

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

In Re: K.W., et al.

No. 11-0174 (Webster County 09-JA-16 - 18)

FILED

June 27, 2011

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Webster County, wherein the Petitioner Father's custodial rights to his three children¹ were terminated. The appeal was timely perfected by counsel, with the complete record 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. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on January 27, 2011. 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

¹The three children share the same initials. The Court therefore references them as K.W.-1, K.W.-2, and K.W.-3.

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 challenges the circuit court’s order terminating his custodial rights and alleges two assignments of error, arguing that the circuit court abused its discretion in terminating his custodial rights because the evidence below indicated a very strong bond between the children and Petitioner Father.² Further, he argues that the degree of family stress and the potential for further abuse and neglect were not so great as to preclude the use of resources to mitigate or resolve family problems or assist the petitioner in fulfilling his responsibilities to the children. While it is true that the record below did evidence a strong bond between petitioner and his children, petitioner failed to accept responsibility for the conditions of abuse and neglect that necessitated removal. 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.” *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). The Court concludes that it was not an abuse of discretion for the circuit court to terminate petitioner’s custodial rights due to Petitioner Father’s failure to acknowledge the problem at issue. Further, it is clear that the circuit court considered the strong bond between petitioner and his children in reaching its decision to terminate custodial rather than parental rights.

Petitioner next argues that the circuit court erred in finding that there are no reasonable grounds to believe that Petitioner Father will address the conditions out of which the neglect or abuse arose or that the conditions can be substantially corrected in the near future. Petitioner Father argues that these findings are in direct contradiction to the evidence adduced below. Petitioner argues that he participated in services throughout this action, and further that the circuit court’s order is deficient due to a failure to specify how it could find that the conditions of abuse and neglect could not be substantially corrected in light of testimony from service providers that petitioner’s treatment plan was working.

The circuit court found that petitioner directly violated a court order by remaining in contact with Respondent Mother for an extended duration of the proceedings below, putting his own desires above his children’s needs. Most importantly, however, the circuit court determined that petitioner’s failure to acknowledge the sexual abuse at issue resulted in petitioner’s inability to meaningfully engage in the necessary counseling or rehabilitation to protect the children from being exposed to abuse in the future. The West Virginia Code states that “no reasonable likelihood that conditions of neglect or abuse can be substantially

²This Court previously refused Petitioner Father’s appeal of the adjudicatory order finding that Petitioner Father sexually abused K.W.-2.

corrected” means that “the abusing adult... [has] demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help” and goes on to state that “such conditions shall be considered to exist” when the abusing parent has sexually abused the child. W.Va. Code § 49-6-5(b)(5). In such an instance, West Virginia Code § 49-6-5(a)(6) grants circuit courts the authority to terminate not only the custodial rights, but also the parental and guardianship rights of the abusing parent. In the present case, the evidence supported the circuit court’s finding that there was no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of petitioner’s custodial 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