

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

In Re: A.H.

No. 12-0225 (Kanawha County 10-JA-207)

FILED

June 25, 2012

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

MEMORANDUM DECISION

Petitioner Father, by counsel Jason S. Lord, appeals the Circuit Court of Kanawha County's January 20, 2012, order terminating his parental rights to A.H. The guardian ad litem, Jennifer Victor, has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its joinder in and concurrence with the guardian's response.

Having reviewed the appendix 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 appendix 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.

The instant petition was filed after Petitioner Father was arrested for causing the death of his girlfriend's one-year-old daughter. Petitioner was eventually convicted of death of a child by a parent, guardian, or custodian by child abuse and sentenced to forty years in the penitentiary plus ten years of intense supervision. At the time of the child's death, petitioner had court-ordered visitation with A.H. Petitioner Father was adjudicated as an abusing parent based on the death of the child in his custody and pursuant to West Virginia Code § 49-1-3(1) and (2). Petitioner Father's parental rights to A.H. were then terminated, as the circuit court noted that reasonable efforts were not required, and that reunification was impossible due to Petitioner Father's prison sentence. Post-termination visitation was also denied.

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 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).

On appeal, Petitioner Father argues that A.H. is not an abused child, as there was no evidence presented at any time that A.H. was abused or neglected. Petitioner argues that the circuit court erred in making the inference that because he was found guilty of abusing a child who did not reside with A.H., then A.H. should be deemed abused or neglected. Petitioner Father further argues that the State failed to meet its burden. In addition, Petitioner Father argues that he should have been granted post-termination visitation, as A.H. may wish to have contact with him in the future if recommended by licensed professionals.

The guardian argues in response that Petitioner Father had court-ordered visitation with A.H., and that therefore A.H. was properly considered a child in the same home as the child who Petitioner Father beat to death. Petitioner Father failed to refute the evidence and failed to testify. Petitioner Father now argues that A.H. was not an abused child, but the guardian responds by arguing that the statutory definition of an abused child includes A.H. in this matter. The guardian argues that termination was proper. The DHHR has joined in and concurred with the guardian's response.

Petitioner in this matter was convicted of death of a child by a parent, guardian, or custodian by child abuse pursuant to West Virginia Code § 61-8D-2a. Prior to this conviction, Petitioner Father had visitation with A.H. in his home.

In any case where a person is convicted of an offense described in section twelve, [§ 61-8-12] article eight, chapter sixty-one of this code or articles eight-b [§§ 61-8B-1 et seq.] or eight-d [§§ 61-8D-1 et seq.] of said chapter against a child and the person has custodial, visitation or other parental rights to the child who is the victim of the offense or to any child who resides in the same household as the victim, the court shall, at the time of sentencing, find that the person is an abusing parent within the meaning of this chapter as to the child victim, and may find that the person is an abusing parent as to any child who resides in the same household as the victim, and the court shall take such further steps as are required by this article.

W. Va. Code § 49-6-11. Therefore, pursuant to this code provision, this Court concludes that the circuit court did not err in finding that Petitioner Father is an abusing parent.

With regard to the termination of Petitioner Father’s parental rights, this Court has held as follows:

“As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.” Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Petitioner Father has refused to acknowledge his part in the death of the child in his custody, even after his conviction. Therefore, this Court finds that termination was proper. As to post-termination visitation, this Court finds that due to petitioner’s lengthy incarceration, post-termination visitation is not in A.H’s best interest.

This Court reminds the circuit court of its duty to establish permanency for the child. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the child within twelve months of the date of the disposition order. As this Court has stated, “[t]he [twelve]-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.” Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that “[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.” Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, “[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.” Syl. Pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

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: June 25, 2012

CONCURRED IN BY:

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