STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
June 17, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: A.S., K.S., and E.S.:

No. 11-0214 (Mineral County Nos. 10-JA-32, 33 and 34)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mineral County, wherein the Petitioner Father's parental rights to A.S., K.S., and E.S. were terminated. The appeal was timely perfected by counsel, with the entire 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 her 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.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. 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). Petitioner challenges the circuit court's order terminating his parental rights, arguing that the circuit court erred because such termination was not in the children's best interest. Petitioner does not contest that he committed sexual assault and incest against the children for years prior to the filing

of the abuse and neglect petition below, but instead points to several alleged mitigating factors that he argues necessitate a resolution less restrictive than termination of his parental rights. These factors include the following: that petitioner, himself, was also sexually abused as a child; that he feels remorse for his actions and wants to seek help in the form of counseling; and, that he expressed interest in helping the subject children receive help through counseling. Petitioner also argues that, most importantly, the best interests of the children dictate a less restrictive alternative to termination because the children were undecided at disposition as to whether they had forgiven the petitioner. He argues that the circuit court's termination of his parental rights precludes the children from having a relationship with him in the future, should they want one following his rehabilitation.

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). In this matter, testimony showed that petitioner committed sexual assault and incest against the three children for years prior to the proceedings. Due to these specific circumstances, the circuit court found that petitioner was currently unwilling or unable to provide adequately for the children's needs, and that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. The circuit court further heard testimony at disposition from a DHHR employee that the children at issue "don't want to have anything more to do with [petitioner]." As such, the circuit court found that termination of petitioner's parental rights was in the best interest of the children.

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

Affirmed.

ISSUED: June 17, 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