

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

In Re: J.W., S.W., R.H., & E.D.

No. 12-0975 (Wood County 11-JA-23, 24, 25 & 26)

FILED

March 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother filed this appeal, by counsel Joseph Troisi, from the Circuit Court of Wood County which terminated her parental rights by order entered on August 13, 2012. The guardian ad litem for the children, Keith White, has filed a response supporting the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of the circuit court's order.

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 Rules of Appellate Procedure.

The DHHR filed the petition in the instant case in October of 2011, after R.H., who was less than two years old at the time, was treated at the hospital for multiple burns, bruises, abrasions, and contusions over her face and body. The physicians who treated R.H. testified that her injuries were non-accidental, that the patterns of her burns were consistent with somebody holding the child by her thighs and an arm and dipping her into scalding water, and that her other injuries dated back to multiple instances over time. Petitioner Mother explained that her boyfriend, M.D., told her that a lamp had fallen on R.H., that R.H. had cut herself with a ravioli can, and that R.H. had been yelling for him after he placed her in the shower so that he could do some vacuuming. The circuit court found that Petitioner Mother's explanations throughout the case were inconsistent from each other and from medical opinions of the child's injuries. Ultimately, it terminated Petitioner Mother's parental rights to the subject children. It is from this termination order that Petitioner Mother appeals.

Petitioner Mother first argues that the circuit court erred in finding that she abused and neglected R.H. because she was not present when the acts of abuse to R.H. occurred and because she acted reasonably in investigating who was responsible. Second, she argues that the circuit court erred in finding that she failed to provide an adequate explanation for R.H.'s injuries. Petitioner Mother asserts that she took action toward caring for R.H.'s injuries and toward finding the truth behind who abused her daughter. In response, the children's guardian ad litem and the DHHR argue that the circuit court found Petitioner Mother's explanations inconsistent with the severity of the child's injuries and also inconsistent with each other. For instance, Petitioner Mother did not use the lamp explanation with the hospital. Further, they argue that

Petitioner Mother only sought medical attention for R.H. after R.H.'s grandmother prompted her to do so.

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). Upon our review, the Court finds no error in the circuit court's findings that Petitioner Mother's failure to protect R.H. and R.H.'s siblings constituted abuse and neglect. We also find no error by the circuit court in its finding that Petitioner Mother failed to provide an adequate explanation for R.H.'s injuries. We bear in mind the following:

Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991). The record supports the circuit court's findings with regard to these assignments of error.

Petitioner Mother next argues that the circuit court erred in finding that R.H.'s siblings were abused and neglected children. She asserts that there was no evidence presented that they were at risk of being harmed or abused and argues that the circuit court made no independent and specific findings of abuse and neglect of the other children. In response, the guardian ad litem and the DHHR contend that after M.D.'s arrest for his abuse against R.H., Petitioner Mother continued to live with him and, after he was incarcerated, she continued to contact him through texting and telephone calls as recently as a few days before the dispositional hearing. Accordingly, both argue that the circuit court correctly found that there was a risk to R.H.'s

siblings for further harm either from M.D. or from others to whom Petitioner Mother might expose them. Our review of the record supports the circuit court's findings. R.H.'s siblings fall into the category of abused children pursuant to West Virginia Code § 49-1-3(a). We find no error by the circuit court with regard to this issue raised by Petitioner Mother.

Lastly, Petitioner Mother argues that the circuit court erred in denying her motion for an improvement period because the evidence established that she was likely to participate fully in an improvement period. Petitioner Mother also asserts that the circuit court erred in terminating her parental rights. The guardian ad litem and the DHHR respond and argue that the evidence revealed that physical abuse against R.H. was chronic and that Petitioner Mother failed to ever protect her child from such abuse or admit that she turned a blind eye to it. Under these circumstances, they both argue that the circuit court correctly denied Petitioner Mother an improvement period and correctly terminated her parental rights.

Upon our review, the Court finds no error in the circuit court's denial of an improvement period or in its termination of Petitioner Mother's parental rights. The Court finds that the circuit court was presented with sufficient evidence upon which it based findings that Petitioner Mother would not substantially comply with an improvement period. Pursuant to West Virginia Code § 49-6-12, the subject parent bears the burden of proving that he or she would substantially comply with an improvement period and it is within the circuit court's discretion to grant or deny an improvement period. The Court also finds that the circuit court was presented with sufficient evidence upon which it based its findings that there were no reasonable grounds to believe that conditions of abuse and neglect could be substantially corrected in the near future and that termination was necessary for the children's welfare. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon such findings.

For the foregoing reasons, we affirm the circuit court's order terminating petitioner's parental rights to the subject children.

Affirmed.

ISSUED: March 12, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II