STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

No. 11-0251
(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 Mother appeals the termination of her parental rights 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 Mother and her boyfriend took A.K. to the hospital, where it was discovered that he had a right occipital skull fracture with hematoma. The treating physician testified that the injury was suspicious and consistent with a non-accidental trauma. A.K. had been in the care of Petitioner Mother's boyfriend at the time the injury was discovered. Mother's boyfriend admits that he often sleeps when Petitioner Mother leaves the children with him. Petitioner Mother and her boyfriend were adjudicated as abusive and neglectful after neither could explain how the injury occurred. Until just before the dispositional hearing, Petitioner Mother maintained a relationship with her boyfriend. Neither would provide an explanation implicating the other for the injury. At the time of the disposition, Petitioner Mother admitted that it was possible that her boyfriend caused A.K.'s injury. Petitioner Mother's parental 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 Mother argues that the circuit court erred in not granting an improvement period. She argues that the continuation of services would have allowed her to correct the conditions of abuse and neglect. This Court has found 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 Dept. of Health and Human Resources v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996); *In re Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Since Petitioner Mother failed to identify the perpetrator of the abuse of A.K., or even that he was abused, this Court finds no error in the denial of an improvement period.

Petitioner Mother argues that the continuation of services would have allowed her to correct the conditions of abuse and neglect. At 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 and non-accidental injury constitutes neglect of A.K. 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 Mother's parental 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