

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

In Re: T.B.

No. 14-0257 (Marshall County 12-JA-09)

FILED

August 29, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father filed this appeal by counsel, Roger R. Weese, from an order entered February 19, 2014, in the Circuit Court of Marshall County that terminated his parental rights to seven-year-old T.B. The guardian ad litem for the child, J.K. Evans IV, filed a response in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney, Lee A. Niezgoda, also filed a response in support of the circuit court's order. Petitioner argues that the circuit court erred in terminating his parental rights on the ground that that petitioner abandoned the child, and in conducting the dispositional hearing without his presence.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

The DHHR filed an abuse and neglect petition against petitioner in March of 2012. The petition alleged that petitioner failed to provide financial and medical support for the child and was recently released from federal prison on drug charges. At an adjudicatory hearing in December of 2013, petitioner was again incarcerated and, therefore, absent from the hearing, but was represented by counsel.¹ At the dispositional hearing in February of 2014, petitioner's counsel motioned for the circuit court to continue the hearing so that petitioner could attend. The circuit court denied this motion and proceeded to take evidence. After finding that petitioner abandoned the child by his failure to provide support to her and that petitioner lacked a bond with the child, the circuit court found 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 in the child's best interests. Consequently, the circuit court terminated petitioner's parental rights. Petitioner now brings this appeal.

This Court has previously established the following standard of review:

¹It is unclear from the record as to when petitioner was re-incarcerated after his March of 2012 release. Nevertheless, it appears that petitioner remained incarcerated throughout the duration of this case and, according to his counsel's brief, is expected to remain in federal prison for several more years.

“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 argues that the circuit court erred in terminating his parental rights for two reasons. First, he argues that the circuit court erred in ruling that he abandoned the child. He asserts that he has spoken with the child, but that his other attempts to contact her were thwarted by the child’s grandmother, with whom she currently resides. Petitioner also argues that the circuit court erred in holding the dispositional hearing in his absence because he was precluded from testifying and from cross-examining the State’s witnesses.

Upon our review of the record, we find no error in the circuit court’s termination of petitioner’s parental rights. “‘Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.’ Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).” Syl. Pt. 2, *In re Timber M.*, 231 W.Va. 44, 743 S.E.2d 352 (2013). First, we find no error with the circuit court’s finding of abandonment by petitioner. We recognize the following:

“A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality abandonment, or other dereliction of duty . . . , the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.”

Syl., in part, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d 798 (1969). Petitioner’s assertion that he was in contact with the child is without support in the record on appeal. Our review of the record reveals no evidence that petitioner ever contacted the child before or during the pendency of this matter. Further, the record does not offer any indication that petitioner provided any financial, medical, or emotional support for the child.

Second, we find that the circuit court did not err in proceeding with the dispositional hearing in petitioner’s absence. “Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court.” Syl. Pt. 10, *State ex rel. Jeanette H. v. Pancake*, 207 W.Va. 154, 529 S.E.2d 865 (2000). We have also held as follows:

In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

Syl. Pt. 11, *id.* The record provides that, at the time of the dispositional hearing, the case had been pending for nearly two years while petitioner was incarcerated in federal prison in Maryland. Moreover, petitioner's attorney was present at every hearing to represent petitioner, including at the dispositional hearing, and would have had the opportunity to cross-examine each witness.

Under West Virginia Code § 49-6-5(b)(4), a parent's abandonment of a child constitutes a circumstance in which there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected. The evidence supports the circuit court's termination of petitioner's parental rights based on his abandonment of the child and the child's best interests. 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.

Affirmed.

ISSUED: August 29, 2014

CONCURRED IN BY:

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