

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

In Re: T.W., S.W, D.W., B.W. and B.W.

No. 11-0144 (Webster No. 09-JA-34 - 38)

FILED

July 6, 2011

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

MEMORANDUM DECISION

Petitioner Mother appeals the termination of her custodial rights to T.W., S.W., D.W., B.W. and B.W. The appeal was timely perfected by counsel, with the petitioner's appendix 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. 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 in this case was filed alleging a lack of supervision and failure to provide a proper home, as there was no electricity in Petitioner Mother's home. The petition also alleges that Petitioner Mother is addicted to alcohol and left the children often to go out drinking. Petitioner Mother stipulated to the allegations of abuse and neglect, and was granted an improvement period. DHHR moved to revoke this improvement period, alleging

Petitioner Mother's failure to comply with court orders. The circuit court declined to revoke the improvement period, and instead gave Petitioner Mother an extension of the improvement period, subject to several requirements, including that Petitioner Mother was to be home all but one hour per day, was not to have the children in the presence of her female companion, who had been deemed unfit to be around the children, was not to have overnight visitors except for occasionally one of the children's friends, and was not to be around people using drugs or alcohol. Following this extension, DHHR again moved to terminate the improvement period, citing noncompliance by Petitioner Mother, including allowing her female companion to be around the children, in violation of the circuit court's orders. DHHR also moved to terminate Petitioner Mother's parental rights, but the circuit court chose to terminate only Petitioner Mother's custodial rights. The circuit court examined *In Re Jessica G.*, 226 W.Va. 17, 697 S.E.2d 53 (2010), and found that although there was a bond between the children and Petitioner Mother, and the children sought to return to Petitioner Mother, there was no substantial likelihood that Petitioner Mother could correct the conditions leading to the filing of the petition in the foreseeable future.

The guardian ad litem does not support termination of custodial rights in this action, as the children have expressed that they wish to return home and live with their mother. He argues that a one year rehabilitation period would have been the appropriate disposition in this case. The DHHR argues in favor of the termination of custodial rights, and argues that the evidence was sufficient for a full termination of Petitioner Mother's parental rights.

On appeal, Petitioner Mother argues that the circuit court failed to consider the interests of the children, all of whom desired reunification with Petitioner Mother. West Virginia Code §49-6-5(a)(6) states that "...the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." Moreover, this Court has held that circuit courts must consider the child's wishes pursuant to this code provision. See, *In the Interest of Jessica G.*, 226 W.Va. 17, 697 S.E.2d 53 (2010). The circuit court noted this Court's opinion in *In the Interest of Jessica G.*, and took judicial notice that the children had a substantial bond with Petitioner Mother and did not wish for the court to terminate her parental rights. However, the circuit court concluded that based upon all of the evidence, there is no less restrictive alternative than to terminate Petitioner Mother's custodial rights. The circuit court clearly considered the children's wishes, in considering DHHR's motion for termination of parental rights, but chose a less restrictive alternative, which was termination of custodial rights. This Court finds no error in the circuit court's order.

Petitioner Mother also argues that DHHR failed to prove by clear and convincing evidence that the custodial rights of Petitioner Mother should be terminated. "W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of

testimony or evidence by which the State Department of Welfare is obligated to meet this burden.” Syl. Pt. 1, *In The Interest of: S. C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981). Petitioner Mother was given a lengthy improvement period, but failed to show improvement. She continually violated the circuit court’s orders to keep her female companion away from the children, even after the companion was shown to be detrimental. The circuit court had to continually order Petitioner Mother to stay home and care for her children. Further, Petitioner Mother was often inappropriate during visitation, blaming T.W. for the filing of the abuse and neglect petition, and expressing negative emotions during visitation, which was upsetting to the children. This Court finds no error in the circuit court’s finding that Petitioner Mother’s custodial rights should be terminated.

Petitioner Mother next argues that the circuit court erred in finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the foreseeable future. This Court has found that “[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 (1977) will be employed; however, 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 Re: R. J. M.* 164 W.Va. 496, 266 S.E.2d 114 (1980). Moreover, “[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 the present case, the circuit court found that the least restrictive alternative was termination of Petitioner Mother’s custodial rights. The circuit court based its decision on Petitioner Mother’s failure to improve after over thirteen months of a post-adjudicatory improvement period, as she continued to discuss the case with the children through visitation, blamed T.W. for the filing of this matter, and failed to maintain a fit and suitable home, even with an income of over \$800 every two weeks. Moreover, a service provider testified that it would take Petitioner Mother a minimum of one full year from the date of the dispositional hearing to implement the proper parenting skills. This Court finds no error in the circuit court’s finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the foreseeable future.

Finally, Petitioner Mother argues that the circuit court erred in its consideration of Petitioner Mother’s relationship with her female companion in deciding whether to terminate Petitioner Mother’s custodial rights to her children. In the order, the circuit court specifically stated that “[t]he [c]ourt is not concerned about the relationship between [Petitioner Mother’s female companion] and [Petitioner Mother] except insofar as [the companion’s] presence adversely affects the children.” The evidence shows that the children were apparently afraid of the companion, and that the companion had gotten into a physical altercation with service providers at least once. Further, the female companion was arrested during the pendency

of this action. After a review of the record, this Court finds that the circuit court did not improperly consider Petitioner Mother's relationship with her female companion.

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's custodial rights, and the circuit court's order is hereby affirmed.

Affirmed.

ISSUED: July 6, 2011

CONCURRED IN BY:

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

DISSENTING:

Justice Brent D. Benjamin
Justice Menis E. Ketchum