

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

In Re: K.C. and D.B.

No. 12-0320 (Kanawha County 11-JA-115)

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Peggy L. Collins, arises from the Circuit Court of Kanawha County, wherein his parental rights to K.C.¹ were terminated by order entered on May 11, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Jennifer R. Victor, has filed a response on behalf of the child.

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.

K.C. was born on June 10, 2011, and the DHHR took custody of the child because of prior involuntary terminations of the mother's parental rights to older children. According to the initial abuse and neglect petition, petitioner has a history of substance abuse, domestic violence, and criminal convictions. The petition also noted that petitioner was arrested for third offense driving under the influence ("DUI") after wrecking a vehicle in which K.C.'s mother, who was pregnant with the child at the time, was a passenger. On July 20, 2011, petitioner was charged with malicious wounding and first degree murder after attacking his two roommates in an incident unrelated to the abuse and neglect proceedings. Petitioner remained incarcerated throughout the proceedings below. Following the dispositional hearing on February 9, 2012, the circuit court terminated petitioner's parental rights to K.C.

On appeal, petitioner alleges that the circuit court erred in adjudicating the child as abused or neglected because the evidence was insufficient to support this finding, and also that it erred in denying him an improvement period. In support, petitioner argues that the child was removed from his custody three days after her birth, and that he had no opportunity to demonstrate his parenting skills. Further, he argues that the circuit court's finding that the child was abused or neglected was based on unsubstantiated criminal charges, discussions related to his use of alcohol and current housing, and his intention to maintain a martial relationship with the child's mother.

¹ Subsequent to paternity testing during the proceedings below, it was determined that petitioner is not the biological father of D.B. As such, the child is not at issue in this memorandum decision.

He argues there was no testimony or evidence that his alleged failure to provide necessary food, clothing, or shelter was not primarily due to a lack of financial means, nor was there any evidence or testimony that his substance abuse impaired his parenting ability. Lastly, petitioner argues that he was provided no improvement period or other services in order to achieve reunification, despite expressing his willingness to comply with services to improve the conditions that necessitated the petition's filing.

The DHHR argues in favor of termination of petitioner's parental rights. Specifically, the DHHR argues that the circuit court was presented with sufficient evidence to find that the child was neglected. This includes petitioner's history of domestic violence toward the child's mother and others, and a history of substance abuse that twice led to motor vehicle accidents with children as endangered passengers. According to the DHHR, this includes the most recent accident, wherein the mother, who was eight-months pregnant with K.C., was a passenger. Further, the circuit court noted that petitioner admitted to using alcohol and not having an appropriate home or provisions for the child, and he never suggested that this was a result of financial inability. While petitioner had not yet had the opportunity to directly abuse the child, the DHHR argues that he neglected her and the threat of abuse was looming at her birth, when he was forcibly removed by hospital security staff due to his behavior. Lastly, the DHHR argues that petitioner failed to request an improvement period as required by law, and that even if he had, the circuit court could not have granted petitioner the delayed improvement period that his incarceration would have required.

The guardian ad litem also argues in support of the circuit court's termination of petitioner's parental rights, and notes that the testimony at adjudication supported the circuit court's finding that the child was neglected. Specifically, the circuit court heard testimony that petitioner admitted his home was unsuitable for the child. According to the guardian, the circuit court was entitled to consider petitioner's failure to testify or present evidence in response to the DHHR's case as affirmative evidence of his culpability. Lastly, the guardian argues that petitioner failed to demonstrate that he was likely to comply with the terms and conditions of an improvement period.

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.” Syl. Pt. 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). Upon review of the record, we find no error in the circuit court's finding that the child was neglected. The circuit court specifically found that petitioner neglected the children by a present refusal, failure, or inability to provide the child with necessary shelter and supervision, among other things. This finding was supported by evidence of the unsuitable nature of petitioner's home, as well as evidence of petitioner's long history of domestic violence and other criminal charges. While petitioner refers to these prior crimes as unsubstantiated, it is clear that the circuit court was presented with testimony from witnesses with first-hand knowledge of petitioner's domestic violence history, including a police officer who personally arrested him multiple times for domestic battery against K.C.'s mother. Based upon the record, it is clear that the evidence presented at adjudication was sufficient to support the circuit court's findings.

As to petitioner's second assignment of error, the Court finds no error in regard to petitioner's parental rights being terminated without the granting of an improvement period. Petitioner's notice of appeal indicates that he did not request an improvement period during the proceedings below, and the record is also absent of any such request. As such, petitioner failed to meet the requirements for an improvement period as set forth in West Virginia Code § 49-6-12. For these reasons, the circuit court did not err in proceeding to termination without first granting petitioner an improvement period.

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: November 19, 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