

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

In Re: W.S., W.V., and A.R.

No. 12-0464 (Jackson County 11-JA-17, 18 & 19)

FILED

November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother’s appeal, by counsel Susan A. Settle, arises from the Circuit Court of Jackson County, wherein her parental rights to the children, W.S., W.V., and A.R., were terminated by order entered on March 14, 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 that the circuit court erred in failing to provide petitioner proper notice of the dispositional hearing and an opportunity to be heard. This case satisfies the “limited circumstances” requirement of Rule 21(d) of the Revised Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

On appeal, petitioner alleges three assignments of error. The Court will address only petitioner’s assignment of error alleging that the circuit court erred in terminating her parental rights. On February 29, 2012, the circuit court held a hearing to review petitioner’s post-adjudicatory improvement period. Following this hearing, the parties submitted proposed findings of fact and conclusions of law related to the hearing. On March 14, 2012, the circuit court issued an order in regard to the hearing, wherein it not only denied petitioner’s request for an extension to her post-adjudicatory improvement period, but also terminated her parental rights. Petitioner argues on appeal that she was not properly notified that a dispositional hearing would also occur at the same time as the February 29, 2012, review hearing, nor was she afforded a proper opportunity to be heard in regard to final disposition.

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 our review of the record, it appears that the circuit court failed to provide petitioner with the required opportunity to be heard at disposition. While petitioner was free to present evidence and testimony at the February 29, 2012, review hearing, we find that without notice that the hearing would also serve as a dispositional hearing, petitioner was denied her statutory right to be heard as provided in West Virginia Code § 49-6-5(a). For these reasons, the Court reverses, in part, the circuit court's March 14, 2012, order to the extent that it terminates petitioner's parental rights, and we order that the circuit court forthwith notice and conduct a dispositional hearing during which petitioner will be provided the right to be heard pursuant to West Virginia Code § 49-6-5(a). At this time, the Court declines to rule on petitioner's remaining assignments of error. Petitioner is not prevented from reasserting these assignments of error following the outcome of the ordered dispositional hearing.

For the foregoing reasons, we reverse, in part, the circuit court's March 14, 2012, order and remand the matter for further proceedings.

Reversed, in part, and Remanded.

ISSUED: November 16, 2012

CONCURRED IN BY:

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

DISQUALIFIED:

Justice Thomas E. McHugh