STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
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EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

***In re* A.P., I.P.-1, and I.P.-2**

No. 17-0991 (Cabell County 16-JA-57, 58, and 59)

MEMORANDUM DECISION

Petitioner Father R.P., by counsel Michael A. Meadows, appeals the Circuit Court of Cabell County's September 22, 2017, order terminating his parental rights to A.P., I.P.-1 and I.P.-2.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed a response in support of the circuit court's order. The guardian ad litem ("guardian"), Elizabeth Gardner Estep, filed a response on behalf of the children also in support of the circuit court's order. Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in (1) denying his motion to extend his post-dispositional improvement period, (2) terminating his parental rights, and (3) ratifying the emergency custody of the children following the preliminary hearing.[2]

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 March of 2016, the DHHR filed an abuse and neglect petition against petitioner and the mother. The DHHR alleged that it received a referral following the mother's arrest and incarceration on federal drug charges in February of 2016. Petitioner had been incarcerated since June of 2015 and his expected release from incarceration was December of 2016. According to

[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 two of children share the same initials, we will refer to them as I.P.-1 and I.P.-2, respectively, throughout this memorandum decision.

[2]Petitioner lists multiple assignments of error concerning the circuit court's termination of his parental rights. We will address them together.

the DHHR, petitioner neglected the children by failing to provide for them financially and emotionally. Petitioner waived his preliminary hearing.

The circuit court held an adjudicatory hearing later in March of 2016, during which petitioner stipulated that his incarceration and failure to support his children hindered his ability to parent his children. The circuit court accepted petitioner's stipulation and granted him a post-adjudicatory improvement period.

The circuit court held several review hearings over the course of the next few months. Petitioner continued to be incarcerated and proffered several possible release dates, none of which were before the expiration of his post-adjudicatory improvement period in September of 2016. The DHHR recommended termination of petitioner's post-adjudicatory improvement period due to his continued incarceration and resulting inability to participate in an improvement period. At a review hearing in September of 2016, petitioner requested an extension of his post-adjudicatory improvement period and testified that his anticipated release date was December of 2016. The circuit court granted petitioner a three-month extension.

In December of 2016, the circuit court held a hearing wherein petitioner advised that his release date had been changed. Petitioner requested a six-month post-dispositional improvement period, which the circuit court granted. A review hearing was held on the matter in March of 2017. Petitioner testified that he anticipated being released within the next week and that he chose to arrange housing at Life House, a rehabilitation center. Petitioner noted that he would not be able to take custody of the children immediately and believed the program would last six months. The circuit court scheduled the dispositional hearing. Petitioner was released from incarceration on parole later in March of 2017, and he agreed to a case plan in April of 2017.

The circuit court held a dispositional hearing in June of 2017, during which petitioner requested a three-month extension to his post-dispositional improvement period. A DHHR worker testified that petitioner had only been working for one month, failed to obtain suitable housing, and failed to meet with his service provider consistently in May of 2017. Further, petitioner's financial situation was unstable as he left Life House owing money to the program and was behind on his parole fees. Petitioner testified that he would be able to comply with obtaining suitable housing and any other requirements if he were granted an extension to his improvement period. After hearing evidence, the circuit court found that there was no reasonable likelihood that petitioner could correct the conditions of abuse and/or neglect and that termination was necessary for the children's welfare. At that time, petitioner was permitted to address the circuit court and he stated that his parental rights should not have been terminated. Petitioner stated that he was a recovered addict and had made significant progress in his life. He further stated

> [w]e've taken pretty good care of our kids considering we could have done much better if it hadn't been for addiction, but, that being said, I guarantee you'll never find a parent full-blown in opiate or heroin addiction who was anywhere near as good parents as we were . . . . But I'm a recovered addict. And I'm not being given a chance to make the decisions for the rest of my kids' lives concerning them.

After finishing his statement, petitioner left the courtroom before the conclusion of the hearing. The circuit court noted that petitioner continued to demonstrate a complete lack of understanding as to why his parental rights were terminated, which was not due to addiction, but rather, his failure to achieve the goals set for him through his improvement period. It is from the September 22, 2017, dispositional order terminating his parental rights that petitioner appeals.[3]

The Court has previously established the following standard of review in cases such as this:

> "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).

On appeal, petitioner argues that the circuit court erred in denying his motion for an extension to his post-dispositional improvement period. Specifically, petitioner argues that he could have corrected any issues which led to the filing of the petition had he been granted a three-month extension. In support of his argument, petitioner notes that he has been working multiple jobs and visiting with the children. We find petitioner's argument to be without merit. Pursuant to West Virginia Code § 49-4-610(6), a circuit court

> may extend any improvement period granted pursuant to subdivision (2) or (3) of this section for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that the extension is otherwise consistent with the best interest of the child.

[3]The parents' parental rights were terminated during the proceedings below. The children were placed in a kinship home and the permanency plan is subsidized legal guardianship in that home.

Here, petitioner failed to demonstrate that he substantially complied with his post-dispositional improvement period such that an extension was warranted. Petitioner was granted a post-adjudicatory improvement period with a three-month extension and a subsequent post-dispositional improvement period during the course of the proceedings below. Due to his incarceration, petitioner was unable to participate in any improvement period until after his release in March of 2016, one year after the case commenced. Despite being afforded numerous improvement periods and knowing that he had little time outside of incarceration to complete them, petitioner chose to live at Life House and participate in a six-month program rather than immediately address the goals of his case plan, which were obtaining suitable housing, maintaining employment, divorcing his wife, and participating in services. Petitioner left the program at Life House, unsuccessful and in debt to the program, and moved in with his sister, whose house was inappropriate for the children due to her substantial Child Protective Services history. Petitioner then lived with his sister's ex-boyfriend, who had also participated in abuse and neglect proceedings due to his association with petitioner's sister. Petitioner obtained employment in May of 2016, and had been working for approximately one month at the time of the dispositional hearing, but continued to lead a financially unstable lifestyle as he was in arrears on his parole fees. Further, petitioner failed to participate in his adult life skills classes during the month of May of 2016, only attending one or two classes.

Moreover, petitioner failed to acknowledge the conditions of abuse. At the dispositional hearing, petitioner addressed the circuit court and argued that it had erred in terminating his parental rights when he was a recovering addict trying to address his drug addiction. However, the circuit court did not adjudicate petitioner as an abusing parent based upon his drug issues, but rather because he failed to provide for his children financially or emotionally due to his incarceration. We have previously held

> [i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

In re Timber M., 231 W.Va. 44, 55, 743 S.E.2d 352, 363 (2013) (quoting *In re: Charity H.*, 215 W.Va. 208, 217, 599 S.E.2d 631, 640 (2004)). As such, the record indicates that petitioner failed to acknowledge the conditions of abuse and failed to demonstrate that he complied with his improvement period such that an extension was warranted. Accordingly, we find no error.

Petitioner next argues that the circuit court erred in terminating his parental rights. Specifically, petitioner argues that the circuit court erred in finding that there was no reasonable likelihood that the conditions of abuse could be corrected in the near future in light of the fact that petitioner substantially complied with his case plan by correcting the conditions which led to the filing of the petition, including obtaining stable income and employment, meeting with his

service providers, and complying with the terms of his parole.[4] We disagree. West Virginia Code § 49-4-604(b)(6) provides that circuit courts are to terminate parental rights upon findings 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 child's welfare. Pursuant to West Virginia Code § 49-4-604(c)(3), a situation in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected includes one in which "[t]he abusing parent . . . ha[s] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts[.]"

Given the evidence mentioned above, we agree with the circuit court's finding that there was no reasonable likelihood that petitioner could correct the conditions of abuse in the near future as he failed to follow through with his case plan. While petitioner argues that he substantially corrected the conditions of abuse by no longer being incarcerated and working two jobs, we note that "[i]n making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child." Syl. Pt. 4, *In re B.H.*, 233 W.Va. 57, 754 S.E.2d 743 (2014). Even apart from petitioner's unsatisfactory participation in his improvement period, the children's best interests necessitated termination of his parental rights. Petitioner's incarceration resulted in the children remaining out of his care for two years by the time of the dispositional hearing. Rather than seek to regain custody, petitioner voluntarily chose to reside at Life House and testified that he would not be able to care for the children for what he anticipated to be six months. Further, petitioner's post-termination visitation was suspended due to the negative impact it had on the children's lives. As such, the best interests of the children necessitated termination in order for them to achieve permanency. While petitioner argues that there were less-restrictive alternatives to termination of his parental rights, we have also held as follows:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va.Code [§] 49-6-5 [now 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 W. Va.Code [§] 49-6-5(b) [now West Virginia Code

[4]In his brief on appeal, petitioner mentions in passing that the circuit court's requirement that petitioner divorce his wife is "troublesome" given his assertion that the right to marry is a fundamental right. Petitioner attempts to bolster this argument in his reply brief. However, petitioner provides no authority in either brief supporting his assertion that the circuit court erred in requiring him to divorce his wife. As such, we decline to address his argument on appeal pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, which requires that

> [t]he brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on ... [and] must contain appropriate and specific citations to the record on appeal[.] The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

> § 49-4-604(c)] . . . 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). Accordingly, we find no error in the circuit court's decision to terminate petitioner's parental rights upon findings that there was no reasonable likelihood that the conditions of abuse could be corrected and that termination was in the children's best interests.

Lastly, petitioner argues that the lower court "erred in ratifying the emergency custody" of the children following the preliminary hearing. A review of the record indicates that petitioner raised no objection to either the ratification of the petition for emergency custody or the preliminary hearing below. As such, petitioner has waived his right to raise this issue on appeal. See *State v. Jessie*, 225 W.Va. 21, 27, 689 S.E.2d 21, 27 (2009) ("This Court's general rule is that nonjurisdictional questions not raised at the circuit court level will not be considered to the first time on appeal."). Accordingly, the Court finds that petitioner is entitled to no relief in this regard.

For the foregoing reasons, we find no error in the decision of the circuit court, and its September 22, 2017, order is hereby affirmed.

Affirmed.

ISSUED: April 9, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Allen H. Loughry II
Justice Elizabeth D. Walker