STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: D.J. and J.J.:

No. 11-0242 (Marion County Nos. 10-JA-1, 10-JA-76)

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Marion County, wherein the Petitioner Father's parental rights to D.J. and J.J. 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 his response on behalf of the children, D.J. and J.J. 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 petitioner challenges the circuit court's termination of his parental rights, raising several assignments of error. He asserts that the circuit court erred by denying his motion to dismiss the petition as to him and in failing to return the children to his custody, as none of the petitions of abuse and neglect below contained allegations against him. However, a review of the record clearly indicates that the petitions below appropriately alleged circumstances as to the

petitioner's abuse and neglect of the children at issue. While it is true that the vast majority of the allegations in the initial petition concern the Respondent Mother and her prior abuse and neglect matter that resulted in voluntary relinquishment of her parental rights to a previous child, that petition concludes by stating that petitioner was incarcerated at the time, thereby leaving the child in these unacceptable conditions. Further, the subsequent amended petition as to D.J. and the petition related to J.J. both included additional allegations against petitioner, including the fact that petitioner lived with Respondent Mother, and petitioner's inability to protect and properly care for the children. As such, it was not error for the circuit court to deny the petitioner's motion to dismiss the abuse and neglect petitions against him, nor for the circuit court to deny him custody of the children.

Petitioner next alleges that the circuit court erred in adjudicating him as an abusive/neglectful parent. He argues that the State presented evidence only to the Respondent Mother's actions, and asserts that he was unable to prevent her from endangering D.J. He also alleges that he substantially complied with services, and that his positive drug screen was the result of an improper pre-adjudicatory improvement period to which he objected and had not requested. "*W.Va. Code,* 49-6-2(c)[1980], requires the [DHHR], 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 [DHHR] 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). The record shows that the State clearly established petitioner's abuse and neglect, and that the circuit court cited the following in adjudicating him as an abusing or neglecting parent: failure to adequately protect the subject child from Respondent Mother's actions; failure to take appropriate action when D.J. was taken by Respondent Mother on an inappropriate and unapproved trip and no information as to his whereabouts was known; failure to participate in drug screens and previously ordered services; and, failure to gain employment to support the children, as well as his probation status. For these reasons, the State met its clear and convincing burden as to adjudication, and the circuit court's decision to adjudicate petitioner as an abusing and/or neglecting parent was not erroneous.

Lastly, petitioner asserts that it was error to deny his motion for a post-adjudicatory improvement period and to terminate his parental rights to both children. Petitioner asserts that a less restrictive disposition should have been employed, such as an improvement period, since the main goal of abuse and neglect proceedings is preserving the familial relationship. He also alleges that the circuit court should have considered his ability to participate in a reunification program, whether or not the subject children were in imminent danger, and also should not have held the results of the pre-adjudicatory improvement period against him since he did not request the same. 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 denying the petitioner's motion for a post-adjudicatory improvement period and ordering termination of his parental rights, the circuit court cited petitioner's cocaine use during the proceedings, the fact that his parenting and adult life skills classes had been terminated for non-compliance, his failure to admit to his substance abuse problem, and also issues surrounding petitioner's unstable relationship with Respondent Mother and the unsuitable nature of their home, including dogs residing in the home that posed a danger to the children. 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 circumstances of the abuse and neglect problem, the circuit court was correct in its finding that there was no reasonable likelihood that petitioner could remedy these circumstances, in denying him a post-adjudicatory improvement period, and further in terminating his parental rights to both children.

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights to D.J. and J.J., 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