STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

***In re* T.C. and P.C.**

No. 20-0221 (Kanawha County 19-JA-671 and 19-JA-672)

MEMORANDUM DECISION

Petitioner Father C.C., by counsel Michael M. Cary, appeals the Circuit Court of Kanawha County's February 5, 2020, order terminating his parental rights to T.C. and P.C.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Mindy M. Parsley, filed a response in support of the circuit court's order. The guardian ad litem, Elizabeth G. Kavitz, filed a response on behalf of the children in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying his request for an improvement period and terminating his parental rights.

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 October of 2019, the DHHR filed a child abuse and neglect petition against petitioner and the mother based upon a referral involving petitioner's sexual abuse of T.C. The referral alleged that petitioner discussed an upcoming camping trip with the child and requested that she bring a friend along on the trip. According to the referral, T.C. indicated that she did not "want the same thing to happen to her friend and felt the need to disclose the abuse she had experienced." T.C. and P.C. were sent to a local hospital, where T.C. disclosed inappropriate sexual touching. A Child Protective Services ("CPS") worker then arranged a protection plan for the mother and the children, keeping petitioner "away from the home." The petition also alleged that petitioner and the mother failed to provide the children with food, clothing, supervision, financial support, and

[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).

adequate housing. At the preliminary hearing the circuit court found probable cause for the children's removal, ordered petitioner to pay child support and submit to a parental fitness exam, and barred him from contact with the mother and children.

The next month, the DHHR filed an amended petition alleging that the CPS caseworker went to the children's school for a monthly visit and the children disclosed that petitioner continued to maintain contact with the mother by phone and text messages, despite the court's order. The children also disclosed that the mother had physically abused them.

In December of 2019, the circuit court held an adjudicatory hearing wherein a DHHR caseworker testified to the allegations in the petition, including that T.C. "discussed numerous occasions when there was inappropriate touching" by petitioner. The caseworker also testified that petitioner violated the circuit court order prohibiting him from speaking with the mother. Next, a CPS supervisor testified that she had accompanied the CPS caseworker to the school to interview the children and that, during the interview, the children disclosed that petitioner and the mother had been communicating by phone calls and text messages. Further, under cross-examination, the supervisor stated that she believed T.C.'s accusations of sexual abuse against petitioner, saying "[T.C.] did not appear to be lying" and that "her story has not changed." Petitioner presented three witnesses, including T.C.'s fifth grade teacher, the principal of the elementary school T.C. attended, and the elementary school's guidance counselor. T.C.'s fifth grade teacher testified that the child often told lies and caused drama. The principal echoed the teacher's comments and indicated that the mother was supportive and helpful as to T.C.'s behavioral issues. Next, the guidance counselor testified that he believed T.C. was untrustworthy but failed to provide specific support for that opinion.[2] The guidance counselor also testified he could not recall if he recommended that T.C. receive any therapy beyond small group sessions he hosted at the school. Finally, the mother testified and denied mistreating T.C. after her allegations of abuse. The mother would not definitively testify that she believed T.C.'s disclosures against petitioner. Petitioner did not testify. After the presentation of evidence, the circuit court adjudicated petitioner as an abusing and neglecting parent.

The circuit court held a dispositional hearing in January of 2020 wherein the DHHR and guardian moved for the termination of petitioner's parental rights. At the hearing, the DHHR caseworker recommended the termination of petitioner's parental rights due to the "egregious nature of the unrebutted [sexual abuse] allegations" against petitioner. The caseworker further testified to the mother's failure to protect the children. Finally, the caseworker deferred to the circuit court's discretion and made no recommendation regarding post-termination visitation. Next, the court questioned the mother about having contact with petitioner if she was awarded custody or visitation with the children. The mother testified that she was uncertain if she would avoid contact with the father. Petitioner did not call any witnesses on his behalf.

Based upon the presentation of evidence, the circuit court found that petitioner's "uncontroverted sexual abuse of the minor child [T.C.] prevents him from being an appropriate parent." The circuit court further found that the DHHR could not provide any services to remedy the conditions of abuse and neglect and there was no reasonable likelihood that the conditions of

[2]The circuit court found that the guidance counselor "did not qualify as an expert."

abuse and neglect could be corrected in the foreseeable future. Accordingly, the circuit court terminated his parental rights to the children.[3] It is from the February 5, 2020, dispositional order that petitioner appeals.

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).

On appeal, petitioner alleges that the circuit court erred in terminating his parental rights without giving him additional time to participate in an improvement period. While petitioner acknowledges that "parents are not automatically entitled to improvement periods," he argues that he "would have been more than willing to participate in . . . services such as adult life skills, parenting classes, random drug screenings, and supervised visitations thereby showing his dedication to his family." Petitioner further argues that he and the mother could have benefited from marriage and family counseling sessions, which were never offered to him. In light of this, he argues that he should have been afforded the opportunity to participate in an improvement period. We disagree.

West Virginia Code § 49-4-610(2)(B) provides that the circuit court may grant a parent a post-adjudicatory improvement period when the parent "demonstrates, by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period." "This Court has explained that 'an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged.'" *In re Kaitlyn P.*, 225 W. Va. 123, 126, 690 S.E.2d 131, 134 (2010) (citation omitted). However, the circuit court has discretion to deny an improvement period when no improvement is likely. *In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002). Moreover, pursuant to West Virginia Code § 49-4-602(d)(1), reasonable efforts to preserve the family are not required when "[t]he parent has subjected the child . . . to aggravated circumstances which include . . . sexual abuse."

[3]The mother's parental rights were terminated below. The permanency plan for T.C. is guardianship placement with a family member with a concurrent plan for adoption. The permanency plan for P.C. is adoption by a foster family.

We first note that the DHHR was not required to make efforts to preserve the family due to the aggravated circumstances of sexual abuse. However, petitioner continues to contest the truthfulness of the allegations made against him, claiming that T.C. "was known for lying and being untruthful" and arguing that the child never "received medical treatment of any kind to verify that any abuse took place."[4] The record shows, however, that at the adjudicatory and dispositional hearings DHHR workers testified that T.C. had been consistent in telling her story that petitioner abused her. Further, the circuit court found in its dispositional hearing order that there was "uncontroverted sexual abuse." We have previously held that

> [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) (citation omitted).[5] As such, given petitioner's failure to acknowledge the sexual abuse and how his actions constituted abusive and neglectful behavior, the granting of an improvement period would have been futile. While petitioner argues that nothing precluded the circuit court from granting him an improvement period in this case, there is no evidence that he would comply with an improvement period. Accordingly, we find no error in the circuit court's denial of his motion.

Finally, petitioner argues that the circuit court erred in terminating his parental rights because there was insufficient evidence to find that there was no reasonable likelihood the conditions of abuse and neglect could not be corrected in the near future or that termination was

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[4]It is important to note that petitioner does not specifically challenge his adjudication as an abusing parent. Similarly, petitioner does not allege that the DHHR introduced insufficient evidence to satisfy its burden of proof at adjudication in regard to the allegations against him. Instead, petitioner simply chooses to continue to dispute the circuit court's findings regarding the abuse. Because petitioner does not assert an assignment of error challenging his adjudication below, the circuit court's findings regarding petitioner's abuse are not at issue on appeal.

[5]We note that our reliance on this case is only to stress that petitioner failed to take the bare minimum step of acknowledging his abuse, which is a determinative factor in whether a parent should receive an improvement period. However, even if petitioner had acknowledged the conduct at issue, his abuse still would have constituted aggravated circumstances, thus relieving the DHHR of its duty to provide reasonable efforts to preserve the family. W. Va. Code § 49-4-604(c)(7) ("[T]he department is not required to make reasonable efforts to preserve the family if the court determines . . . [t]he parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include . . . sexual abuse."). As such, we emphasize that although petitioner's failure to acknowledge the abuse precluded him from obtaining an improvement period, his acknowledgement would not have entitled him to one given that the conditions of abuse were so egregious as to preclude reasonable efforts to preserve the family.

necessary for the children's welfare. We find, however, that the substantial evidence laid out above supports termination as well. West Virginia Code § 49-4-604(c)(6) provides that circuit courts are to terminate parental rights upon 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 children's welfare. According to West Virginia Code § 49-4-604(d), "'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected' means that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help." As set forth repeatedly above, petitioner's failure to acknowledge the conditions at issue have rendered them uncorrectable. In terminating petitioner's parental rights, the circuit court specifically found that "[petitioner] failed to demonstrate capacity to improve." Pursuant to West Virginia Code § 49-4-604(c)(6), circuit courts may terminate parental rights upon these findings. Additionally, this Court has held that

> "[t]ermination 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 rights.

For the foregoing reasons, we find no error in the decision of the circuit court and its February 5, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison