

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

In Re: R.B. and L.B.:

**No. 11-0052
(Mingo County 10-JA-27 and 28)**

FILED

June 27, 2011

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

MEMORANDUM DECISION

Petitioner Father appeals the termination of his parental rights to R.B. and L.B. The appeal was timely perfected by counsel. 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 children, R.B. and L.B. The Intervenor Virginia S. has filed her response. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

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).

The petition for abuse and neglect was filed after L.B., then one month, was found to have lesions on his legs and feet that were unexplained by the parents, but blamed on his two year old brother. A medical expert testified that the injuries were not caused by the brother, and were in her opinion nonaccidental. Petitioner Father indicated that he and L.B.'s mother had snorted Lortab and passed out, and did not know how the injuries occurred. The parents did not seek medical attention for L.B. until directed to do so by DHHR. The parents were arrested on felony charges of child abuse, and both parents were adjudicated as abusive and neglectful. The parents were incarcerated throughout the proceedings, and therefore participated in no services other than psychological examinations. Petitioner Father's parental rights were terminated by the circuit court. The circuit court notes that neither parent has provided an explanation for the injuries received by L.B. The circuit court also found that pursuant to West Virginia Code §49-6-5(b), there is no reasonable likelihood that the conditions of abuse and neglect can be corrected in this matter because the parents are addicted to drugs, and have not participated in the family case plan. Intervenor Virginia S., DHHR, and the guardian ad litem argue in favor of the circuit court's termination of parental rights in this matter.

On appeal, Petitioner Father argues that he was denied the opportunity to meaningfully participate in the matter or to correct the conditions which led to the removal of his children due to his incarceration. This Court has held that "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children... may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood... 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). In this matter, Petitioner Father was incarcerated on felony child abuse charges stemming from the same incident that led to the filing of the abuse and neglect petition. Moreover, Petitioner Father has admitted to a long history of drug abuse, and has had more than one prior referral to DHHR regarding drug use in the home. At the time L.B. was injured, Petitioner Father admitted he was misusing prescription painkillers. Given the evidence, this Court finds no error in the termination of Petitioner Father's parental rights.

Petitioner Father also argues that the circuit court erred in denying him a post-dispositional improvement period. Pursuant to West Virginia Code §49-6-12(b) and (c), before a circuit court can grant either a post-adjudicatory or a dispositional improvement period, the court must first find that the parent is likely to fully participate in the improvement period. In the present case, Petitioner Father was incarcerated throughout the proceedings, and remains incarcerated. Further, Petitioner Father is charged with felony child abuse and is likely to serve a prison sentence for that crime. This Court has recently stated that:

The 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.*, 2011 WL 864950 (W.Va. 2011). Considering Petitioner Father's incarceration throughout the proceedings and likely further incarceration, this Court finds no error in the denial of a post-dispositional improvement period.

Finally, Petitioner Father argues that the circuit court erred in denying post-termination visitation. This Court has found that:

When 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 children in this case are very young, and L.B. only lived with Petitioner Father for approximately one month before being removed. During that month, L.B. was injured in a manner that the testifying medical expert deemed "nonaccidental." Thus, this 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 parental rights is hereby affirmed.

Affirmed.

ISSUED: June 27, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum