

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re E.S.

No. 23-12 (Lewis County CC-21-2022-JA-11)

MEMORANDUM DECISION

Petitioner Mother C.D.¹ appeals the Circuit Court of Lewis County’s December 9, 2022, order terminating her parental rights to the child, E.S.,² arguing she should have been granted a less restrictive alternative to termination. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court’s order is appropriate. *See* W. Va. R. App. P. 21.

In February 2022, the DHS filed an abuse and neglect petition against petitioner and the father of the child following a search of their home, which revealed weapons and drug paraphernalia scattered throughout and within the child’s reach. Drug paraphernalia was also found in petitioner’s car and purse. The DHS’s petition further outlined the parents’ domestic violence history and recent criminal offenses. In November 2021, petitioner pled guilty to charges of drug possession, driving with a revoked or suspended license, and driving under the influence, which resulted in her incarceration.³ During the same month, the father was charged with destruction of property following a domestic violence incident with petitioner. Earlier that year, the father pled guilty to two counts of child neglect creating a risk of bodily injury regarding other children not at issue in this appeal. The petition also noted that the father relinquished his parental rights to two

¹Petitioner appears by counsel G. Phillip Davis. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Katica Ribel. Counsel Betty Clark Gregory appears as the child’s guardian ad litem (“guardian”).

Additionally, pursuant to West Virginia Code § 5F-1-2, the agency formerly known as the West Virginia Department of Health and Human Resources was terminated, effective January 1, 2024, and is now three separate agencies—the Department of Health Facilities, the Department of Health, and the Department of Human Services. For purposes of abuse and neglect appeals, the agency is now the Department of Human Services (“DHS”).

²We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

³Petitioner was not incarcerated during the pendency of the proceedings below.

other children in 2019. According to a Day Report Center (“DRC”) worker, petitioner advised that she was going to drop the domestic violence charges against the father. She admitted to the worker that she knew the father was abusing his Suboxone prescription by injecting it but justified his behavior by saying, “at least it’s not meth.”

Petitioner stipulated to the allegations in the petition at an adjudicatory hearing held in April 2022. Therefore, the court found the child to be abused and neglected and adjudicated petitioner as an abusing and neglecting parent. Petitioner then filed a motion for a post-adjudicatory improvement period, which the court granted at a hearing in June 2022. However, the DHS filed a motion to terminate petitioner’s parental rights in November 2022, and the court set the matter for disposition.

The court held a dispositional hearing in December 2022, during which the DHS and guardian supported termination of petitioner’s parental rights. The court heard testimony from two police officers who investigated claims that the child was injured during a visit with the parents in September 2022. One police officer testified that he received a call from the local hospital about a possible sexual assault of the child. The foster parents provided the officer with a statement that the child had an unsupervised visit with the parents, and that when the child returned, he had bruises on his penis. The parents first denied knowing of any injuries. The other police officer testified regarding a follow-up interview he conducted with petitioner. Petitioner admitted during the interview that she witnessed the father become angry while changing the child’s diaper and that, although his back was to her and she couldn’t see what happened, “he got rougher than he should have.” Petitioner further admitted to the officer that she did not intervene. The court also heard testimony from a Child Protective Services worker who stated that petitioner and the father separated only a week prior to the dispositional hearing and that petitioner relapsed in November 2022. Petitioner testified and admitted to recently abusing fentanyl. Petitioner initially denied any drug use when asked by a DRC worker, and only admitted to using fentanyl when confronted with positive test results. Even then, petitioner only admitted to the DRC worker that she used it once, but testified during the dispositional hearing that she used it twice. Regarding the injury to the child, petitioner insisted that she “didn’t know what happened,” and suggested alternative possibilities for his injury, including that his leg got stuck in his crib and that he fell off a piano that he climbed on. She contended that she did not notice any bruising before she sent the child back to foster placement. Furthermore, petitioner conceded that she separated from the father only a week before the hearing, although the child’s injury occurred about two months prior. At the conclusion of petitioner’s testimony, the court found that petitioner “utterly failed” her improvement period. Finding that there was no reasonable likelihood that conditions of abuse or neglect could be substantially corrected in the near future and that it was necessary for the welfare of the child, the court terminated petitioner’s parental rights.⁴ It is from the final dispositional order that petitioner appeals.

On appeal from a final order in an abuse and neglect proceeding, this Court reviews the circuit court’s findings of fact for clear error and its conclusions of law de novo. Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011). Petitioner’s sole assignment of error on appeal is

⁴By the same order, the court terminated the father’s parental rights. The permanency plan for the child is adoption by foster placement.

that the circuit court erred by terminating her parental rights where there were less restrictive dispositional alternatives. Upon our review, we find no error by the circuit court. We have held as follows:

“Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(c)(6)] . . . 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). Here, the record demonstrates that there was no reasonable likelihood that conditions of abuse or neglect could be substantially corrected. Although petitioner may have appeared to exhibit some initial improvement, her own testimony revealed no significant change in her behavior. Not only did petitioner continue to abuse illegal substances as recently as one month before disposition, but she was dishonest with the DRC about her use of the same. Additionally, petitioner’s denial of the child’s genital injury at disposition, despite observing the father’s aggressive behavior when changing the child’s diaper and knowing of the father’s history of child abuse, shows no reasonable likelihood that the conditions of abuse could be substantially corrected.

Furthermore, the court correctly found termination necessary for the child’s welfare. *See* Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980) (“[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 . . .”). The record reveals that the conditions of abuse and neglect at issue actually worsened during the proceedings, as petitioner admitted to law enforcement that the child was physically abused yet she failed to intervene. Moreover, petitioner continued to reside with the father for two months after the child’s injury occurred, demonstrating petitioner’s continued loyalty to the father at the child’s expense. *See In re Brianna Elizabeth M.*, 192 W. Va. 363, 367, 452 S.E.2d 454, 458 (1994) (“[T]he rights of children to be free from abuse require that a parent’s first loyalty be to the protection of his or her children.”). While it is true that petitioner eventually separated from the father, the fact that this occurred almost immediately preceding the dispositional hearing further underscores her unwillingness to act in the child’s best interests. The child’s welfare would clearly be threatened if the court permitted petitioner to resume care. We, therefore, find that the court did not err in terminating petitioner’s parental rights.

Accordingly, for the foregoing reasons, we find no error in the decision of the circuit court, and its December 9, 2022, order is hereby affirmed.

Affirmed.

ISSUED: February 7, 2024

CONCURRED IN BY:

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