

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

*In re A.D. and E.C.*

No. 23-112 (Kanawha County 22-JA-474 and 22-JA-475)

**MEMORANDUM DECISION**

Petitioner Mother/Guardian J.B.<sup>1</sup> appeals the Circuit Court of Kanawha County’s February 1, 2023, order terminating her parental rights to E.C. and her guardianship rights to A.D.<sup>2</sup> She argues that the evidence did not support her adjudication as an abusing parent and the court’s chosen disposition was not the least restrictive alternative. 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 October 2022, the DHS filed a petition alleging that petitioner physically abused and neglected the children.<sup>3</sup> The DHS alleged that petitioner put her hands around E.C.’s throat. According to the petition, petitioner admitted to the Child Protective Services (“CPS”) employee who visited her home that she “aimed to beat the shit out of” E.C. but was able to abstain. Petitioner further informed the CPS employee that E.C. “thinks she can do whatever she wants” and “the little bitch” will not listen. E.C. disclosed that petitioner disciplined her with a belt and called her vulgar names such as “fat, a whore, and a bitch.” E.C. provided the CPS employee with audio recordings of altercations between her and petitioner, which sounded to be a verbal argument in

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<sup>1</sup>Petitioner appears by counsel Edward L. Bullman. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Heather Olcott. Counsel Jennifer R. Victor appears as the children’s guardian ad litem.

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

<sup>2</sup>We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e). Petitioner is E.C.’s mother and A.D.’s grandmother and legal guardian.

<sup>3</sup>The DHS later filed an amended petition to include additional information about the children.

which petitioner called her vulgar names, threatened to hurt her, and screamed at her. Petitioner was accused of substance abuse and admitted to the CPS employee that she would test positive for Suboxone, although it was unclear if petitioner possessed a valid prescription.

In December 2022, the court held an adjudicatory hearing. The court noted that petitioner was not present at the virtual hearing, although she was represented by counsel. E.C. testified that petitioner had been using heroin and detailed how petitioner's actions and demeanor would vary depending on whether she was sober. E.C. further testified that she feared for her and her sibling's safety due to petitioner's actions. She described the incident that led to the filing of the initial petition, testifying that petitioner demanded E.C. get her a drink, E.C. declined and attempted to go upstairs, and then petitioner put her hand around E.C.'s throat and threatened her. E.C. further stated that after the physical altercation, petitioner unplugged their internet service to prevent E.C. from calling authorities.<sup>4</sup> Based upon the evidence, the court found that petitioner had a substance abuse problem that negatively affected her parenting ability, committed domestic violence against E.C., and perpetrated emotional abuse on both children. Thus, the court found that petitioner was an abusing parent and that both children were abused and neglected. In January 2023, petitioner filed a written motion for a post-adjudicatory improvement period.

In January 2023, the court held a dispositional hearing. The guardian ad litem and the DHS both moved to terminate petitioner's rights, while petitioner objected. The court noted that petitioner was offered services consisting of drug screens, life skills education, parenting education, and supervised visits with the children, but she refused to participate. Petitioner failed to stay in contact with CPS and did not provide a prescription for Suboxone, as ordered by the court. The court further found that petitioner continually denied any abuse or neglect and refused to take responsibility for her failure to cooperate with services. The court concluded that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future, termination was necessary for the children's welfare, and there was no less restrictive alternative other than termination. Ultimately, the court denied petitioner's motion for a post-adjudicatory improvement period and terminated her parental rights as to E.C. and her guardianship rights as to A.D.<sup>5</sup> It is from the court's 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). Before this Court, petitioner argues that the circuit court erred when it adjudicated her of abusing and neglecting the children. Petitioner argues that she "dealt with the problem in a manner proportional to the behaviors exhibited by E.C." during the altercation that led to the filing of the initial petition. Petitioner claims that her actions were not abusive as a matter of law. We disagree.

West Virginia Code § 49-1-201 defines an abused child as

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<sup>4</sup>E.C. testified that her phone service is poor at the home, so without internet service, she could not dial out a call.

<sup>5</sup>The permanency plan for the children is to remain in the care of their nonabusing fathers.

a child whose health or welfare is being harmed or threatened by: (A) A parent, guardian, or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home. Physical injury may include an injury to the child as a result of excessive corporal punishment.

The evidence below established that petitioner committed an act of domestic violence against E.C., thereby demonstrating that petitioner knowingly and intentionally inflicted physical injury upon the child. This is more than sufficient to adjudicate petitioner of physically abusing E.C. and, by extension, A.D. Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995) (“Where there is clear and convincing evidence that a child has suffered physical . . . abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical . . . abuse but is at risk of being abused is an abused child.”). Further, the evidence established that petitioner’s substance abuse negatively impacted her parenting abilities. Based upon ample evidence, the court appropriately adjudicated petitioner of abusing and neglecting the children.

Petitioner also asks that this Court engage in a credibility determination by making numerous references to her testimony and essentially requesting that we choose to believe her testimony over all other evidence presented. However, we have held that “[a] reviewing court *cannot* assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.” *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) (emphasis added). Moreover, “[a]n appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact.” *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995). The circuit court appropriately exercised its authority to assign weight and credibility to the evidence presented. Therefore, we decline to disturb the circuit court’s ruling.

Next, petitioner argues that the circuit court erred in terminating her parental and guardianship rights because the court did not apply the least restrictive alternative. Petitioner claims that placement with the children’s respective fathers without termination of her rights would have been sufficient. However, we have previously 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(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). Moreover,

“[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).

*Cecil T.*, 228 W. Va. at 91, 717 S.E.2d at 875, Syl. Pt. 4. The circuit court made specific findings that petitioner failed to abide by the orders of the court, failed to participate in services, denied any abuse or neglect, and refused to take responsibility for her failure to cooperate throughout the proceedings. The record contains ample evidence to support the circuit court’s findings 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 necessary for the children’s welfare to terminate petitioner’s parental and guardianship rights. *See* W. Va. Code § 49-4-604(c)(6) (permitting circuit court to terminate parental and guardianship rights upon finding no reasonable likelihood conditions of neglect can be substantially corrected in the near future and when necessary for the child’s welfare). Thus, petitioner’s argument that the court erred is without merit.

For the foregoing reasons, we find no error in the decision of the circuit court, and its February 1, 2023, order is hereby affirmed.

Affirmed.

**ISSUED:** March 6, 2024

**CONCURRED IN BY:**

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