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: Z.B., S.M., J.B., T.B., and B.B.:

No. 11-0220 (Nicholas County Nos. 09-JA-62, 64, 65, 66 and 10-JA-24)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Nicholas County, wherein the Petitioner Father's parental rights to Z.B., S.M., J.B., T.B., and B.B. were terminated. 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 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.

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 termination of his parental rights, alleging several assignments of error. Petitioner argues that the circuit court erred in finding that he failed to cooperate during his improvement period, and that he refused to accept the terms thereof and to comply with the services provided. Petitioner alleges that he put forth a great deal of effort during the improvement period, participating five or six days of the week by attending visitations,

parenting classes, and counseling while maintaining full-time employment. Petitioner also argues that he complied by remaining drug and alcohol free, providing the required drug screens, and maintaining suitable and safe housing for the children. However, the circuit court noted that petitioner failed to contact the DHHR for several months at the beginning of his improvement period, and that he did not attend any visitations or provide any drug screens as ordered during that initial period. Further, the evidence shows that petitioner concealed the fact that Respondent Mother Tiffany M. was pregnant with B.B. during the proceedings. He also fell asleep during visitations with his children. Most important, however, is the evidence that petitioner refused to acknowledge the severity of the abuse inflicted upon Z.B. Based on a review of the record, the Court finds that the circuit court did not err in finding that petitioner failed to comply and cooperate with the terms of his improvement period and the services provided therein.

Petitioner next alleges that the circuit court erred in its finding that there was a history of abuse as to Z.B. and A.M.[1] Petitioner argues that the allegations of physical abuse as to A.M. were never substantiated, and that the evidence below does not indicated that he ever physically abused Z.B. on any occasion other than the incident to which he admitted. However, the evidence below shows that petitioner willingly entered into a safety plan regarding his physical abuse to A.M., and that the child was to be kept away from petitioner; as a result, the child began residing with her maternal grandmother. Further, petitioner admitted to inflicting the severe physical abuse that Z.B. suffered, and medical testimony demonstrated that the abuse inflicted caused the child's PTSD onset. For these reasons, the circuit court's finding was not clearly erroneous.

Lastly, petitioner asserts that it was error for the circuit court to fail to consider a less restrictive alternative to termination of his parental rights. Petitioner argues that he had a strong bond with Z.B. that was severed abruptly, and further that he engaged in positive, problem-free visitation with S.B. and B.B. during his improvement period. These facts, he argues, should have weighed in favor of a less restrictive outcome. However, the circuit court found that the children's best interests necessitated termination, due to petitioner's failed improvement period and refusal to acknowledge the severity of the circumstances that caused removal. 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).

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[1]A.M. is the biological child of Tiffany M. and Roger L. who lived with petitioner and Tiffany M. prior to the filing of the petition for abuse and neglect below. As A.M. is not petitioner's biological child, A.M. is not the subject of petitioner's appeal.

In ordering termination of petitioner's parental rights, the circuit court cited petitioner's marijuana use during his previous involvement with the DHHR, the fact that he refused to admit the severity of the physical abuse, and the petitioner's non-compliance with the terms of his improvement period, as well as additional factors. 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). Because petitioner refused to acknowledge the severity of the circumstances of the abuse and neglect problem and failed to comply with the terms of his improvement period, the circuit court was correct in its finding that there was no reasonable likelihood that petitioner could remedy these circumstances.

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights to Z.B., S.M., J.B., T.B., and B.B., 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