

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

In Re: C.W.:

**No. 11-0234
(Monongalia County 09-JA-21)**

FILED
September 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Putative Father appeals the circuit court's order finding that he is not the legal father of C.W. 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 his response on behalf of the child, C.W.

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 abuse and neglect petition in this case was filed because C.W.'s mother had two prior terminations of her parental rights, one in 2001 and one in 2006. These terminations

were due to mother's mental deficiencies. Throughout her life, mother has been a protected person, and at the time C.W. was born, DHHR Adult Protective Services was her guardian, as she was found to need constant supervision in her daily living. Mother has been evaluated many times, and has been found to be mentally retarded, with an IQ in the sixties. The petition did not allege abuse or neglect of C.W., as he was removed immediately upon his birth. One month prior to C.W.'s birth, mother married Petitioner Putative Father who was not the biological father of C.W., but who sought to raise him, and fully participated throughout the litigation in this case. She did not meet Putative Father until approximately one month prior to the marriage. After the petition was filed, the circuit court ordered that mother and Putative Father be thoroughly evaluated to determine their ability to care for C.W., who has extensive special needs. DHHR complied, offering visitation, parenting and adult life skills services, but throughout the case, mother and Putative Father were found to be lacking in the skills necessary to raise a child, particularly a special needs child like C.W. The circuit court eventually found that although mother and Putative Father loved the child and fully complied in services, the circumstances surrounding mother's two prior terminations, her mental deficiencies, had not substantially changed. Further, the circuit court found that Putative Father's claim of legal paternity of C.W. due to the marriage is overborne by the reality of the fact that another man has proven to be C.W.'s biological father, and Putative Father knew he was not the father when he married mother. The circuit court further noted that Putative Father "cannot fairly claim to be capable of providing constant and safe custodial care for [C.W.] on his own."

Petitioner Putative Father first argues that the circuit court erred in finding that he was not the legal father of C.W. This Court has stated that "[i]n West Virginia, the presumption of legitimacy that arises when a child is born or conceived during a marriage is rebuttable." Syl. Pt. 1, *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989). In the present case, the presumption is rebutted by blood tests, and by the fact that Petitioner Putative Father did not even meet Mother until she was several months pregnant. Thus, the circuit court did not err in finding that Petitioner Putative Father was not the legal father of C.W.

Petitioner Putative Father also argues that the circuit court erred in terminating the parental rights of petitioner because there were no allegations of abuse and/or neglect and it was contrary to the best interests of the child. As stated above, this Court finds no error in the circuit court's finding that Petitioner Putative Father was not C.W.'s legal father. Concerning a nonbiological father claiming custody or visitation rights to a child, this Court has held:

A nonbiological father must show a caring father-child relationship, which means not only providing for the financial support of the child, but also emotional and psychological support. The relationship must have begun with

the consent of the biological mother. It must not have been temporary and there must have been sufficient time for the nonbiological father to become the functioning father.

Syl. Pt. 6, *Simmons v. Comer*, 190 W.Va. 350, 438 S.E.2d 530 (1993). Petitioner has clearly shown that he cares for the child; however, he has never financially supported the child nor has he been an emotional or psychological parent. His only contact with the child is periodic visitation in a structured setting. He has never had parental rights. Moreover, the circuit court noted that Putative Father “cannot fairly claim to be capable of providing constant and safe custodial care for [C.W.] on his own.” Thus, the circuit court did not err in terminating Petitioner Putative Father’s parental rights to C.W.

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

Affirmed.

ISSUED: September 13, 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