

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

In Re: E.M., D.M., and J.M.:

No. 11-0605 (Kanawha County 10-JA-43, 44 and 45)

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 to E.M., D.M. and J.M. The appeal was timely perfected by counsel, with the petitioner's appendix and the guardian ad litem's supplemental appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the children. 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 E.M., then three months old, was taken to the hospital and found to be suffering from a traumatic closed head injury, a bleeding retina, and several brain bleeds in various stages of healing. He was also found to have healing fractures of the ribs and femur. Petitioner Mother had no explanation for these injuries, although she is admittedly the primary caretaker. After the preliminary hearing, she had a

positive drug screen. Petitioner Mother was adjudicated as an abusing parent after a medical expert testified that E.M.'s injuries were nonaccidental, and no other perpetrator was identified. Court summaries indicate that Petitioner Mother often failed to visit E.M. in the hospital, although he was gravely ill and the other children were in foster care. Moreover, the evidence shows that there were significant issues within the family absent E.M.'s horrific injuries, including developmental delays, extensive tooth decay and medical neglect of a serious eye injury of D.M. and malnourishment of E.M. Petitioner Mother's parental rights to the children were terminated after the circuit court found that she has failed to participate adequately in these proceedings and has refused to cooperate in the development of a family case plan. The circuit court found that Petitioner Mother either seriously injured E.M. or permitted another to seriously injure E.M. without identifying the perpetrator, and the potential for further abuse is so great as to preclude the use of resources to mitigate or resolve family problems.

On appeal, Petitioner Mother argues that the circuit court erred in adjudicating her as an abusing parent and in terminating her parental rights, when there is no proof that she was the one who injured E.M. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993). Petitioner Mother acknowledges that E.M. was in her care or her mother's care during the relevant time frame, and also admits that both frequently used drugs. She failed to identify how E.M.'s numerous injuries occurred, and failed to identify another perpetrator. This Court finds no error in the circuit court's adjudication order.

Petitioner Mother also argues that the circuit court erred in terminating her parental rights without granting her an improvement period. In order to receive an improvement period, the parent must demonstrate, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. *See* W.Va. Code §49-6-12. This Court has previously stated that "[f]ailure 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 Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). There is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when a parent has committed serious bodily injury to the child. W. Va. Code §49-6-5(b)(5). In the present case, Petitioner Mother has not identified anyone who could have caused E.M.'s extensive injuries. Moreover, the record shows that she failed to comply with the DHHR. Finally, the extensive physical abuse suffered by E.M. shows that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially

corrected in the foreseeable future. This Court finds no error in the denial of an improvement period.

This Court reminds the circuit court of its duty to establish permanency for Z.W. and E.W. pursuant to Rules 36a, 39, 41 and 42 of the West Virginia Rules of Procedure for Child Abuse and Neglect. Further, this Court reminds the circuit court of its duty pursuant to Rule 43 to find permanent placement for Z.W. and E.W. within eighteen months of the date of the disposition order. As this Court has stated, “[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.” Syl. Pt. 6, *In re Cecil T.*, 2011 WL 864950 (W.Va.2011). Moreover, this Court has stated that “[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.” Syl. Pt. 3, *State of West Virginia v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998).

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights, and the circuit court's order 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