STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.F. and J.F.:

No. 11-0363 (Mercer County 10-JA-44 and 45)

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 B.F. and J.F. 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.F. and J.F. 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 alleges that Petitioner Father had sexual contact with B.F., that the children were not properly supervised, and that the children were living in unsanitary conditions. Petitioner Father admits that he was sexually aroused while bathing B.F., and

B.F. claims that he has also touched her sexually in the shared family bed at night. The court adjudicated both parents as neglectful, and adjudicated Petitioner Father as abusive due to the sexual contact with B.F. At the dispositional hearing, Dr. Bobby Miller testified that Petitioner Father is not a pedophile, but does suffer from frotterism. Dr. Miller opined that this condition is treatable, but treatment would take at least one year. During such treatment, Petitioner Father should not be alone with B.F. The circuit court terminated Petitioner Father's parental rights, stating that the circuit court has no discretion because the court previously found that Petitioner Father had sexual contact with the child, sexual contact is sexual abuse under the statutory definition, and sexual abuse is an aggravated circumstance. Thus, there is no reasonable likelihood that the conditions of abuse can be substantially corrected in the near future.

Petitioner Father argues that the circuit court erred in failing to grant him a post-adjudicatory improvement period, when the evidence from Dr. Miller shows that he is capable of rehabilitation. 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). Further, West Virginia Code § 49-6-5(a)(7)(A) describes various situations wherein the DHHR is not required to make reasonable efforts to preserve the family, including situations where sexual abuse has occurred. In this matter, it was established by clear and convincing evidence that sexual abuse occurred, as Petitioner Father admits that touching his child's vagina caused sexual arousal, so the DHHR was not required to make efforts to preserve petitioner's relationship with the subject child. The circuit court found, based on these aggravated circumstances, that there was no reasonable likelihood that the conditions of abuse could be substantially corrected in the near future.

Petitioner Father also argues that the acts giving rise to the finding at adjudication do not constitute an aggravated circumstance. Sexual contact is the touching of sex organs for the purpose of sexual gratification according to West Virginia Code §61-8B-1(6) as referenced by West Virginia Code §49-1-3(m). The circuit court made a threshold determination that Petitioner Father had sexual contact with the child, and therefore committed sexual abuse pursuant to West Virginia Code §49-1-3(l), (a)(2) and (d). Based on the facts, the circuit court found that Petitioner Father sexually abused B.K. Under the facts of this case, this Court finds no error in the circuit court's findings.

Both DHHR and the guardian ad litem argue in favor of the circuit court's termination of parental rights in this matter. After considering all of the evidence, this Court finds no error in the termination of Petitioner Father'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 Menis E. Ketchum
Justice Thomas E. McHugh