

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

In Re: A.R., B.K., S.D.M. and K.D.M.:

**No. 11-0250
(Braxton County 10-JA-19 -22)**

FILED

June 27, 2011

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

MEMORANDUM DECISION

Petitioner Father appeals the termination of his parental rights to S.D.M. and K.D.M. and his custodial rights to A.R. and B.K. The appeal was timely perfected by counsel. 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, A.R., B.K., S.D.M. and K.D.M. 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 matter was filed after Petitioner Father and Mother took A.K. to the hospital, where it was discovered that he had a right occipital skull fracture with hematoma. Petitioner Father has two children, S.D.M. and K.D.M., and his girlfriend has two children, A.K. and B.K. Petitioner Father has no children with his girlfriend, A.K. and B.K.'s mother. The treating physician testified that the injury was suspicious and consistent with a non-accidental trauma. A.K. had been in Petitioner Father's care at the time the injury was discovered, and Petitioner Father admits that he often sleeps when his girlfriend leaves the children with him. Petitioner Father and mother were adjudicated as abusive and neglectful parents after neither could explain how the injury occurred. Until just before the dispositional hearing, Petitioner Father and Mother maintained a relationship, and neither provided an explanation implicating the other for the injury. At the time of the disposition, Mother did admit that it was possible that Petitioner Father caused the injury. Petitioner Father's parental and custodial rights were terminated, as the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future.

On appeal, Petitioner Father argues that the circuit court erred in terminating his parental rights. This Court has held that "[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 preliminary hearing, after hearing the medical evidence and testimony from the treating physician, the circuit court ruled that the injury was "non-accidental" based upon the testimony of the doctors. This unexplained injury constitutes neglect of A.K, and mother is charged with failure to adequately protect the children. Pursuant to West Virginia Code §49-6-5(b)(5), there is no reasonable likelihood that the conditions of abuse and neglect can be corrected when a parent has seriously injured a child physically or emotionally. Both DHHR and the guardian ad litem argue in favor of the circuit court's termination of parental and custodial rights in this matter. After considering all of the evidence, this Court finds no error in the termination of Petitioner Father's parental and custodial rights.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental 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