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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* T.W.-1, H.W., M.W., and B.W.**

No. 21-0701 (Greenbrier County 20-JA-30, 20-JA-31, 20-JA-32, and 20-JA-33)

MEMORANDUM DECISION

Petitioner Father T.W.-2, by counsel Paul S. Detch, appeals the Circuit Court of Greenbrier County's August 6, 2021, order terminating his custodial rights to T.W.-1 and H.W. and parental rights to M.W. and B.W.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Patrick Morrisey and Gary L. Michels, filed a response in support of the circuit court's order. The guardian ad litem, Michael R. Whitt, filed a response on behalf of the children in support of the circuit court's order. Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in adjudicating him as an abusing parent and in terminating his parental and custodial rights to 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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In May of 2020, the DHHR filed a child abuse and neglect petition alleging that petitioner sexually abused his then fourteen-year-old stepdaughter, H.W., and that this sexual abuse also

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). Additionally, because one of the children and petitioner share the same initials, we refer to them as T.W.-1 and T.W.-2, respectively, throughout the memorandum decision.

threatened the wellbeing of T.W.-1, M.W., and B.W.[2] The DHHR alleged that it received a referral the prior month that H.W. disclosed that petitioner had sexually abused her. According to the petition, this was the second incident of sexual abuse involving petitioner. The referral indicated that the mother denied any sexual abuse and claimed that H.W. was lying. After receiving the referral, a Child Protective Services ("CPS") worker went to the parents' home, where H.W. confirmed that she woke up on a recent morning to petitioner touching her. The child disclosed to the worker that petitioner was "touching her b[reasts], butt[ocks] and stuck his fingers inside of her." H.W. also disclosed that petitioner had sexually abused her twice, but she never told anyone about the first incident until the second incident occurred. The CPS worker also interviewed the biological father of H.W., who stated that petitioner had been sending him text messages apologizing and stating that he could not remember the incident and that he was disgusted with himself.[3]

Finally, according to the petition, H.W. participated in a forensic interview at the Child Advocacy Center ("CAC"). During the interview, H.W. disclosed that she woke up on the morning of April 24, 2020, to petitioner "touching her inappropriate parts." The child stated that she felt around for her phone but could not find it, so she laid there frozen. She disclosed that her younger sister, then seven-year-old M.W., was in the middle of the bed with her and petitioner. H.W. stated that she at first thought that petitioner was asleep, but then stated that he was awake. She disclosed that her younger sister said "ow" and petitioner said "sorry." H.W. stated that petitioner continued to abuse her and then he got up and went to the bathroom. During the interview, H.W. noted that she was shocked when petitioner digitally penetrated her because nothing like that had ever happened to her before.

The DHHR filed an amended petition in July of 2020 alleging that CPS workers visited H.W., and the child disclosed that, days prior, she told her mother that she would prefer to live with her biological father because she "felt uncomfortable in the [mother's] home." H.W. disclosed that the mother began to yell at her, stated that the child was the reason that petitioner may go to jail, and threatened suicide if petitioner did go to jail. In its amended petition, the DHHR further alleged that the mother recently went out for the night without disclosing her destination and left H.W. in charge of caring for the younger children. When H.W. awoke the next morning, she found petitioner sitting in her mother's living room, which made her extremely uncomfortable. Finally, the petition indicated that H.W. admitted to briefly withdrawing her claims of abuse after the DHHR filed the initial petition because her mother influenced her to call CPS workers and law enforcement so that petitioner could return to the home.

After several continuances, the circuit court held a series of adjudicatory hearings in April of 2021 during which it heard testimony from several witnesses consistent with the allegations in

[2]Petitioner is the stepfather of T.W.-1 and H.W. and the biological father of M.W. and B.W.

[3]At the time of the incident, T.W.-1 and H.W. were in petitioner's and the mother's primary custody pursuant to a prior agreement. The biological father of T.W.-1 and H.W. exercised custody of the children on weekends.

the petitions. A law enforcement officer testified that H.W. disclosed inappropriate touching as alleged in the petition. The officer explained that the child attempted to recant her allegations after speaking with family members, but she ultimately confirmed her original statement of abuse she gave to the officer in April of 2020. In addition, the officer recounted his interview of petitioner, who confirmed that he, H.W., and M.W. were sharing a bed on the night of the alleged incident in April of 2020. According to the officer, petitioner claimed that on multiple prior occasions he would awaken during the night while having sexual intercourse with his wife and posited that his behavior was caused by a disorder, implying that this alleged disorder resulted in him unknowingly abusing H.W.

Next, the mother, a CPS worker, and CAC worker testified about the incident of sexual abuse. The mother testified that, although petitioner went to bed with the children on the night of the incident, she repeatedly looked into the bedroom throughout the night and did not witness any incident of sexual abuse. The CPS worker and CAC worker testified that H.W. disclosed the inappropriate touching as alleged in the petition.

Finally, petitioner testified and stated that he had no recollection of inappropriately touching H.W. during a prior alleged abuse incident in November of 2019. Petitioner further acknowledged that it was possible he touched H.W. during the second alleged incident in April of 2020, but any such contact was unintentional as it occurred while he was asleep. He admitted that he shared a bed with M.W. and H.W. on the night of the second alleged incident, and he somewhat recalled M.W. saying "ow" and that he said "sorry" as he thought he had pulled M.W.'s hair. According to petitioner, he was not under a blanket with H.W., and he woke up between 5:00 and 5:30 am. He further testified that after hearing the allegations of abuse, he "freaked out," text messaged two of his brothers, spoke to his father, and messaged H.W.to say that he was sorry if he did anything to her.

After hearing the evidence, the circuit court found H.W.'s accusations and interviews to be "the most credible evidence presented in this case." The court explained that the child's statements were "corroborated by the statement of others," and the "recollection of events as expressed by H[.W.] were consistent in detail when provided" to the law enforcement officer as well as CPS workers. Additionally, the court acknowledged that H.W. had been "pressured by her mother and grandmother to keep it a family matter," which caused her to withdraw her initial statements, but the court found that H.W.'s original statement was "true and correct." Based on its conclusion that H.W.'s recollection of events and the approximate time of the incident were confirmed by petitioner's own testimony, the court found by clear and convincing evidence that petitioner was an abusing parent, and that the children were abused and neglected children.

During a dispositional hearing in July of 2021, the DHHR and guardian requested that petitioner's parental and custodial rights to the children be terminated. The DHHR noted that it did not offer reunification services because of the court's prior finding that petitioner sexually abused H.W. At the conclusion of the hearing, the circuit court found that there were aggravated circumstances "such that the potential for future abuse and neglect of the children is so great that resources to resolve the family issues and assist" petitioner should be precluded. The court also

found that petitioner had done nothing on his own to address the issues that led to the filing of the petition. Based upon this evidence, the court found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and that it was in the best interests of the children to terminate petitioner's parental rights to M.W. and B.W. and his custodial rights to T.W.-1 and H.W.[4] The circuit court entered an order reflecting its decision on August 6, 2021. Petitioner appeals from this order.

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).

First, petitioner argues that the circuit court erred in adjudicating him as an abusing parent and custodian because he alleges that he was asleep at the time H.W. was sexually abused.[5] According to petitioner, H.W. indicated "on multiple occasions that she believed that [petitioner] may have been asleep" during the alleged incident in April of 2020. According to petitioner, this absolves him of responsibility for his sexual abuse of the child. This argument, however, misstates the record. Petitioner is correct that H.W. indicated that she believed that petitioner may have been asleep *before* the sexual abuse, but there is nothing in the record to indicate that the child ever believed that petitioner was asleep *during* the incident. Indeed, H.W.'s full CAC interview makes

[4]The mother's parental rights were also terminated below. According to the parties, H.W. has achieved permanency in the care of her nonabusing father. The permanency plan for M.W. and B.W. is adoption by their aunt and uncle. T.W.-1 reached the age of majority after the proceedings.

[5]In support of this argument, petitioner asserts that the definition of "abused child" as set forth in West Virginia Code § 49-1-201 requires a showing of intent in order for the DHHR to satisfy its burden of proof at adjudication. It is unnecessary to address whether this statute requires intent, however, because petitioner's factual basis for this argument lacks support in the record. Again, petitioner predicates this argument on his assertion that he was asleep when he sexually abused H.W. Because the evidence shows that petitioner was awake during this incident, as discussed above, he cannot be entitled to relief on this basis.

clear that the child was aware that petitioner was awake when he apologized to M.W. after the child said "ow" during the incident. Confusingly, petitioner testified to these same facts, indicating that be believed he pulled M.W.'s hair and that he apologized to the child. In essence, petitioner admitted that he was awake during the sexual abuse, yet he contradictorily stated that he had no recollection of the incident. Accordingly, all the evidence introduced—including petitioner's own implicit admission to being awake when he apologized to M.W., which H.W. indicated happened *during* petitioner's sexual abuse—demonstrates that petitioner was awake at the time he sexually abused H.W. In short, petitioner's arguments in support of this assignment of error are all predicated on his assertions that the circuit court erroneously weighed the evidence in question. However, the rulings to which petitioner cites all come down to the issue of credibility, and as this Court has long held, "[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997). Accordingly, we find that petitioner is entitled to no relief in this regard.

Having established that petitioner's arguments regarding the court's credibility determinations do not entitle him to relief, we further find no error in the circuit court's adjudication of petitioner as an abusing parent and custodian. We have previously held as follows:

> At the conclusion of the adjudicatory hearing, the 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 . . . . The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

In re F.S., 233 W. Va. 538, 544, 759 S.E.2d 769, 775 (2014). This Court has explained that "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Id*. at 546, 759 S.E.2d at 777 (citation omitted). However, "the clear and convincing standard is 'intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.'" *Id.* (citation omitted). Further,

> "[West Virginia Code § 49-4-601(i)], requires the [DHHR], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing [evidence].' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the [DHHR] is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. Pt. 1, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (citations omitted). It is also important to note that, in the criminal context, sexual abuse may be proven solely with the victim's testimony, even if that testimony is uncorroborated. Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). On appeal, petitioner argues that there was no indication that he groomed the

child and that he did not threaten the child to silence the allegations. As a result, petitioner maintains that "key indicators of sexual abuse were absent" in the proceedings. We do not find these arguments compelling, however, given that uncorroborated testimony is sufficient to satisfy not only the clear and convincing standard at issue, but also the higher standard of proof beyond a reasonable doubt in a criminal proceeding. As such, it is clear that the circuit court did not err in adjudicating petitioner as an abusing parent and custodian.

Finally, petitioner argues that the circuit court erred in terminating his rights to the children. According to petitioner, there was insufficient evidence to find that he abused and neglected H.W. and, therefore, the court committed reversible error by terminating his parental and custodial rights. We disagree and find that the substantial evidence laid out above supports termination of petitioner's parental and custodial rights.

Pursuant to West Virginia Code § 49-4-604(c)(6), a circuit court may terminate a parent's parental rights upon a finding that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that termination is necessary for the welfare of the children. West Virginia Code § 49-4-604(d)(5) provides that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when

> [t]he abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems, or assist the abusing parent or parents in fulfilling their responsibilities to the child.

Here, in terminating petitioner's parental and custodial rights, the circuit court specifically found by clear and convincing evidence that petitioner sexually abused H.W. and that it was in the best interests of all of the children to terminate his rights. Therefore, the circuit court's finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected is in accord with West Virginia Code § 49-4-604(d)(5). Additionally, we have held as follows:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] . . . that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). As such, it is clear that the circuit court did not err in terminating petitioner's parental and custodial rights.

For the foregoing reasons, we find no error in the decision of the circuit court, and its August 6, 2021, order is hereby affirmed.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn