

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

**FILED
April 15, 2024**

C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In re L.G.

No. 23-215 (Boone County CC-03-2021-JA-88)

MEMORANDUM DECISION

Petitioner Father D.G.¹ appeals the Circuit Court of Boone County’s March 15, 2023, order terminating his parental, custodial, and guardianship rights to L.G., arguing that the circuit court erred in terminating his rights and denying post-termination visitation.² 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 September 2021, the DHS filed a petition alleging that petitioner exposed his child, L.G., to substance abuse and permitted firearms to be within the child’s reach. The petition followed petitioner’s arrest for multiple crimes, including third-offense driving under the influence, prohibited person in possession of a firearm, and child neglect creating risk of injury. The child was in the vehicle when these offenses occurred. According to the petition, the child had access to firearms in the car and in the home. Initially, the DHS provided services, including drug screens, in an attempt to prevent the filing of a petition. However, it was reported that both parents “ha[d]

¹Petitioner appears by counsel Kassie N. Ball. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Andrew Waight. Counsel Allison K. Huson 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).

been failing screens.” Specifically, petitioner tested positive nine times, including for methamphetamine, and missed nine screens.³

At an adjudicatory hearing in November 2021, the DHS presented evidence consistent with the petition’s allegations. Based on the evidence, the court adjudicated petitioner of abusing and neglecting the child. Thereafter, the court granted petitioner a post-adjudicatory improvement period based on his completion of a short-term substance abuse treatment program and his ongoing participation in a medication-assisted treatment program. As part of his improvement period, petitioner was required to participate in therapy, comply with services in the home, and pass drug screens. Thereafter, the parties discovered that petitioner had tested positive for methamphetamine during his treatment program. The court also permitted the mother to have overnight visits with her children as long as petitioner was not in the home. According to a DHS report from August of 2022, petitioner allowed the mother to abuse his prescribed Suboxone. Further, the children had been instructed to lie about petitioner being present for a visit with the mother. The DHS implemented an updated case plan that required petitioner to, among other things, maintain participation in a medication-assisted treatment program. Petitioner executed this case plan in July 2022. Thereafter, petitioner filed a motion for a post-dispositional improvement period.

In October 2022, the court held a hearing wherein the guardian explained that petitioner’s visits were stopped after an incident in which petitioner screamed at one of the children,⁴ in addition to a recent screen that was positive for alcohol. The court then held a series of dispositional hearings, culminating in a final hearing in December 2022. During one hearing, petitioner admitted to using methamphetamine after he completed his initial short-term treatment program, although his explanation as to where he obtained the drugs was inconsistent. Petitioner also admitted to having lied to a service provider about the screen to avoid going to jail. Further, petitioner admitted to instructing the children to lie about his presence at an overnight visit. When addressing his inappropriate conduct that caused visits to end, petitioner denied having screamed or cussed at the children and, instead, described his conduct as corrective in response to one child’s misbehavior. Further, when discussing how he allowed the mother to abuse his Suboxone prescription, petitioner indicated that he “didn’t keep up with it like [he] should have,” but indicated that he did not “want . . . to snitch on [his] wife.” Further, a parenting service provider testified that although petitioner complied with services, he did not make any observable progress in addressing his issues. The provider indicated that petitioner revealed he was aware the mother abused his Suboxone. Finally, the court heard extensive evidence about petitioner’s inappropriate conduct during multiple visits, which included screaming and cussing at the children, and testimony that L.G. “wants nothing to do with” petitioner.

³The DHS later filed an amended petition to include allegations against the father of I.D. and J.D. Although petitioner lived in the home with I.D. and J.D., the court took no action in this case in regard to any rights he may have exercised. Further, petitioner raises no argument concerning these children, who are, accordingly, not at issue in this appeal.

⁴It appears that visits below varied in manner and attendance, as some were in person, others were remote, and some involved petitioner, the mother, and all three children.

Based on the evidence, the court found that petitioner engaged in drug use and dishonesty and gave inconsistent and incredible testimony. The court also found that petitioner knew the mother was taking his prescription illegally and that petitioner engaged in “deceitful behavior and covered it up with lying.” Accordingly, the court found that there was no reasonable likelihood that petitioner could correct the conditions of abuse and neglect in the near future and that termination of his rights was in the child’s best interests. As such, the court terminated petitioner’s parental, custodial, and guardianship rights to L.G. The court further denied petitioner’s request for post-termination visitation with the child, finding that it would not be in the child’s best interests.⁵ 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). Before this Court, petitioner first argues that termination of his rights was in error because granting him a post-dispositional improvement period would have been less restrictive. While petitioner acknowledges that the circuit court found that he failed to substantially comply with his post-adjudicatory improvement period, he argues that he experienced the substantial change in circumstances necessary to obtain an additional improvement period. *See* W. Va. Code § 49-4-610(3)(D) (requiring a parent seeking a second improvement period to “demonstrate[] that since the initial improvement period, the respondent has experienced a substantial change in circumstances” and “that due to that change in circumstances, the respondent is likely to fully participate in the improvement period”). Petitioner’s argument, however, is not supported by the record.

Petitioner stresses his completion of a substance abuse treatment program but minimizes his continued drug abuse after that program. Further, while it may be true that he provided clean screens for a period, the evidence demonstrated that petitioner permitted the mother to abuse his Suboxone prescription, made no improvement despite participation in parenting classes, forced the children to lie about his presence at visits, behaved inappropriately at visits, and lied about his positive screen in an effort to avoid jail. Simply put, the evidence overwhelmingly established that petitioner did not experience a substantial change in circumstances such that an additional improvement period was warranted, and we find no abuse of discretion in the circuit court’s denial of petitioner’s motion. *See In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002) (granting circuit court discretion to deny an improvement period when no improvement is likely).

Further, this same evidence supports the circuit court’s finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect in the near future. While it is true that petitioner complied with many services, the record supports the service provider’s testimony that he failed to benefit. As we have explained, “it is possible for an individual to show ‘compliance with specific aspects of the case plan’ while failing ‘to improve . . . [the] overall attitude and approach to parenting.’” *In re Jonathan Michael D.*, 194 W. Va. 20, 27, 459 S.E.2d 131, 138 (1995) (quoting *W. Va. Dep’t of Hum. Serv. v. Peggy F.*, 184 W. Va. 60, 64, 399 S.E.2d 460, 464 (1990)). Further, petitioner clearly refused to acknowledge that his conduct during visits was unacceptable, as he claimed that his screaming and cussing at the children was corrective

⁵The mother’s parental, custodial, and guardianship rights were also terminated below. The permanency plan for the child is adoption in the current placement.

action in response to misbehavior. The circuit court concluded that petitioner was dishonest and his testimony incredible, determinations we refuse to disturb on appeal. *See Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) (“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.”). Accordingly, it is clear that petitioner “demonstrated an inadequate capacity to solve the problems of abuse or neglect on [his] own or with help,” thereby establishing that there was no reasonable likelihood he could correct the conditions. *See* W. Va. Code § 49-4-604(d).

Further, the court found that the child’s best interests required termination of petitioner’s rights, as the record demonstrates that petitioner’s conduct during the proceedings was inappropriate and detrimental to the child’s wellbeing. Because the court had ample evidence upon which to make the findings necessary under West Virginia Code § 49-4-604(c)(6) for termination of petitioner’s parental, custodial, and guardianship rights, we find no error. *See also* Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011) (permitting termination of parental, custodial, and guardianship rights “without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] . . . that conditions of neglect or abuse can be substantially corrected.” (quoting Syl. Pt. 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980))).

Finally, petitioner argues that the court erred in denying post-termination visitation. As we have explained, post-termination visitation is appropriate only where “[t]he evidence . . . indicate[s] that such visitation or continued contact would not be detrimental to the child’s well being and would be in the child’s best interest.” Syl. Pt. 11, in part, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002) (quoting Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995)). While petitioner argues that he and the child shared a strong bond, the record shows that petitioner’s dishonesty regarding his violation of the prohibition on contact and his inappropriate conduct during visits clearly established that ongoing visitation would be against the child’s best interests. Further, petitioner’s arguments that the circuit court was required to conduct an in camera interview of the child or otherwise hear from an expert on the issue of ongoing contact is without merit. According to Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, there is “a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child’s testimony.” Petitioner points to no attempt below to rebut this presumption. As such, he is entitled to no relief.

For the foregoing reasons, we find no error in the decision of the circuit court, and its March 15, 2023, order is hereby affirmed.

Affirmed.

ISSUED: April 15, 2024

CONCURRED IN BY:

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