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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 22-0464

IN RE: H.D.

Appeal from the Circuit Court of Nicholas County
The Honorable Stephen O. Callaghan, Judge
Case No. 21-JA-73

AFFIRMED

Submitted: March 29, 2023
Filed: June 2, 2023

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JUSTICE ARMSTEAD delivered the Opinion of the Court.

CHIEF JUSTICE WALKER and JUSTICE WOOTON dissent and reserve the right to file dissenting Opinions.

SYLLABUS BY THE COURT

1. "West Virginia Code § 49-4-610(6) (eff. 2015) authorizes only *one* extension of a post-adjudicatory improvement period." Syl. Pt. 5, *State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021).

2. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' Syl. Pt. 1, in part, *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

Armstead, Justice:

The Circuit Court of Nicholas County terminated the parental and custodial rights of Petitioner, A.T., due to her substance abuse problem. On appeal, A.T. objects arguing she substantially complied with the terms of her post-adjudicatory improvement period and that her tuberculosis infection prevented her from entering a long-term drug rehabilitation facility in a more timely manner. After review, we find that the circuit court did not err when it terminated A.T.'s parental and custodial rights or when it declined to extend her improvement period or grant an additional, post-dispositional improvement period. Therefore, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A.T. gave birth to a daughter, H.D., in June 2021.[1] Both A.T. and H.D. tested positive for methamphetamine, and in July 2021 the Department of Health and Human Resources (the "DHHR") filed an abuse and neglect petition against A.T. H.D.'s father, R.D., was deemed a non-offending parent and retained custody of the child. However, H.D. went to live with her maternal grandparents, so A.T. could remain at home with R.D.

A.T. admitted the petition's allegations in August 2021, was adjudicated as an abusive and neglectful parent, and received a 90-day post-adjudicatory improvement period. As a special condition, the circuit court ordered A.T. to complete a "long term drug

[1] We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e) [eff. 2022].

rehabilitation program." Though H.D. remained in her father's custody, visitation by A.T. was to be at the discretion of the DHHR and the child's guardian *ad litem*.

Around the time of the birth, A.T. learned that she had tested positive for tuberculosis, and the record shows that on September 21, 2021, FMRS Health Systems, Inc., ("FMRS") issued a letter to a Child Protective Services ("CPS") worker advising that FMRS would need "all records" for A.T.'s tuberculosis diagnosis and treatment and that its Turning Pointe rehabilitation facility could not admit A.T. while she had an "active" tuberculosis infection. In October 2021, the court received a letter from the Nicholas County Health Department stating that A.T. was "under care with the WV State TB Elimination Program" and that the health department was "responsible for treatment, medication administration[,] and monitoring during this period."

The DHHR's October 2021 court report noted that A.T. had "passed" all her drug screens at the day report center and had a prescription for Buprenorphine,[2] that A.T. was set to begin outpatient therapy later that month, and that A.T. was being treated for tuberculosis through the health department. As for the court's special condition that A.T. attend long-term rehabilitation, A.T. professed that she was "not opposed to rehab" and would "go when she can." However, she claimed that, due to her tuberculosis diagnosis, no "rehab" facility would accept her and that she was "a risk for any facility." Nevertheless, the report also advised that A.T. had refused to share medical information.

[2] Because A.T. had a prescription for Buprenorphine, a test result was considered negative if it found no other illicit substance.

A.T. argued that she had provided a letter from the health department and stated, "That's all you need." A.T.'s attorney instructed her to provide "all" her medical records.

That month, A.T. underwent a psychological evaluation. The resulting report provided A.T.'s account of how she ingested methamphetamine before the birth of H.D. According to A.T., she thought she was ingesting crushed Subutex, and the report describes A.T.'s lengthy history of illegal substance abuse. According to the report, A.T. admitted testing positive for "nanograms of amphetamine or methamphetamine" and professed confidence in her ability to abstain from drug abuse: "I'm sure everybody says that, but I think it would take something really, really bad to even make me have the thought. Nothing's worth it." Nevertheless, the report concluded that A.T.'s prognosis was "guarded" and "contingent on her ability to abstain from drug use."

At a review hearing in November 2021, the assistant prosecuting attorney reported that he had reviewed several medical records and that "rehabilitation facilities will not take [A.T.]" He stated, "[S]he does have tuberculosis. She's doing a *six-month* treatment, which this was diagnosed in July; so there will be no long-term place that will take her because of the health problems she has." (Emphasis added.) At the prosecutor's request, the circuit court extended A.T.'s improvement period for an indeterminate period and ordered A.T. to attend an approved long-term rehabilitation program if she was "eligible."

The DHHR's January 2022 court report noted that A.T. had "passed" all screens at the day report center. A.T. reported that she was still being treated for

tuberculosis and maintained that she could not enter a rehabilitation facility. However, despite this claim, the court report states that A.T. had yet to sign a release for her infectious disease doctor's records and that she objected when a CPS worker requested records from the outpatient treatment program where A.T. had been screening. When the DHHR issued the January 2022 court report, A.T. had been diagnosed with tuberculosis for more than six months.

Issues related to A.T.'s medical records were discussed at the January 2022 review hearing later that month. The guardian *ad litem* stated, "We have no medical records . . . [and] don't know why . . . [A.T.] cannot go into rehab." A CPS worker clarified that the DHHR had hospital records from H.D.'s birth (and A.T.'s related hospitalization) and "some" records from the outpatient treatment program. However, the DHHR lacked releases for A.T.'s infectious disease doctor. A.T.'s attorney insisted that A.T. had signed releases and that they had been trying to obtain records without cooperation from the "medical folks." He asked the circuit court to extend A.T.'s improvement period a second time, arguing that the "issue of the rehab" would eventually "come to a head" and that "[e]ither we'll have sufficient medical documentation, or we'll have to . . . make a decision in light of that." The circuit court reminded the parties that long-term rehabilitation was the "biggest part" of the improvement period and found that it was A.T.'s responsibility to "track down" the relevant medical documentation. Under the circumstances, the court found that A.T. had neither complied with the court's order nor provided "any good cause" for her non-compliance.

The DHHR's February 2022 court report advised that A.T. continued to produce negative screens at the day report center and that she was medically cleared to begin rehabilitation. Yet, according to the report, A.T. still refused to provide medical releases and "ha[d] not been compliant with the Department."

On March 23, 2022, law enforcement arrested H.D.'s father, R.D., on an outstanding warrant. Two days later, the DHHR filed an amended petition alleging that R.D. had attempted to "outrun" law enforcement with H.D. in his vehicle and that, when he was arrested, R.D. had a vial of methamphetamine on his person.

Although the amended petition leveled no new allegations against A.T., the DHHR's April 2022 court report revealed that *A.T. was also present in the vehicle* and that, afterward, A.T. tested positive for methamphetamine for two consecutive days. According to the report, A.T. had been living with R.D. and H.D. off and on while A.T.'s case was pending and not just on agreed visitation days. As of the date of the report, A.T. was in a 60-day rehabilitation program, which she maintains she mistakenly believed qualified as long-term rehabilitation.

The DHHR recommended revoking A.T.'s improvement period, and later that month, the court held a hearing to determine whether to terminate her improvement period. A CPS worker testified that, although A.T. was "cleared" to enter long-term rehabilitation in early February,[3] later that month A.T. had been turned away from a long-

[3] We note that, according to the worker, this testimony was based on "documentation" from the health department and A.T.'s doctor.

term rehabilitation program because she denied having a drug problem. The worker opined that A.T. could not address her problems in the near future without long-term rehabilitation and that A.T. could not complete long-term rehabilitation "within the time frames[.]" On cross-examination, the worker testified that, before A.T. was released from tuberculosis treatment, she "could have" qualified for a particular long-term rehabilitation program by submitting to "a couple of initial tests." Yet, according to the worker, A.T. did not submit to the tests.

A.T. also testified at the April 2022 hearing. She described her course of tuberculosis treatment and said that she had phoned "multiple" rehabilitation facilities, only to be advised that she would not qualify due to "no recent use" of drugs, her tuberculosis infection, or both. She confessed, "I am an addict[,]" and though she testified that the "sole purpose" of the 60-day program was to "get off the Suboxone[,]" she also agreed that she was in the 60-day program because she had "a meth problem." She agreed, further, that H.D. was in the vehicle when law enforcement seized R.D, stating,

> We had picked [H.D.] up, and we were on our way back to our house, . . . and we had gotten gas, and I was in the backseat with [H.D.] . . .
>
> We . . . turned around at the gas pump, just going to pull out, and, when we did so, a blue truck was just in front of us . . . [that] hit our car, blue lights came on. There was a lot of screaming. They tried to bust out the front passenger window. I had leaned over at this point and was covering [H.D.] with my body, screaming, "I have a baby. I have a baby," and they—they backed off on that side, and they came—they had ran [sic] up to the driver's side. [R.D.]'s window was down. They opened the door. They pulled him out, and I . . . couldn't understand anything that was being said, there were so many

> voices and flashlights and guns, and I wasn't sure where to look. I was told not to look out the window, so I tried to keep [H.D.] calm and keep her looking at me, and just hope that she didn't realize that anything was going on.

As for her positive screens for methamphetamine, she explained that "I made a very poor choice, and I relapsed. I had what felt like the weight of the world on my shoulders[.]" On cross-examination, she testified that she had been cleared to begin long-term rehabilitation in early February 2022 and that she was turned away from a long-term rehabilitation program later that month because she refused to say that she was misusing her Suboxone and because, at that point, she did not believe she had a problem with methamphetamine. On subsequent cross-examination, she explained, "I hadn't used in so long at that point . . . I did not consider it a problem, or I was in denial." Nevertheless, she testified that she had used methamphetamine the day before the arrest and agreed that she was "under the influence of meth with the baby in the car[.]" She also testified that she had purchased the methamphetamine in a transaction that began at the courthouse:

> Q Tell us how you arranged the deal.
> A I saw her [i.e., the dealer].
> Q Where at?
> . . . .
> A Right here on the corner at the courthouse. . . .
> Q And then what—how did the deal arrange?
> A She asked me how I'd been, . . . told me I should stop by, and I was dumb enough to do it. . . .
> . . . .
> Q How much did you buy?
> A $20 worth.

She later explained that methamphetamine is "just the easiest to get" and agreed that this ease of access was a "problem" for her. After hearing argument, the circuit court revoked A.T.'s improvement period and set the matter for disposition. By that point, A.T.'s improvement-period *extension* had been in place for five months, and the DHHR's original petition had been pending for nine months.

The next day, A.T. entered a nine-month residential rehabilitation program. She later filed a written motion for a post-dispositional improvement period, arguing that her entrance into the program was a substantial change in circumstance that made it likely she would fully participate in what would have been her second improvement period.

The DHHR's May 2022 court report noted that A.T. was "progressing well" in the program and recommended that A.T.'s motion for a post-dispositional improvement period be granted. The guardian *ad litem* recommended the same, despite concluding that A.T. "has not been compliant with the terms and conditions of her improvement period until recently[,]" that A.T. "has a serious substance use disorder that she has failed to address until now[,]" and that A.T. "was evasive with the [multi-disciplinary team] regarding her medical records and was improperly exercising visitation with the child."

In May 2022, the circuit court held a dispositional hearing and repeated its January 2022 findings that A.T. had failed to comply with the court's order to enter long-term rehabilitation and had failed to "show good cause" for her failure to do so. Those matters were deemed "settled." A CPS worker testified that A.T. had shown "minimal compliance" by attending the 60-day program and beginning the nine-month program;

however, the worker explained that this "was the main thing that we needed her to do, so I did recommend an improvement period." Nevertheless, the worker did not believe that it was in H.D.'s best interests to be reunited with A.T. at that time, stating A.T. "has not completed the . . . rehabilitation program with recent failed meth screens" and that the worker could not "speculate what would happen in nine months[.]" The worker emphasized, however, that she was recommending an improvement period "[s]olely because [A.T.] went to rehab." On further questioning, the worker agreed that it was in the child's best interests to "see how [A.T.] does in rehab[.]" The guardian *ad litem* joined the DHHR's recommendation, stating that, "if there's any possibility of reunification, I would like to see that happen[.]" A.T. did not testify at the dispositional hearing or offer any other witnesses.

The circuit court denied A.T.'s motion for a post-dispositional improvement period and terminated A.T.'s parental and custodial rights. In its dispositional order, the circuit court found, among other things, that A.T. had admitted to using methamphetamine during her pregnancy, that she was ordered to enter long-term rehabilitation in August 2021, and that long-term rehabilitation was the "most critical" condition of her improvement period. The circuit court further found that A.T. did not enter a long-term rehabilitation program until April 12, 2022, and failed to "show good cause" for why she had not entered such long-term rehabilitation before then. With regard to A.T.'s substance abuse, the circuit court found that A.T. tested positive for methamphetamine on March 24 and 25, 2022, and was "high on methamphetamine," with the child in the car, when R.D.

was arrested in March 2022. Finally, the circuit court found that A.T. was denied admission to a suitable long-term rehabilitation program because she denied that she was addicted to drugs "at a time when she clearly was." Due to these findings, the court determined by clear and convincing evidence that A.T. was "unable to correct the conditions of abuse and neglect (methamphetamine abuse) even with . . . assistance" from the DHHR, that she was "unable to correct her addiction in the near future[,]" and that she was not likely to "fully participate" in a post-dispositional improvement period. Accordingly, the court determined that it was not in H.D.'s best interest to delay permanency to "monitor" whether A.T. could address her "long-term and severe substance abuse problem after she refused treatment for eight months[.]" A.T. appeals from the circuit court's May 17, 2022 dispositional order.

II. STANDARD OF REVIEW

On appeal from a dispositional order, we defer "to the circuit court's factual findings and conduct an independent review of questions of law[.]" *In re S.C.*, 245 W. Va. 677, 686, 865 S.E.2d 79, 88 (2021). Indeed, we have stated that, in abuse and neglect matters, a circuit court's findings of fact may "not be set aside . . . unless clearly erroneous" and that a finding is not "clearly erroneous" unless, "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." Syl. Pt. 1, in part, *In Int. of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). This deference extends to "substantive determinations" on "dispositional matters—such as . . . whether termination is

necessary"—*In re Rebecca K.C.*, 213 W. Va. 230, 235, 579 S.E.2d 718, 723 (2003) (per curiam), because "we recognize[] that 'the circuit court is the better-equipped tribunal' to make" such decisions, *id.* at 233, 579 S.E.2d at 721 (quoting *In re Emily*, 208 W. Va. 325, 340, 540 S.E.2d 542, 557 (2000)). "[C]ritical" yet "unreviewable intangibles[,]" *In re J.C.*, 232 W. Va. 81, 87, 750 S.E.2d 634, 640 (2013) (per curiam) (quoting *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 562, 490 S.E.2d 642, 649 (1997)), may escape our notice "from a vista of a cold appellate record[,]" *State v. Potter*, 197 W. Va. 734, 751, 478 S.E.2d 742, 759 (1996); therefore, we refuse to "overturn a finding simply because [we] would have decided the case differently," *Tiffany Marie S.*, 196 W. Va. at 226, 470 S.E.2d at 180, syl. pt. 1, in part. On the contrary, our duty is to "affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* Guided by this standard, we now consider A.T.'s appeal.

III. ANALYSIS

A.T. advances three assignments of error. First, she alleges that the circuit court erred by refusing to extend her post-adjudicatory improvement period. Second, she maintains that the circuit court erred by denying her motion for a post-dispositional improvement period. Finally, she states that the circuit court erred by terminating her parental rights. Despite their recommendations below, the DHHR and the guardian *ad litem* ask us to affirm the circuit court on every assignment of error. The intervening foster parents urge us to do the same. We will consider each assignment of error in turn.

A. Refusal to Extend Post-Adjudicatory Improvement Period.

A.T. claims that the circuit court should have extended her post-adjudicatory improvement period because she substantially complied with the terms of her improvement period and because extending the improvement period was consistent with H.D.'s best interest and would not have impaired the DHHR's ability to place H.D. in a permanent setting.[4] A.T. supports her claim by citing the record of her allegedly substantial compliance, and she maintains that, in April 2022, she had one month of "possible time" left on her post-adjudicatory improvement period.

A.T. reaches this one-month figure by adding (a) the maximum time allowed for an initial post-adjudicatory improvement period (i.e., six months)[5] plus (b) the maximum time allowed for a post-adjudicatory improvement period extension (i.e., three months)[6] to reach a maximum post-adjudicatory improvement period of nine months. This reasoning, however, ignores both the relevant law and the facts of this case.

West Virginia Code § 49-4-610(2) (eff. 2015) does not provide for an initial post-adjudicatory improvement period whose length is six months *automatically*; what it

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[4] *See* W. Va. Code § 49-4-610(6) (authorizing an improvement period extension "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").

[5] *See* W. Va. Code § 49-4-610(2) (authorizing an initial post-adjudicatory "improvement period of a period not to exceed six months").

[6] *See* W. Va. Code § 49-4-610(6) (authorizing an extension "for a period not to exceed three months").

provides is that a circuit court "may grant" an initial post-adjudicatory improvement period "*not to exceed* six months[.]" *Id.* (emphasis added). More to the point, although West Virginia Code § 49-4-610(6) provides that "[a] court may extend" a post-adjudicatory improvement period, the statute only permits an extension "for [1] *a period* [2] *not to exceed* three months[.]" *Id.* (emphasis added). Hence, we have held that "West Virginia Code § 49-4-610(6) (eff. 2015) authorizes only *one* extension of a post-adjudicatory improvement period[,]" Syl. Pt. 5, *State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021), and that this "extension must be for a period that does not exceed three months[,]" *id.* at ___, 878 S.E.2d at 733, syl. pt. 6, in part.

These statutory limits pose a problem for A.T. In this case, the circuit court granted A.T. a post-adjudicatory improvement period of 90 days in August 2021, which meant that her initial improvement period expired in November 2021. When the circuit court extended A.T.'s improvement period in November 2021, though the circuit court did not set a time limit on the extension, that extension could not lawfully continue for longer than three months (i.e., until February 2022) and could not be followed by an additional extension of any length. Thus, in April 2022, the circuit court could not lawfully extend A.T.'s post-adjudicatory improvement period for any additional length of time or for any reason. Because the circuit court could not lawfully grant A.T.'s motion to extend her post-adjudicatory improvement period, it was not error for the circuit court to refuse to do so.

B. Denial of Post-Dispositional Improvement Period.

A.T. argues that the circuit court also erred when it denied her motion for a post-dispositional improvement period. She contends that her eleventh-hour participation in long-term rehabilitation was a substantial change in circumstances that, when combined with her prior record of compliance, proved that she was "fully likely" to participate in a second improvement period. She claims that her failure to participate in long-term rehabilitation was her "only" failing and that, even then, her tuberculosis diagnosis provided a "valid medical excuse" for such failure. We are not convinced.

When a parent has received a post-adjudicatory improvement period, West Virginia Code § 49-4-610(3)(D) authorizes a second, post-dispositional improvement period only if the parent demonstrates, first, "that since the initial improvement period, the [parent] has experienced a substantial change in circumstances" and, second, "that due to that change in circumstances, the [parent] is likely to fully participate in the improvement period[.]"[7]

However, no "parent charged with abuse and/or neglect is . . . unconditionally entitled to an improvement period." *In re Charity H.*, 215 W. Va. 208, 216, 599 S.E.2d 631, 639 (2004) (per curiam). On the contrary, "West Virginia law allows

[7] We note that, by statute, a post-dispositional improvement period functions as an "alternative disposition" for purposes of West Virginia Code § 49-4-604(e). *See id.* (providing that a "court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six months"); W. Va. Code § 49-4-610(3) (authorizing a court to grant a post-dispositional "improvement period not to exceed six months as a disposition pursuant to section six hundred four of this article").

the circuit court *discretion* in deciding whether to grant a parent an improvement period[,]" and the parent, not the DHHR, "bear[s] the burden at the disposition stage to show that [she] should be granted the opportunity to remedy the circumstances that led to the filing of the abuse and neglect petition." *In re M.M.*, 236 W. Va. 108, 115, 778 S.E.2d 338, 345 (2015) (emphasis added). If "a parent cannot *demonstrate* that he/she will be able to correct the conditions of abuse and/or neglect with which he/she has been charged, an improvement period need not be awarded[.]" *State ex rel. W. Va. Dep't of Health & Hum. Res. v. Dyer*, 242 W. Va. 505, 516, 836 S.E.2d 472, 483 (2019) (emphasis added) (quoting *In re Emily*, 208 W. Va. at 336, 540 S.E.2d at 553).

In this case, the circuit court focused its analysis on the second statutory requirement and found that A.T. was not "likely to fully participate" in a post-dispositional improvement period. W. Va. Code § 49-4-610(3)(D). Although A.T. claims that this finding was error, we note that the circuit court's underlying findings of fact are essentially uncontested. When A.T. admitted the allegations in the petition, she admitted to using methamphetamine during her pregnancy, and she confirmed this admission in her statements to the psychological evaluator. Given this history, it was entirely appropriate for the circuit court to make long-term rehabilitation a special condition of A.T.'s improvement period, and there was little doubt that this was the most important term of her improvement period, which was granted in August 2021. Additionally, there is no dispute that, despite this requirement, A.T. tested positive for methamphetamine on March 24, 2022, and March 25, 2022, or that A.T. did not enter long-term rehabilitation until April

12, 2022. A.T., herself, agreed that she was "under the influence of meth" when R.D. was arrested in March 2022 and that H.D. was present in the vehicle at the time. A.T. testified, further, that she was denied admission to a long-term rehabilitation program in February 2022 because she "did not consider it [i.e., her methamphetamine addiction] a problem[] or . . . was in denial." Yet A.T. was plainly suffering from addiction in February 2022 when she was denied admission to this program. Roughly one month later, she purchased twenty dollars' worth of methamphetamine and had the child in her care only a day after she consumed this dangerous and illegal drug. These well-established facts fully support the circuit court's finding that A.T. was not "likely to fully participate" in a post-dispositional improvement period.[8] On the facts of this case, waiting *eight months* to begin necessary long-term rehabilitation does not suggest a capacity for future compliance but instead supports the circuit court's finding that A.T. was not likely to fully participate in a post-dispositional improvement period.

[8] Although we find that the record supports both the circuit court's findings of fact and its ultimate finding that A.T. was not "likely to fully participate" in a post-dispositional improvement period, we think some of the circuit court's characterizations of the record are unduly harsh. For example, the circuit court found that A.T. "failed to show *any success* in addressing her methamphetamine abuse" and that A.T.'s "*only* effort" to address her methamphetamine addiction was her entry into a long-term rehabilitation facility in April 2022. (Emphasis added.) This is not entirely accurate. While the case was pending, A.T. had numerous negative screens and, among other things, participated in outpatient rehabilitation. A.T.'s problem was not that she failed to demonstrate *any* compliance or progress in her post-adjudicatory improvement period but, rather, that her compliance and progress were marred by significant and demonstrable failures that undermined the circuit court's confidence that she would fully participate in a second, post-dispositional improvement period.

A.T. claims that her delay in participating in long-term rehabilitation should be excused by her tuberculosis infection. However, the circuit court found that she failed to substantiate this excuse, and we do not believe that this finding was clear error. It may be that, for a time, A.T.'s tuberculosis infection posed an impediment to her participation in a long-term rehabilitation program. However, the record indicates that A.T. failed to ensure that the DHHR had timely access to her most relevant medical records—i.e., those from her infectious disease doctor—so that the DHHR could confirm the status of her treatment. A parent in an improvement period has a statutory duty to "execute a release of *all medical information* regarding that respondent, including, but not limited to, information provided by mental health and substance abuse professionals and facilities." W. Va. Code § 49-4-610(4)(B) (emphasis added). Even if the "medical folks" failed to release A.T.'s records, there is no evidence that A.T. sought the court's assistance. *See id.* (requiring "a professional or facility" to accept a respondent parent's release "regardless of whether the release conforms to any standard required by that facility"). Indeed, the record suggests that A.T., herself, resisted the DHHR's efforts to obtain her records and failed to submit to tests that might have allowed her to enter long-term rehabilitation before February 2022, when she was reportedly "cleared" to participate in such programs.

Furthermore, even if we assume that A.T. was ineligible to enter long-term rehabilitation for the entire period between August 2021 and February 2022, A.T. did not enter any other long-term rehabilitation program between the time she was "cleared" in February 2022 and her relapse in March 2022 or before April 12, 2022. By statute, it was

A.T.'s responsibility to both *initiate* and *complete* "all terms" of her improvement period. W. Va. Code § 49-4-610(4)(A). Yet A.T. did not *initiate* compliance with the most important term of her prior improvement period until, months after the case had commenced, she suffered a serious relapse. In light of these findings, we believe that the circuit court's findings of fact that A.T. was not likely to fully participate in a second, post-dispositional improvement period and that A.T. failed to substantiate her purported excuse are more than "plausible in light of the record viewed in its entirety." *Tiffany Marie S.*, 196 W. Va. at 226, 470 S.E.2d at 180, syl. pt. 1, in part. Accordingly, we find that A.T.'s motion for a post-dispositional improvement period was properly denied.

C. Termination of Parental and Custodial Rights.

Finally, A.T. argues that the circuit court erred by terminating her parental and custodial rights. According to her, she was "in treatment" when her rights were terminated and could have completed long-term rehabilitation within statutory timeframes. Additionally, though she acknowledges her "addiction to drugs[,]" she contends that there was "no evidence" that her failure to "respond or follow through with the recommended treatment" was willful. Again, we disagree.

West Virginia Code § 49-4-604(c)(6) (eff. 2020) authorizes a circuit court to "terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent" when the court finds "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 child[.]" In this case, the circuit court

expressly determined 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 "not in the best interest of the child to delay permanency to monitor whether . . . [A.T. could] address her long-term and severe substance abuse problem[.]" These findings enjoy "substantial deference in the appellate context[,]" and we do not believe that they are clearly erroneous. *Rebecca K.C.*, 213 W. Va. at 235, 579 S.E.2d at 723.

According to applicable law, "'[n]o 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*." W. Va. Code § 49-4-604(d) (emphasis added). That description captures A.T.'s performance below. Although A.T. acknowledged her abuse of or addiction to drugs in August 2021, she remained, months later and by her own admission, a person who was addicted to drugs and who had used methamphetamine as recently as March 2022. This was not for lack of "help" with her addiction. During this case, A.T. had the benefit of months of drug screens to hold her accountable and the benefit of months of outpatient treatment to address her addiction. Nevertheless, these efforts failed.

Additionally, we agree with the circuit court that, regardless of other statutory timeframes, A.T.'s addiction to drugs was not likely to be "substantially corrected in the *near* future[.]" W. Va. Code § 49-4-604(c)(6) (emphasis added). As of the dispositional hearing in May 2022, A.T. had completed just one month of a nine-month

rehabilitation program, and though by that point A.T. had done well in the program, her short-term success did not overcome the fact that, even with continued success, she would be unable to complete the program in the near future. Moreover, as we have previously stated:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011) (alteration in original). Those concerns are particularly relevant when the child, like H.D., is less than one year old at disposition. We agree with the circuit court that H.D.'s best interests would not have been served by waiting months to see whether A.T. could finally overcome her addiction.

In the end, A.T. has established no lawful basis for this Court to disturb the circuit court's termination of her parental and custodial rights or the circuit court's refusal to grant a post-dispositional improvement period or extend her post-adjudicatory improvement period. Indeed, "appellate review is not a device for this Court to replace a [circuit court]'s finding with our own conclusion." *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995).

IV. CONCLUSION

For the foregoing reasons, we affirm the circuit court's May 17, 2022 dispositional order.

Affirmed.

No. 22-0464, In re H.D.

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Walker, C.J., dissenting, joined by Justice Wooton,

When a circuit court's order relies on erroneous findings of fact, discretion does not insulate it from error. The majority has misgivings about the findings of fact here, footnoting that they are "unduly harsh" characterizations of the record, but, in the name of deference, does backflips to factually justify an otherwise trumped-up order terminating parental rights without any evidence sufficient to make the finding that the conditions of abuse and neglect could not be remedied. For that reason, I dissent, and I am authorized to state that Justice Wooton joins me.

Going into the dispositional hearing, both the Guardian ad Litem and the DHHR were recommending that A.T. be put on a post-dispositional improvement period and maintained that, ultimately, reunification remained in the best interests of the child even if they could not yet recommend reunification. On the heels of the Guardian ad Litem's statement that she would like to see reunification happen and noting that she agreed with the DHHR's recommendation of an improvement period, the circuit court abruptly and inexplicably concluded that continuation in the home of A.T. was contrary to the welfare and best interests of H.D. and terminated A.T.'s parental rights. It did so even though the *only* evidence presented at the dispositional hearing related to whether A.T. should be granted a post-dispositional improvement period. There was no evidence

whatsoever elicited at that hearing relative to disposition, much less enough to satisfy the DHHR's burden to establish by clear and convincing evidence there was no likelihood that the conditions that led to the filing of the petition could be substantially corrected, and the facts here cannot support such a finding.

The findings that led the circuit court to conclude that the conditions could not be remedied relied heavily on the "harsh" (in the words of the majority) characterizations of the record. I take serious issue with the following findings, and I would find the decisions that flowed from this faulty factual foundation warrant a vacation of the termination order:

- "At the April 11, 2022, hearing, Adult Respondent [A.T.] admitted that she is a current drug addict actively using."

But at the time of the hearing, A.T. was (1) passing drug screens after her one-time relapse and (2) residing at St. Joseph's, an inpatient rehab, where it seems unlikely she was permitted to actively use drugs.

- "The [c]ourt finds that Adult Respondent [A.T.] has failed to show any success in addressing her methamphetamine use."

On the contrary, A.T. passed more than 70 drug screens after her adjudication, with only two failures for a single, isolated relapse, after which she again began producing negative screens and never produced another positive screen.

- "The [c]ourt finds that this case was filed on July 8, 2021, and the only effort to address her severe drug addiction was entering a rehabilitation facility on April 12, 2022. The Court finds that during the interim she continued her illegal drug use and remained an active addict."

- "The [c]ourt finds that long-term rehabilitation was the most critical condition of the improvement period due to Adult Respondent [A.T]'s severe addiction. The Court further finds that for the first eight months of the improvement period she failed to enter rehab and continued using illegal drugs."

According to these findings, a one-time use of methamphetamine that led to the filing of the petition and a one-time, isolated relapse (for a grand total of two methamphetamine uses throughout this entire case) constitutes a "severe"

methamphetamine addiction,[1] and one can somehow continue active illegal drug use whilst simultaneously passing dozens upon dozens of drug screens.

And, in the estimation of the circuit court, the outpatient rehab A.T. attended while waiting to be medically cleared for inpatient rehab and the sixty-day inpatient rehab seemingly count for nothing. Finally, the circuit court backdates the failure to get into long-term inpatient rehab for eight months to the beginning of the case as though it is wholly unexcused, despite that A.T. had an active tuberculosis infection that prevented her from being admitted to one of those facilities until she was cleared of the infection, which wasn't until February 2022.

- "Adult Respondent [A.T.] had a bed at Prestera Center which would have met the rehabilitation requirement. The Court finds that she told the center at intake that she did not have a drug problem and was denied admission. The Court finds that she reported that she was not addicted to illegal drugs at a time when she clearly was."

[1] The petition against A.T. for methamphetamine use arose from a single use during pregnancy. The ongoing drug addiction references made by both counsel for DHHR and the circuit court may be leveled at A.T.'s opiate addiction developed early in life, but managed through Subutex prescription. Importantly, that was *not* the basis of the petition filed against her and has no relevance to the basis for termination here.

This late-February Prestera encounter pre-dated A.T.'s relapse of March 24-25, and was at a time when A.T. was passing drug screens and *had been* passing drug screens for some seven months, so to say that she was "clearly" addicted to drugs at that time is an overstatement. Moreover, active use and/or last-use inquiries are well-known screening criterion for admission into rehabilitation facilities in a state such as ours that doesn't have the beds to spare for patients like A.T. who aren't and haven't been actively using. And, as noted below, A.T. testified she was prompted to lie about her drug use to gain admission to that facility and she refused to do it.

These findings, particularly relative to the failure to enter a long-term rehab until the "eleventh-hour" are entirely inconsistent with the facts and circumstances of the case, and, in my view, prompted the circuit court to employ a shoddy "too little, too late" analysis quick-triggering a termination without evidence sufficient to meet the burden of proof and without exploring less-restrictive alternatives.

Under other circumstances a "too little, too late" analysis may be an appropriate basis for termination of parental rights when viewed against the backdrop of drug use that continued throughout the proceedings. But contrary to the circuit court's findings, that simply isn't what we have here. Notably, the majority opinion doesn't reiterate any of those drug use findings in its analysis of termination of rights, nor does it conclude that the conditions of abuse and neglect were unlikely to be remedied based on A.T.'s drug use. Instead, it hangs its hat on A.T.'s inability to remedy the conditions in the

"near future." In doing so, the majority maintains the notion that the "too little, too late" to correct in the "near" future was the result of a totally unexplained eight-month delay in getting into a long-term rehab when it is undisputed that A.T. had an active tuberculosis infection that precluded her from inpatient rehabilitation until just before her parental rights were terminated.

Under the majority's analysis, the length of time it takes to get medical records (even after you have executed a release in October 2021) counts against you and negates any of the information contained in those medical records – which establish that A.T. had an active tuberculosis infection. It also ignores A.T.'s testimony that she and one of the DHHR providers "spent hours at our dining room table with lists, calling multiple rehabs. They would tell us over the phone that I was not – I would not qualify either because I had no recent use or because of the TB or both."

The circuit court repeatedly made statements to the effect of "We have heard from the beginning of the case, 'I can't go to rehab because I have TB.' She provided nothing. Her former counsel provided nothing . . . and it remained nothing until January of [2022]." Consider, though, that at a hearing on *November 2, 2021*, counsel for DHHR represented to the court "I . . . reviewed a bunch of medical records we obtained from West Virginia University; so rehabilitation facilities will not take [A.T.] . . . [w]ithout quoting directly from the medical records, she does have tuberculosis. She's doing a six-month treatment, which this was diagnosed July; so there will be no long-term place that will take

her because of the health problems she has." Then, counsel for DHHR posed to the court that the recommendation from A.T.'s psychological evaluation was for *outpatient* rehabilitation,[2] and stated again "we do not have any long-term rehab for her . . . . we have to get through the treatment for the tuberculosis or TB, so that won't be until January maybe." So, DHHR acknowledged the hurdles the tuberculosis diagnosis presented for getting A.T. into inpatient rehab (hurdles for *DHHR* to get her in), identified when inpatient rehab might be a possibility, but then holds A.T. accountable for "refusing" to go during that time.

It is later established (and confirmed by DHHR)[3] that A.T. finished the tuberculosis treatments in early February and was medically cleared at that point. Confusingly, despite admitting that medical clearance wasn't given until February 2022, the DHHR worker testified that there was a facility (Turning Pointe) willing to *look* at taking A.T. before that point if she took certain tests and concluded that A.T. could have

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[2] Note also that the psychological evaluation recommends that "[s]hould she test positive during her CPS case, she should be required to complete a *short-term* residential rehabilitation program[.]"

[3] DHHR Worker Hall testified:

Q. Okay. Do you dispute the fact that the [Health Department] released her – (displayed document) – February the 7th of this year –
A. No.
Q. – having TB treatment? You're aware –
A. No.
Q. – of that ?
A. (Nodded.) I agree.

gone to inpatient rehab all along had A.T. only taken those tests. But, that letter from Turning Pointe states that an inquiry was made about (and it would need all records for) a patient who had been *exposed* to tuberculosis and stated unequivocally that it would *not* take her if she had an active tuberculosis infection because it could not adequately provide care for an active infection. Again, A.T. did have an active infection until she was cleared in February 2022.

Later in February, A.T. called and did intake over the phone for Prestera and drove there for admission into the long-term rehabilitation facility. Her primary worker met her there, but the secondary worker (who was not there) testified that A.T. was denied admission because she stated that she did not have a current drug problem. A.T. later clarified that she had not used methamphetamine in so long that she did not consider it a current drug problem, and that she was encouraged[4] to lie and say she was misusing her Subutex medication to gain admission and she refused to do so, afraid that the lie would impugn her credibility before the court in the abuse and neglect proceedings. Not long after, A.T. had her relapse, at which point she was then able to gain admission into an inpatient facility. In this sense, A.T. was placed in the position that *until* she relapsed, she wasn't able to comply with the circuit court's order to enter a long-term inpatient rehab.

[4] The record is not clear whether the person referred to in this portion of the testimony is the DHHR worker or the admissions worker at Prestera.

Following her relapse in March, A.T. was accepted at St. Joseph's inpatient rehab. However, both A.T. and her counsel stated that they were unaware the inpatient rehab was considered by the circuit court to be short-term as it was a sixty-day[5] program. After being informed of that at the MDT meeting on April 8, A.T.'s counsel was able to get a bed for her at a long-term inpatient facility (Lifehouse), and counsel advised her to go straight there. But, the DHHR worker admitted she told A.T. *not* to go over advice of A.T.'s legal counsel because "the case manager said that she wanted [A.T.] to stay [at St. Joseph's]" because she did not feel that Lifehouse, despite being long-term, would address the mental health issues that the case manager felt needed addressed.[6] The DHHR worker further testified that she told A.T. they would just wait and see what the judge decided since it was a bed (in an ever-elusive inpatient facility) even if it wasn't long term. The DHHR worker who told A.T. not to go to the long-term rehab prior to the hearing nevertheless threw the blame at A.T.'s feet, testifying that she did not feel A.T. was addressing the drug problem because "[s]he was court-ordered to go to a long-term rehab in August. She still has not entered a long-term rehab." The circuit court's order likewise reflects that A.T. had "refused" to enter long-term rehabilitation.

[5] Some portions of the record refer to it as a ninety-day program.

[6] Interestingly, the psychological evaluation states there is an "apparent absence of any significant mental health issues[.]"

Like the circuit court, the majority appears to deem getting into the right *kind* of rehab as more indicative of a parent's ability to correct a drug problem than is actually producing consistently negative drug screens through a *different* kind of rehab (outpatient, then short-term inpatient), which, at the time, was the best she could do with her diagnosis. As discussed above, we are dealing with a single, isolated two-screen-affected relapse that has been extrapolated into a severe methamphetamine problem; we are not dealing with the typical case where there is long history of methamphetamine use combined with a failure to test or often-positive screens. While full compliance with the terms of an improvement period is appropriately considered in determining whether to grant an additional improvement period,[7] it does not follow that because you aren't enrolled in the right kind of rehab you necessarily cannot correct the conditions of abuse and neglect that led to the filing of the petition, even if you produced a thousand negative drug screens.

Under the facts of this case, the "too little, too late" rationale doesn't hold water not only because it completely ignores the litany of negative drug screens in favor of emphasizing two positives, but it also ignores the glaring tuberculosis diagnosis that had a huge impact on the delay here. And, significantly, the circuit court appears to have amended its criteria for successful completion of the improvement period by order dated

[7] *See* West Virginia Code § 49-4-610(3), which provides, "The court may grant an improvement period . . . . when . . . . The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period. . . ."

November 2, 2021 that "*If [A.T.] is eligible to attend long term rehabilitation after her TB treatments*, she shall attend a long-term rehabilitation approved by the Department."

Even so, the circuit court and the majority backdate the timeframe of A.T.'s eligibility to comply with admission into long-term inpatient rehabilitation to August 2021. Consistent with that erroneous finding, the majority focuses on A.T.'s inability to complete the long-term inpatient program "in the near future" as sufficient evidence that she could not correct the conditions of abuse and neglect so as to terminate parental rights. The circuit court was fixated on A.T.'s inability to meet the "timeframes" since she "waited" so long to get into the long-term rehab. I am perplexed as to what timeframes we are talking about here that would have demanded termination of parental rights as opposed to some other disposition even if the court was intent on not granting a post-dispositional improvement period. True, there are certain time limitations in the Code: the "15 of the last 22 months" rule found at West Virginia Code § 49-4-605 and limitations on the extension of improvement periods found at § 49-4-610. Importantly, the 15 of the last 22 months rule *and* the limitation on the extension of improvement periods found at West Virginia Code § 49-4-610(9) apply *only* to children in foster care, and this child was in the custody of the father until March 2022.[8]

[8] When those time frames are implicated, the DHHR is required to *seek* termination of parental rights.

Even assuming the "time frame" referenced relates to whether the rehabilitation could be completed within the statutorily-allowed six months for a post-dispositional improvement period, the statute also allows for a three-month extension of that post-dispositional improvement period.[9] By that time, A.T. could have completed the nine-month inpatient rehab with a month to spare. In fact, a six-month rehab would have been sufficient to meet the court's "long-term" rehab requirement and would have required no extension. I say that not because A.T. was unconditionally entitled to a post-dispositional improvement period or an extension of one, but to point out the flaw in the majority's conclusion that A.T.'s inability to *complete* the inpatient rehab was so far outside the "near future" that termination of rights was necessary, when, in fact, giving A.T. the time to complete the inpatient rehab would have been entirely consistent with the statutory framework.

Instead, what happened is that the circuit court took the "time frame" to complete an improvement period and treated it like a time bomb that had gone off and required the termination of parental rights. If we assume that the circuit court appropriately exercised its discretion to deny the post-dispositional improvement period, the procedure is simply to move to disposition, not necessarily termination. That is the crux of my dissent – that the circuit court and the majority have supplanted the substantive standard for termination of parental rights with a requirement that A.T. fully and technically comply

[9] West Virginia Code § 49-4-610(6).

with the terms of an improvement period, no matter how arbitrary the terms and irrespective of whether any improvement has actually been made during the improvement period.

We have repeatedly stressed that termination of parental rights is the most drastic remedy but in practice it is treated as anything but. While I personally would have granted the post-dispositional improvement period based on the factually-correct time frames (two months post-medical clearance to get into long-term rehab piggy-backed on a short-term inpatient rehab prior to that, and outpatient rehab prior to that) the more pressing concern to me is that in this case the circuit court jumped over all other dispositional alternatives that might have been appropriate and went straight to termination of parental rights when *no one* asked for it and *no one* proved it was necessary.

I cannot imagine a more appropriate case for a section 5 disposition[10] than this one – that at present, A.T. is unable to provide adequately for H.D. due to her participation in inpatient rehab (delayed because of her tuberculosis diagnosis). And, upon completion of that inpatient rehab, she could move the court for a modified disposition to dismiss the petition and reunite with H.D. by operation of West Virginia Code § 49-4-606,

[10] West Virginia Code § 49-4-604(c)(5) provides, in relevant part, that as a preferred alternative disposition to termination of parental rights, and "[u]pon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs," the court may "commit the child temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court."

the change of circumstances being that she has *successfully* completed a long-term inpatient rehabilitation. Conversely, if she failed to successfully complete the long-term inpatient rehabilitation and/or began actively using drugs, DHHR or the Guardian ad Litem could move under that same provision to modify the disposition to terminate rights at that point.

If A.T. is in the type of rehabilitation facility that allows children, even a disposition 4 might have been appropriate,[11] but none of those options were explored because no evidence on disposition was ever taken. In the wake of a denial of an improvement period that all parties recommended be granted, the circuit court treated termination as the default, not the last resort. While it will seemingly always be in the child's best interest to not have to wait, the statute has a tiered structure of dispositional preference for a reason. And, despite continued reliance on "permanency" for the child, *all* statutory dispositions are permanency options; termination of parental rights in favor of adoption is not the only way to afford a child permanency. Either of these dispositional options would have been especially appropriate given the Guardian ad Litem's testimony that it was in the best interest of the child to reunify with A.T.

[11] West Virginia Code § 49-4-604(c)(4) provides that as a preferred alternative disposition to termination of parental rights, the circuit court may "[o]rder terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform[.]"

I decline to join the majority in deferring to the findings and ultimate conclusion of the circuit court, not only because I would have decided the case differently, but because I find that the circuit court's order terminating parental rights constitutes an abuse of discretion this Court should not bend over backwards to save. The unembellished facts of this case are substantively inadequate to show that the conditions of abuse and neglect cannot be remedied. Due process places a substantial burden of proof upon the DHHR to justify a termination of parental rights and affirming on these facts stomps on it. The majority has rewritten the standard for termination of parental rights as having little to nothing to do with actual progress and likelihood of remediation and everything to do with whether the technical and arbitrary[12] terms of an improvement period have been completed within a circumstance-ignorant timeframe.[13] Because I would hold the DHHR accountable

[12] It seems important to point out that under West Virginia Code § 49-4-604(c) the definition of "no reasonable likelihood that the 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." (emphasis added). And, while the failure to "respond[] to or follow[] through the recommended and appropriate treatment" can meet that definition, the circuit court arbitrarily determined that A.T. required long-term, inpatient treatment when the recommendation of the psychological evaluation was that outpatient treatment was sufficient and that even upon relapse, short-term inpatient would have sufficed. So, the failure to explore less restrictive alternatives to termination when she was medically prevented from inpatient rehab is particularly harsh.

[13] This is especially true here where DHHR admitted the failure to get into *inpatient* rehab – a special term set by the court, not the MDT – was the only deficiency. A.T. received a favorable psychological evaluation during which she took responsibility for her drug use, completed parenting and life skills education, visited with H.D. under supervision, completed overnight visitations with H.D., entered therapy, and completed outpatient rehabilitation in addition to consistently testing negative for methamphetamine.

to meet its burden of proof and hold the circuit court's order to the proverbial due process fire, I respectfully dissent.