglect Proceedings. The record clearly demonstrates that the delays in holding the dispositional hearing were caused, in part, by petitioner's incarceration on criminal charges related to the abuse at issue below. This Court has held that "a mere procedural technicality does not take precedence over the best interests of the children." *In re Tyler D.*, 213 W.Va. 149, 160, 578 S.E.2d 343, 354 (2003). Prior to the instant matter below, petitioner abandoned an older child in the state of Ohio while the child was the subject of a child abuse investigation in that state. While the child at issue in this matter was still less than three months old, petitioner admittedly caused severe injuries, including the fracturing of multiple ribs, the tibia, and even the skull. It is clear from the record that the petitioner inflicted injuries upon the child, and that, if returned to him, the child would again be placed at risk. For these reasons, termination of petitioner's parental rights was clearly in the child's best interest, and an alleged procedural technicality will not take precedence over the same.

This Court reminds the circuit court of its duty to establish permanency for [the children] Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for [the children] within eighteen months of the date of the disposition order. As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt.

6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that “[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.” Syl. Pt. 3, *State of West Virginia v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, “[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.” Syl. Pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

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:** January 18, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh