

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

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

**No. 11-0292
(Lewis County 09-JA-19, 20 and 21)**

FILED

**June 17, 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 B.A. and S.A. 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, B.A. and S.A. 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 in December 2009 due to ongoing serious domestic violence between mother and stepfather (M.K.’s parents). DHHR placed B.A. and

S.A. with Petitioner Father and stepmother, as there were no allegations of abuse against Petitioner Father. The case plan was directed toward reunification with mother, until there was another domestic violence altercation between mother and stepfather in August 2010. Petitioner Father, who was on parole for a prior drug conviction, was meanwhile arrested for delivery of a controlled substance (morphine), and pled guilty in August 2010, at which time he was incarcerated. He was sentenced to concurrent prison terms of one to five years and one to fifteen years. The circuit court terminated Petitioner Father's parental rights. The circuit court found that because of Petitioner Father's length of incarceration, he cannot provide the children with the necessary food, clothing, shelter, supervision, medical care and education. Also because of the incarceration, there is no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future. The circuit court further ordered that in the best interests of the children, the siblings should be kept together.

On appeal, Petitioner Father argues that the circuit court erred in terminating his parental rights, after finding that he was a neglectful parent due to his incarceration, when he had previously been nominated as an appropriate caregiver. 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). Petitioner Father nominated his wife as the children's caretaker during his incarceration. The circuit court found Petitioner Father's appointment of his wife was not feasible, as she has no residence, job or income. She has no ability to properly transport five children, and was living in a mobile home with a friend and her husband, their child, and stepmother's two children biological children. Both DHHR and the guardian ad litem argue in favor of the circuit court's termination of parental rights in this matter, and against placement of the children with Petitioner Father's wife. After considering all of the evidence, this Court finds no error in the termination of Petitioner Father's parental rights.

Petitioner Father also argues that the circuit court erred in failing to place the children with family members. Once a lower court has properly determined that a child has been abused or neglected and that the natural parents are unfit, "the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody." Syl. Pt. 8, in part, *In Re: The Matter of Ronald Lee Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). In the present matter, the circuit court noted that placement with stepmother was inappropriate and not in the best interests of the children. Petitioner Father also argues that placement of all of the children with M.K.'s paternal grandmother was appropriate. However, this Court addresses paternal grandmother's custody appeal in Memorandum Decision 11-0318, affirming the circuit court's decision not to grant her custody. This Court finds that the circuit court did not err in placing the children with non-family members under the facts of this case.

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 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