STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In Re: **D.R., C.R., & H.R.**

No. 12-0848 (Calhoun County 12-JA-14, 15 & 16)

MEMORANDUM DECISION

Petitioner Father, by counsel Betty Clark Gregory and Erica Brannon Gunn, appeals the Circuit Court of Calhoun County's order entered on June 27, 2012, terminating his parental rights to his children. The guardian ad litem, Loren B. Howley, has filed a response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response.

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 was filed after two-month-old D.R. was taken to the hospital where she was found to have suffered a severe blunt force trauma to the head that eventually resulted in her death. Moreover, D.R. was found to have several bruises on her body and her arm had been broken approximately two weeks after her birth. After the broken arm, services were begun in the home. The medical evidence showed that the trauma to D.R. was nonaccidental and that if Petitioner Father or the mother had brought D.R. to the emergency room in a timely manner, she would likely have survived. Eventually, the mother admitted to shaking the baby, and she was charged with child abuse causing death, while Petitioner Father was charged with child neglect resulting in death for his failure to seek medical attention in a timely manner. Petitioner was adjudicated as an abusing father for his failure to seek medical attention. The circuit court then terminated Petitioner Father's parental rights, and found that although there was no evidence that he was present when the deadly injuries were inflicted on D.R., he continued to support the mother's version of how the injuries occurred and knowingly took no plan to prevent or stop the abuse to protect the children. Moreover, the circuit court found that Petitioner Father aided and abetted the mother's chronic abuse by refusing to acknowledge the evidence of abuse, refusing to identify her as the perpetrator, and refusing to seek medical treatment and help.

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).

Petitioner first argues that there was no evidence that he knowingly allowed the mother to injure the child. Petitioner argues that he gave statements to the police and child protective workers stating that he did not knowingly allow the abuse. Petitioner admits that child protective services ("CPS") workers were involved with the family, but notes that even they did not see injuries to the child or see indications that the child was being abused. Finally, petitioner argues that he is "intellectually delayed" or "low functioning."

The DHHR argues in response that petitioner aided and abetted the mother's chronic abuse of the children by ignoring the clear evidence of abuse and by not seeking appropriate medical care for the child. The DHHR also argues that petitioner and his wife gave accounts of the injuries which did not comport with the medical evidence. Moreover, the DHHR argues that even if petitioner did not actually witness the abuse taking place, he ignored ample evidence of the abuse. The guardian argues that petitioner's intellectual capabilities have nothing to do with his failure to protect the children from severe abuse. The guardian also argues that the child who remained in the home[1] would be threatened by petitioner's failure to protect him. This Court finds no error in the circuit court's findings. The evidence shows that Petitioner Father believed something to be wrong with D.R. several hours before seeking help, and even upon finally deciding to seek help for the child, he chose to make several unnecessary stops on the way to the hospital. Further, he ignored significant evidence of abuse, including bruises on various parts of the child's body.

Petitioner next argues that since he was not present when the child was injured and he did not perpetrate the abuse of the child. Therefore, petitioner argues that the circuit court erred in determining that there was no substantial likelihood that the conditions of abuse could have been remedied. The DHHR argues in response that because petitioner ignored the ample evidence of abuse and failed to protect the child, the risk remained that petitioner would again ignore serious issues allowing the other child in the home to be injured. The guardian agrees with the DHHR's argument, and notes that petitioner should have known of the severity of the child's injuries and acted in a timely manner to get her help. Again, this Court finds petitioner's arguments without merit as the evidence shows that he ignored signs of abuse, and his psychological report indicates that he is likely to continue to ignore obvious problems such as physical abuse.

[1] H.R. did not live in the home with petitioner.

Petitioner next argues that he should have been granted an improvement period because he did not know about the abuse and could have remedied the issues giving rise to the petition. The DHHR argues in favor of the denial of an improvement period, noting that the circuit court has discretion in awarding a post-adjudicatory improvement period and that petitioner did not prove by clear and convincing evidence that he would fully comply with an improvement period. The guardian also supports the denial of an improvement period, and asserts that an improvement period would not be in the best interests of the child.

The Court has held that "'courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened. . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when an abusing parent has repeatedly or seriously injured a child physically or emotionally. W.Va. Code § 49-6-5(b)(5). Upon a review of the record, this Court finds no error in the circuit court's termination of parental rights without an improvement period. Petitioner was not shown to be the perpetrator of the physical abuse, but the evidence shows that he willfully ignored the same.

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: 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