

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **D.M.-1 and D.M.-2**

No. 23-144 (Wood County CC-54-2022-JA-113 and CC-54-2022-JA-114)

MEMORANDUM DECISION

Petitioner Mother A.M.¹ appeals the Circuit Court of Wood County’s February 24, 2023, order terminating her parental rights to D.M.-1 and D.M.-2, arguing that the court erred in accepting her stipulation at adjudication and in terminating her rights upon insufficient evidence.² Upon our review, we determine that oral argument is unnecessary and that a memorandum decision vacating the circuit court’s November 23, 2022, adjudicatory order and its February 24, 2023, dispositional order and remanding for further proceedings is appropriate, in accordance with the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

In May 2022, the DHS filed a petition alleging that petitioner allowed her children, then ages two and three, to exit her home and wander unattended, including in the street, on multiple occasions. The petition also included allegations that petitioner abused drugs and had a history of domestic violence. After a series of continuances, the court held an adjudicatory hearing in November 2022, during which petitioner submitted a written stipulation to her adjudication. Petitioner admitted that the children were abused and neglected by her failure to provide them with

¹Petitioner appears by counsel Nancy L. McGhee. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee Niezgoda. Counsel Keith White appears as the children’s guardian ad litem (“guardian”).

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”).

²We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e). Additionally, because the children share the same initials, we refer to them as D.M.-1 and D.M.-2.

a safe and appropriate living environment, as evidenced by the multiple times they were able to exit the home unattended. During the adjudicatory hearing, the following exchange occurred:

THE COURT: And you've gone over the stipulation, as well as the terms, with your attorney?

[PETITIONER]: Yes.

THE COURT: And you understand that by entering into the stipulation there won't be a hearing on this matter?

[PETITIONER]: Yes.

THE COURT: And has anyone forced you, threatened you, coerced you, scared you or done anything to you to get you to enter into the stipulation?

[PETITIONER]: No.

THE COURT: So you do so of your own free will after having discussed the stipulation, as well as the terms, with your attorney?

[PETITIONER]: Yes.

THE COURT: Do you have any questions with regard to any of the terms?

[PETITIONER]: No.

THE COURT: All right. I'll enter both the stipulation and the terms.

The court accepted petitioner's stipulation and, by order entered on November 23, 2022, adjudicated her of abusing and neglecting the children. Despite the court's limited questioning of petitioner, the resulting order made findings well beyond the scope of the inquiry. Specifically, the court found that it informed petitioner "of the rights and procedures [she] would be waiving and forfeiting if the stipulation of facts is accepted . . . , including the right to contest the allegations in the petition, the right to present in a hearing any evidence and testimony to refute the allegations, and the right to appeal any adverse adjudication." This order also granted petitioner's prior motion for a post-adjudicatory improvement period, the terms of which, among other things, prohibited petitioner from using drugs or alcohol.

In anticipation of a review hearing in January 2023, the DHS filed a report containing several factual inaccuracies. First, it indicated that petitioner's improvement period began on August 16, 2022, three months before the November 2022 hearing at which the court granted the improvement period. It also indicated that petitioner "ha[d] not attended all MDTs or court hearings at this time," despite the fact that the DHS later admitted that there had not been any court hearings or multidisciplinary team ("MDT") meetings since the initiation of the improvement period. Aside from these inaccuracies, the report contained information regarding a failed drug

screen and asserted that petitioner was arrested in November 2022 on several charges, including possession of a controlled substance. At the January 2023 review hearing, the DHS proffered to the court that petitioner was not compliant with her improvement period, but did not introduce any other evidence. The court terminated petitioner's improvement period but ordered that her services remain open pending the dispositional hearing. Thereafter, petitioner filed a motion for a post-dispositional improvement period.

In anticipation of the dispositional hearing, the DHS filed a report outlining that petitioner had submitted to only two drug screens, both of which were positive. The DHS also indicated that petitioner's failure to properly screen resulted in her having no visits with the children. The report more thoroughly laid out petitioner's arrest history during the proceedings, indicating that she was arrested three times between July and November 2022. Finally, the DHS asserted that it made referrals for petitioner's services, but that she was not compliant with those services. A Court Appointed Special Advocate also filed a one-page report recommending termination of petitioner's parental rights.

In February 2023, the court held a dispositional hearing, during which it accepted both reports into evidence. Petitioner failed to appear for the hearing, although she was represented by counsel. Without introducing additional evidence, other than requesting that the court take judicial notice of the entire record, the DHS moved to terminate petitioner's parental rights. The court ultimately found that petitioner failed to participate in services or address any of the conditions that led to the petition's filing. The court found that there was no reasonable likelihood petitioner could substantially correct the conditions of abuse and neglect in the near future and that termination was necessary for the children's welfare.³ It is from the 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). Further, we have explained that,

“[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children [alleged] to be abused or neglected has been substantially disregarded or frustrated, the resulting order . . . will be vacated and the case remanded for compliance with that process and entry of an appropriate . . . order.” Syllabus point 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

Syl. Pt. 3, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009).

³The court also terminated the parental rights of D.H.-1's unknown father. D.H.-2 has been returned to the custody of the nonabusing father. The permanency plan for D.H.-1 is adoption by the father of D.H.-2.

Before this Court, petitioner first argues that the circuit court erred in accepting her stipulation because it failed to comply with the requirements of Rule 26 of the Rules of Procedure for Child Abuse and Neglect Proceedings. According to Rule 26(b),⁴

[b]efore accepting a stipulated or uncontested adjudication, the court shall determine that the parties understand the content and consequences of the admission or stipulation, the parties voluntarily consent, and that the stipulation or uncontested adjudication meets the purposes of these rules and controlling statute and is in the best interests of the child.

According to petitioner, the court did not inquire as to the content of the stipulation, determine whether she understood it, or determine that she was aware of any consequences other than that there would be no hearing. Upon our review, we agree. As the record shows, the circuit court's extremely limited inquiry was concerned, primarily, with the voluntariness of petitioner's stipulation. As petitioner correctly points out, the only other issue the court inquired about, other than whether she discussed the matter with counsel, was if petitioner was aware that the acceptance of her stipulation meant that there would not be "a hearing on this matter." There is nothing in the record upon which the circuit court could determine whether petitioner understood the content of the stipulation, given that the court failed to address it in any meaningful way. Further, the fact that petitioner would not receive a hearing fails to address the full consequences of entering a stipulation. Finally, it is clear that the court took no steps to ensure that the stipulation met the purposes of the applicable rules and statutes or was otherwise in the best interests of the child. We also note that the circuit court's adjudicatory order, in which it found that it informed petitioner about a litany of issues, including that she waived the right to appeal any adverse adjudication, lacks a basis for these findings. Accordingly, we find that the court's acceptance of the stipulation constitutes a substantial frustration or disregard of the applicable rule, and the circuit court's November 23, 2022, adjudicatory order is hereby vacated.

Further, it is necessary to vacate the circuit court's dispositional order in this matter, given the paucity of evidence introduced below.⁵ Petitioner argues that the DHS's failure to present

⁴The resolution of petitioner's appeal does not require analysis as to whether the written stipulation satisfied the requirements of Rule 26(a).

⁵We recognize that vacation of the circuit court's adjudicatory order necessarily requires vacation of the subsequent dispositional order because the circuit court lacked jurisdiction to proceed to disposition absent a proper adjudication. *See, e.g., In re Z.S.-1*, 249 W. Va. 14, --, 893 S.E.2d 621, 631 (2023) (explaining that "we find that the circuit court failed to properly adjudicate Mother or Father as to Z.S.-1 during the underlying proceedings and that this failure frustrated the process for conducting abuse and neglect proceedings and deprived the court of jurisdiction to proceed to disposition as to this child. Accordingly, we vacate the circuit court's May 31, 2022 order terminating Mother's and Father's parental rights to Z.S.-1, as well as the court's adjudicatory orders that were based on the parents' improper stipulations, and remand for further proceedings consistent with this opinion."). However, we find it necessary to address petitioner's assignment of error concerning disposition on its merits.

evidence at the dispositional hearing constituted reversible error, and we agree. From the appendix record presented to this Court, it does not appear that the DHS presented a single testimonial witness during the entirety of the proceedings. Instead, it appears that the DHS relied on the two court summaries and other drug screen results to support termination. While petitioner's two failed drug screens are certainly relevant to disposition, we find that the overall evidence is lacking.

We recently addressed a similar scenario in which the DHS failed to introduce any evidence at a dispositional hearing and found that vacation was warranted. *In re K.S.*, 246 W. Va. 517, 522, 874 S.E.2d 319, 324 (2022). In the instant matter, the DHS argues, among other things, that termination was appropriate because petitioner's counsel conceded that petitioner failed to participate in services. However, in *K.S.*, we explained that "even when there have been stipulations entered which would seemingly obviate the need for the [dispositional] hearing, this Court has still required the hearing to be conducted." *Id.* at 525, 874 S.E.2d at 327 (citing Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998)). We also made clear that "[t]he standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." *Id.* (quoting Syl. Pt. 6, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973)). Finally, we stressed that

[t]he State must produce clear and convincing evidence to support [the findings that there is no reasonable likelihood the conditions of abuse and neglect can be substantially corrected in the near future and that termination is necessary for the child's welfare] before the court may sever the . . . rights of the natural parents.

Id. (quoting *State v. C.N.S.*, 173 W. Va. 651, 656, 319 S.E.2d 775, 780 (1984)).

As in the current matter, the DHS in *K.S.* "argue[d] that the circuit court's access to written DH[S] case summaries, which included historical drug testing results, [was] a viable surrogate for sworn testimony or other evidence." *Id.* at 526, 874 S.E.2d at 328. We rejected this assertion and concluded that "[i]n order to assess a parent's degree of improvement and make the required statutory findings for purposes of disposition, the circuit court must be presented with affirmative, cogent evidence by the party with the burden of proof." *Id.* It is also important to note that the scant evidence the DHS offered below focused almost entirely on whether petitioner was able to substantially correct the conditions of neglect in the near future while mostly ignoring whether termination of her parental rights was necessary for the children's welfare. As we stressed in *K.S.*, "[t]he controlling standard that governs any dispositional decision remains the best interests of the child." *Id.* at 528, 874 S.E.2d at 330 (quoting Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)). Moreover, a finding that termination is necessary for a child's welfare is a requirement for termination that requires an evidentiary basis. *See* W. Va. Code § 49-4-604(c)(6). Accordingly, we find that the evidence below was insufficient to support the court's ultimate termination of petitioner's parental rights to the children, and we vacate the court's dispositional order.⁶

⁶Petitioner raises an additional assignment of error in which she alleges that the circuit court's dispositional order was incongruent with the ruling on the record at the dispositional hearing. Because we are remanding the matter with instructions for the court to hold further hearings before reaching a new dispositional hearing, if appropriate, it is unnecessary to address this assignment of error.

For the foregoing reasons, we vacate the circuit court's November 23, 2022, adjudicatory order and its February 24, 2023, dispositional order, and we remand to the circuit court with directions to conduct further proceedings that comply with the procedure for abuse and neglect cases as discussed herein. The Clerk is directed to issue the mandate contemporaneously herewith.

Vacated and Remanded, with directions.

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