

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

In Re: J.K.

No. 12-0612 (Webster County 11-JA-61)

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, by counsel Christopher G. Moffatt, appeals the Circuit Court of Webster County's order entered on April 18, 2012, terminating her psychological parental rights to J.K. The guardian ad litem, Howard J. Blyler, has filed his response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response. Respondent Mother has also filed a response, by counsel Joyce Helmick Morton.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The abuse and neglect petition in this matter alleges drug abuse by Respondent Mother after she was stopped by police in a traffic stop with J.K. in the vehicle and was found to have drugs and drug trafficking paraphernalia in the vehicle. Further, Respondent Mother does not have custody of her four older children, and does not have parental rights to any of them.¹ Upon the birth of J.K., Respondent Mother gave the child to petitioner and her husband, but refused to sign a temporary custody order. Respondent Mother asserts that petitioner and her husband were helping her, and in return, she put the husband's name on the birth certificate as the father, although J.K.'s father is actually deceased.² Respondent Mother states that after approximately three months, she sought custody of J.K., but did not actually regain custody of him for almost a year, after extensive litigation in family court. During that year, J.K. lived with petitioner and her husband. Although the record is scant, it appears that the child had been back in his mother's custody for

¹ Respondent Mother indicates that she gave up custody of three of them and allowed those three to be adopted, and admits that her parental rights were terminated to the fourth child. However, there are allegations that her rights were involuntarily terminated to all four children, and allegations that she sold some or all of the children. These events occurred in Florida, and the WV DHHR did not fully investigate Respondent Mother's cases in Florida.

² Petitioner's husband admits that he is not the biological father of the child, and apparently DNA testing in Florida confirmed the same.

approximately eight months before this petition was filed, and upon receiving custody, the mother moved to West Virginia, while petitioner and her husband remained in Florida. There is no evidence in the record that petitioner or her husband had any visitation with the child, or attempted to visit the child.

After the child was removed from the mother's custody by the DHHR, petitioner and her husband intervened in the action. Both were granted visitation. However, petitioner tested positive for prescription drugs and therefore could not attend visitation. She indicated that she had a prescription for the drugs in her system but failed to produce the same for several months. After she was denied visitation, petitioner allegedly attempted suicide and was hospitalized. Testimony showed that although petitioner and her husband had once acted as psychological parents to the child, the bond was broken between them. The circuit court therefore terminated petitioner and her husband's psychological parental rights after finding that neither had participated in the case in a meaningful way and finding that they have not shown that placement with them is in the best interests of J.K. Moreover, the circuit court found that petitioner and her husband did not present any evidence to refute the testimony that they had both used controlled substances and that petitioner's mental health issues would not affect any potential placement.

The Court has previously established the following standard of review:

“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 Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.* 228 W.Va. 89, 717 S.E.2d 873 (2011).

On appeal, petitioner first argues that the circuit court erred in terminating her psychological parental rights where inadmissible evidence pertaining to drug use and mental health issues were accepted and relied upon by the circuit court. Information on petitioner's alleged suicide attempt was based on hearsay testimony gleaned from petitioner's daughter, and no expert witness was called regarding petitioner's positive drug screen. Petitioner argues that by allowing the introduction of this evidence, she had to “dramatically” change her trial strategy, as she was forced to not testify because it was clear that if she testified she would have been cross-examined on these issues. Petitioner next argues that she cared for the child for the first half of his life, had a bond with him, and was his psychological parent; therefore, petitioner argues that the circuit court erred in terminating her psychological parental rights to J.K. She argues that the

only visitation in the matter between petitioner and J.K. went well, and petitioner argues that she was a psychological parent to the child up until her visitation was disallowed based on a positive drug screen. Moreover, petitioner argues that there was no expert testimony proving that the bond between her and J.K. had been broken. Finally, petitioner argues that the circuit court erred in terminating her rights when there were no allegations asserted against her in the abuse and neglect petition. She asserts that the circuit court was correct to find that she had the burden as the intervenor in this action regarding placement of the child, but argues that the burden of proving why her rights should be terminated remained with the State.

The guardian responds in favor of the termination of psychological parental rights, arguing that petitioner had no contact with the child for eight months, after the biological mother regained custody in Florida and immediately moved to West Virginia. During that time, the guardian argues that petitioner did nothing to regain custody of J.K. or maintain contact with J.K. The guardian notes that the burden was upon petitioner to prove that she was a psychological parent to J.K., and she failed to do so throughout the proceedings. Additionally, the guardian notes that petitioner had separated from her husband and that neither offered testimony regarding how they would care for the child or what the custody agreement would be, as both continued to seek custody.

The DHHR likewise responds in favor of the termination, arguing that petitioner is not a fit or suitable custodian for the child based on her positive drug screens, failure to provide a prescription for the same, and serious mental health history. Moreover, the DHHR argues that there is no longer a bond with the child based on the eight months the child spent with the mother without seeing petitioner at all. The biological mother has also responded in favor of terminating petitioner's psychological parental rights, noting that petitioner failed a drug test, failed to attend some court hearings, has no bond with J.K., and did not have custody during the eight months preceding the petition.

In the present case, petitioner makes a vague argument that she was J.K.'s psychological parent. This Court has held as follows:

“A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified.” Syl. Pt. 3, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

Syl. Pt. 9, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011). There is no evidence that petitioner had any contact with J.K. in the eight months that the biological mother resided in West Virginia prior to the petition being filed, and therefore was not his psychological parent. Therefore, even assuming arguendo that she formerly was the child's psychological parent, petitioner had no

rights to the child at the time the petition in this matter was filed, as she had not continued in her purported role as a psychological parent. This Court finds that the circuit court's termination of "any psychological parent rights or other rights" of the petitioner was unnecessary, as petitioner had no rights to the child. Based on this fact, petitioner is not entitled to adjudication, as no allegations were made against her in the petition. Further, this Court finds that petitioner failed to establish that placement with her was in the best interests of J.K.

For the foregoing reasons, we find that petitioner had no rights to J.K. and that the circuit court did not err in failing to place the child with petitioner.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh