

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

In Re: S.E.:

No. 11-0229 (Mercer County 10-JA-75)

FILED

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein the Petitioner Fathers's parental rights to E.S. were terminated. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her response on behalf of the child, S.E. The Respondent Mother has also filed a response. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

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. 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." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). The petitioner challenges the circuit court's order terminating his parental rights, arguing that the circuit court erred in allowing an unqualified witness to provide expert testimony and to provide hearsay evidence, and also that it was error to deny petitioner a post-adjudicatory improvement period. Petitioner alleges that the therapist who provided testimony as to his sexual abuse of the subject child was not properly qualified to testify as an expert. However,

the record clearly shows that this witness testified as to her knowledge, skill, training, and education as per the requirements of West Virginia Rule of Evidence 702. Specifically, she testified that she is self-employed in private practice as a licensed, independent, clinical social worker specializing in play therapy and children's counseling, and further performs contract work through the Children Home Society. As such, an adequate foundation was established for this witness's expert testimony.

Petitioner next argues that it was clear error for the circuit court to allow this therapist to testify to his child's extrajudicial statements unless there is testimony to demonstrate that the child was sent there for treatment. This Court has held that "[w]hen a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 9, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001). A review of the record clearly establishes that the subject child was being treated by the therapist at the time of these statements. The family court ordered that the child undergo the play therapy with the therapist and that the child was undergoing such therapy at the time of the statements. For these reasons, the Court concludes that the testimony was properly admitted.

Lastly, petitioner argues that it was error to deny him an improvement period below. This Court has held that, "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). Further, West Virginia Code § 49-6-5(a)(7)(A) describes various situations wherein the DHHR is not required to make reasonable efforts to preserve the family, including situations where sexual abuse has occurred. In this matter, it was established by clear and convincing evidence that sexual abuse occurred, so the DHHR was not required to make efforts to preserve petitioner's relationship with the subject child. Further, the circuit court found, based on these aggravated circumstances, that there was no reasonable likelihood that the conditions of abuse could be substantially corrected in the near future.

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

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum