

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

In Re: B.J.S. :

No. 11-0311 (Raleigh County 10-JA-30-H):

FILED

June 17, 2011

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

MEMORANDUM DECISION

Petitioner Father appeals the denial of his motion to reenter the abuse and neglect case after he received actual notice of the termination of his parental rights. The appeal was timely perfected by counsel, with petitioner's designated record accompanying the petition. The guardian ad litem has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The respondent mother has also filed a response. 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.

The petition in this matter was filed alleging sexual abuse against B.J.S. by mother's boyfriend. An amended petition was filed, adding allegations of abandonment by Petitioner Father, as he has never paid child support, has not seen the child since infancy, and failed to submit to paternity testing in the past. Petitioner Father's whereabouts were unknown, and thus he was served by publication in West Virginia. His rights were terminated in August 2010 after he failed to appear following the publication. In November 2010, he contacted his attorney and DHHR, asserting that he found out about the termination via Facebook, and sought to reenter the case. He moved to reenter the case in December 2010, and this motion was denied after a hearing at which Petitioner Father failed to appear. In the February 2011 order, the circuit court found that the procedure to serve Petitioner Father was proper, as he was served pursuant to statute through publication. The court also noted that Petitioner Father had no contact with the child for five years, and denying the motion to allow father to reenter the case was in the child's best interest.

"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).

On appeal, Petitioner Father argues that the termination in this matter was improper, as he was not given proper notice or the opportunity to be heard. West Virginia Code §49-6-1(b) provides, in part:

If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that the proceedings can result in the permanent termination of the parental rights.

Petitioner Father's motion to reenter the case was denied after the circuit court found that the publication by newspaper was proper, and his rights were terminated due to his abandonment of the child for at least five years. There is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when a parent has abandoned a child, pursuant to West Virginia Code §49-6-5(b). DHHR, the GAL and Respondent Mother all argue in support of termination. Each notes that Petitioner Father had not seen the child in over five years, had never paid child support, and had previously refused paternity testing. Thus, this Court finds no error in the denial of the motion to reenter the case, nor in the termination of parental rights.

For the foregoing reasons, the decision of the circuit court 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