

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

In Re: B.E., A.E., & A.E.

No. 12-0986 (Mingo County 12-JA-4, 5, & 6)

FILED

March 12, 2013

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

MEMORANDUM DECISION

Petitioner Father, by counsel Susan Van Zant, appeals the Circuit Court of Mingo County's order entered on August 2, 2012, terminating his custodial rights to A.E. and A.E.¹. The guardian ad litem, Diana Carter Wiedel, filed her response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, 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 Rules of Appellate Procedure.

A petition for immediate custody of minor children in imminent danger was filed after Child Protective Services ("CPS") received a referral alleging the following: that the home is generally unfit; the mother uses her food stamp card to buy things for other people in exchange for pills; the mother is currently "wiped out" and has been "wiped out" for the last seven days; Petitioner Father was recently released from the hospital after overdosing; and the mother beats the children and will not give them food. The children were immediately removed from the home based on the finding that the current care and custody constitutes abuse and/or neglect and poses an imminent danger to the well-being of the children. During the pendency of the case, Petitioner Father voluntarily failed to participate in all hearings, refused all substance abuse counseling, failed to follow through with the family case plan, and failed to establish paternity as to A.E. and A.E. The circuit court found by clear and convincing evidence that Petitioner Father neglected and failed to protect the children, participated in substance abuse and other at-risk behaviors, which have endangered the children, and created an imminent danger. Following disposition, Petitioner Father's custodial rights were terminated for failing to meaningfully participate in this matter, to follow through with the family case plan, and to correct the conditions of neglect.

¹ The circuit court terminated Petitioner Father's custodial rights to all children. Petitioner Father is only appealing the termination of his custodial rights to A.E. and A.E. because he believes he is their biological father. Another man was married to respondent mother when all three children were born and is listed as the father on all the birth certificates. Petitioner Father did not request a paternity test.

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 Father argues that the circuit court erred in terminating his custodial rights to A.E. and A.E. Petitioner Father argues it is in the best interest that he be allowed visitation because of the mutual bond he shares with the children. The guardian ad litem responds in favor of the termination of custodial rights. The guardian argues Petitioner Father did not appear at any proceeding to request a DNA test or challenge the presumption that respondent mother's husband was the children's father. The guardian argues Petitioner Father did not comply with in-home services, parenting classes, drug screens, and substance abuse treatment. The DHHR also responds in support of the termination of custodial rights. The DHHR argues Petitioner Father was abusive and/or neglectful and due to his drug addiction and failure to participate in services, the use of less restrictive alternatives was not necessary.

This 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). “Termination . . . 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. 7, in part, *In re Katie S.*, 198 W.Va. 79, 82, 479 S.E.2d 589, 592 (1996). This Court finds that the circuit court was presented with sufficient evidence upon which it could have found that that there was no reasonable likelihood that the 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 custodial rights upon these findings.

For the foregoing reasons, the circuit court's order terminating petitioner's custodial rights is hereby affirmed.

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