# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**In Re: S.M.:**

**No. 11-0914 (Roane County 10-JA-23)**

**FILED**
**December 2, 2011**
**RORY L. PERRY II, CLERK**
**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

## MEMORANDUM DECISION

Petitioner Mother appeals the circuit court's order terminating her parental rights to her child, S.M. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR") has joined in the guardian ad litem's response.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. The case is mature for consideration. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

"'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.' Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

This petition was filed after the child, then approximately three months old, was taken to the hospital and found to have a broken leg. A pediatric expert noted that the spiral fracture was non-accidental. Both Petitioner Mother and the father of the child had custody during the time period in which the injury could have occurred, although they were not

together in the same home during any of those times as the parents are no longer in a relationship. Neither parent could account for the injury, and Petitioner Mother gave several unsubstantiated scenarios as to how the injury could have occurred. Petitioner Mother was found to be uncooperative in several instances, by failing to take two scheduled polygraphs, failing to fully answer questions posed by hospital staff regarding the injury, and by failing to give a reasonable explanation for the injury to the child. Both parents were adjudicated as abusing and neglectful. The circuit court terminated Petitioner Mother's parental rights without an improvement period, finding that the mother has made no acknowledgment of the abuse and neglect, making any improvement period "in vain."

Petitioner Mother first argues that the circuit court erred in adjudicating her as an abusing and neglectful parent. This Court has found that

> an abused child is defined as "a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" W.Va.Code § 49-1-3(a)(1) (1998). This Court has enlarged this definition by stating that "[i]mplicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." Syllabus Point 1, *W.Va. Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). Furthermore, [t]he term 'knowingly' as used in West Virginia Code § 49-1-3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred. Syllabus Point 7, *id.* When presented with the medical testimony regarding [the child's] injuries, we believe the parents should have known their child was abused and should have put forth a concerted effort to identify the abuser.

*In re Harley C.*, 203 W.Va. 594, 599, 509 S.E.2d 875, 880 (1998). Petitioner Mother has, to date, made no admissions that the child was even abused, let alone identified the perpetrator of said abuse. Thus, this Court finds no error in the circuit court's finding that S.H.M. was an abused and neglected child.

Petitioner Mother also argues that she should have been granted an improvement period. The circuit court has the discretion to refuse to grant an improvement period when no improvement is likely. This Court stated that "in order to remedy the abuse and/or neglect

problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense." *W. Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). Moreover, "[p]arental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993). Petitioner Mother never admitted that the child was abused, and repeatedly gave scenarios in which the child could have been accidentally injured, although those were all implausible considering the mechanism of injury. Thus, this Court finds no error in the denial of an improvement period.

For the foregoing reasons, we find no error in the decision of the circuit court to terminate petitioner's parental rights without an improvement period, and the circuit court's order is hereby affirmed.

Affirmed.

**ISSUED**: December 2, 2011

**CONCURRED IN BY**:

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