STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: T.H., D.E., and D.H.**

No. 12-0647 (Jackson County 11-JA-62, 63 & 64)

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother's appeal, by counsel Drannon L. Adkins, arises from the Circuit Court of Jackson County, wherein her parental rights to the children, T.H., D.E., and D.H., were terminated by order entered on May 9, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Laurence W. Hancock, has filed a response on behalf of the children.

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 proceedings below were initiated after D.H. was taken to the hospital and diagnosed with non-accidental injuries and shaken baby syndrome. While the child was in the hospital, medical professionals also determined that the child had other non-accidental injuries predating the December 7, 2011, incident for which he was admitted, indicating that he had been shaken on previous occasions. Both parents denied shaking the child or knowledge of the injuries, though petitioner did attempt to cast blame on then two-year-old T.H., the child's sibling. At the adjudicatory hearings held on February 16, 2012, and February 29, 2012, petitioner invoked her right against self-incrimination under the Fifth Amendment to the United States Constitution, and was found to be an abusing parent due to her failure or refusal to provide the child with necessary and adequate medical care. Petitioner was denied a post-adjudicatory improvement period, and the circuit court subsequently terminated her parental rights. On appeal, petitioner argues several assignments of error that are addressed below.

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." Syllabus Point 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). To begin, petitioner argues that the circuit court erred in reopening the evidence at adjudication after all parties had rested and the DHHR had begun closing arguments during the first adjudicatory hearing. According to petitioner, the circuit court questioned the DHHR's decision to rest without presenting medical evidence of the child's injuries. Petitioner argues that because neither the DHHR nor the guardian actually moved to reopen the evidence, it was error for the circuit court to do so on its own despite the guardian's motion to continue the adjudicatory hearing for later presentation of medical evidence. Further, petitioner argues that neither party could show the requisite good cause to reopen the evidence. In response, the DHHR argues that under Rule 614 of the West Virginia Rules of Evidence, the circuit court has discretion to call witnesses and/or question them, and that the circuit court in this matter had the authority to require medical experts to testify to the child's injuries. The guardian ad litem mirrors this argument, asserting that the circuit court had the authority to require presentation of medical expert witnesses in order to achieve the goal of abuse and neglect proceedings designed to protect defenseless children.

Upon review of the record, we find no error in the circuit court's decision to continue the adjudicatory hearing in order for the DHHR to present medical evidence of D.H.'s injuries, despite the fact that the DHHR had already rested. As noted above, Rule 614 of the West Virginia Rules of Evidence allows circuit courts the discretion to call witnesses on its own motion. Further, at adjudication, petitioner's own counsel admitted that testimony related to the child's medical records would tend to shed more light on the nature and extent of the subject child's injuries. We have previously held that

> in any case involving child custody, "[t]he controlling principle . . . is the welfare of the child and . . . in a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 405, 168 S.E.2d 798, 799 (1969).

In re Antonio R.A., 228 W.Va. 380, 388, 719 S.E.2d 850, 858 (2011). For these reasons, the circuit court did not err in requiring the presentation of additional evidence at adjudication related to D.H.'s injuries because this decision was clearly in the children's best interest. As such, we find no error in the circuit court's decision to grant the guardian's motion to continue the adjudicatory hearing so that witnesses could testify to this issue.

In relation to this assignment of error, petitioner also alleges that the evidence presented at the first adjudicatory hearing was insufficient to support the circuit court's finding that petitioner abused and/or neglected the children. Petitioner bases this assignment of error on her allegation

that the circuit court erred in reopening the evidence, and argues that the circuit court should not have considered the evidence presented at the second adjudicatory hearing. Because we find no error in the circuit court's decision to continue the adjudicatory hearing for the presentation of medical evidence, we find this assignment of error to be without merit. The record shows that the circuit court was presented with ample evidence upon which to base its finding that petitioner is an abusing parent, including the fact that petitioner was "presented with plainly sufficient indicators that the child was in need of medical attention" yet failed to properly obtain the same.

Next, petitioner alleges that the circuit court erred in terminating her parental rights upon her invocation of the constitutionally guaranteed right against self-incrimination. According to petitioner, termination was based upon her refusal to acknowledge the existence of a problem necessitating the abuse and neglect petition, as evidenced by her failure to respond to the allegations against her during the abuse and neglect proceedings. Petitioner argues, however, that she was not refusing to accept responsibility for her actions, but instead was simply invoking her constitutionally guaranteed right against self-incrimination related to the criminal charges pending against her for D.H.'s injuries. Petitioner argues that for the circuit court to hold otherwise is a violation of her due process rights.

In response, the DHHR argues that our prior holdings have established that silence in an abuse and neglect proceedings is evidence of culpability, and that the Court has instructed that parents must choose between this inference and waiving the right to silence. The guardian reiterates this argument, noting that petitioner decided that her right against self-incrimination was more important than admitting her parental deficiencies and regaining custody of her children. Upon review of the record, the Court finds no merit in this argument. We have previously discussed the difficult choice parents face in abuse and neglect proceedings, stating that

> [w]e are satisfied that this rule allowing a trial court to consider one's silence as affirmative evidence of culpability, as set forth in *Wright*, is soundly supported by the authorities and is consistent with the policy of this State which encourages prompt hearing of abuse and neglect cases and a paramount concern for the best interests of the children involved in such proceedings. We are also satisfied that the rule does not offend the protections against self-incrimination afforded by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article III, Section 5 of our State Constitution. As applied to the issue of culpability, the rule simply confronts the accused parent with a choice: Assert the privilege against self-incrimination with the risk that silence will be considered in the civil proceeding as evidence of culpability, or waive the privilege and offer such evidence as the accused may alone possess to refute the charge of abuse and neglect.

In re Daniel D., 211 W.Va. 79, 87, 562 S.E.2d 147, 155 (2002). As such, we find no merit in petitioner's argument that her due process rights were violated, and further that the circuit court did not err in relying upon petitioner's silence in terminating her parental rights.

Lastly, petitioner argues that the circuit court erred in denying her a post-adjudicatory improvement period because she was complying with the services offered to her. For this reason, petitioner argues that "there was no rational way the circuit court could have concluded that the conditions of abuse and/or neglect could not have been corrected in the future." In response, the DHHR argues that the first step to remedying a problem is acknowledging it, and that petitioner refused to acknowledge the conditions giving rise to the abuse and neglect petition. For this reason, the circuit court was correct to deny petitioner an improvement period. The guardian also argues in support of the circuit court's denial of a post-adjudicatory improvement period.

Upon our review, the Court finds no error in the circuit court's denial of petitioner's motion for a post-adjudicatory improvement period. We have previously held 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. Dep't of Health and Human Res. ex rel. Wright v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). Based upon this language, it is clear that the circuit court did not err in denying petitioner an improvement period due to her failure to acknowledge the existence of the problem necessitating the petition's filing.

For the foregoing reasons, we find no error in the decision of the circuit court, and the termination of petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: October 22, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman

DISSENTING:

Chief Justice Menis E. Ketchum

DISQUALIFIED:

Justice Thomas E. McHugh