

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **D.L.**

No. 23-263 (Wetzel County CC-52-2021-JA-23)

MEMORANDUM DECISION

Petitioner Father N.L.¹ appeals the Circuit Court of Wetzel County’s April 7, 2023, order terminating his parental rights to the child, D.L.,² arguing that the court erred by terminating his parental rights on a basis for which he was not adjudicated. 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 August 2021, the DHS filed an abuse and neglect petition following the birth of D.L., who was born drug affected, alleging that petitioner was homeless, had a history of domestic violence toward the mother, and his parental rights to two older children were previously terminated after he was convicted of felony child endangerment for breaking his infant child’s femur. Petitioner served approximately three years in prison prior to D.L.’s birth and the initiation of the instant proceeding.

Evidence at adjudicatory hearings held in November 2021, December 2021, and February 2022 revealed that the child D.L. was born with drugs in his system and that petitioner purchased illicit substances for the mother during her pregnancy. In sum, the circuit court adjudicated petitioner as an abusive and neglectful parent solely based on petitioner providing illicit substances

¹Petitioner appears by counsel Amy Pigg Shafer. The West Virginia Department of Human services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee Niezgoda. Counsel Lisa M. Harwot appears as the child’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”).

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

to the mother “for the express intent” that she use them while pregnant with the child. Thereafter, the court granted petitioner an improvement period with agreed terms and conditions submitted by the parties, which included that petitioner would (1) refrain from abusing drugs and other controlled substances, (2) submit to random drug screens as directed by the DHS to ensure compliance, (3) submit to a drug and alcohol evaluation by an approved service provider for purposes of determining appropriate services upon a failed screen, (4) successfully complete individualized parenting classes and adult life skills, (5) maintain regular supervised visitation with the child, (6) and complete an anger management assessment and follow through with counseling and/or other recommendations as deemed necessary.

The DHS filed a motion to terminate petitioner’s improvement period and proceed to disposition in May 2022. However, at a hearing in September 2022, the circuit court granted an extension of his improvement period for a period of sixty days. Then, at a review hearing in November 2022, the court found it appropriate to proceed to disposition and suspend visitation based on allegations that the child was returned to his foster parents with a rash all over his body requiring immediate medical attention following petitioner’s last unsupervised visit with the child.

The circuit court then held several evidentiary hearings, with a final dispositional hearing concluding in March 2023. Throughout the course of the hearings, the court heard testimony of petitioner, petitioner’s therapist, a service provider, a DHS worker, a Child Protective Services supervisor, a probation officer involved with the Family Drug Treatment Court (“treatment court”), a treatment court supervisor, the child’s foster mother, and petitioner’s fiancée. Of critical importance to the resolution of this appeal, during petitioner’s dispositional testimony, he admitted to purchasing Suboxone “off the street” for the mother while she was pregnant and insisted that doing so was best for his child. Petitioner also denied any issues with drugs, despite his own admission to using methamphetamine and marijuana, coupled with testimony from other witnesses that petitioner tested positive “over fifty times” for substances such as such as methamphetamine, amphetamine, fentanyl, and THC, with the most recent positive screen being in January 2023. Additionally, testimony from service providers, treatment court workers, and DHS workers indicated that petitioner failed to appear for drug screens on more than ten occasions, missed approximately fifteen therapy sessions, and adult skills and individualized parenting services were closed for noncompliance. Furthermore, petitioner forgot about visits with the child on multiple occasions and left early from a visit with the child on petitioner’s birthday, when he admitted to using methamphetamine. Petitioner had not completed any treatment program and told the treatment court supervisor that “he was going to continue to play the game” in an attempt to regain custody of the child.

Based on the foregoing, the circuit court found that petitioner “is simply going through the motions” and his failure to acknowledge the existence of problems resulted in the problems being untreatable. Therefore, the court found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and that the best interests of the child required termination of petitioner’s parental rights.³ It is from the final dispositional order that petitioner appeals.

³The mother voluntarily relinquished her parental rights; therefore, the permanency plan for D.L. is adoption by his foster parents.

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's primary assignment of error is that the circuit court erred in terminating his parental rights based on his failure to acknowledge substance abuse issues when he was not adjudicated on that basis.

Petitioner relies on *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013), for the proposition that it is plain error for a circuit court to terminate parental rights on the basis of allegations and issues which were never properly made the subject of adjudication. *Id.* at 180, 744 S.E.2d at 290 (“[T]his Court takes notice of the plain error permeating the disposition wherein the circuit court terminated the parental rights on the basis of allegations and issues which were never properly made subject of the adjudication.”); *see also In re K.L.*, 247 W. Va. 657, 666, 885 S.E.2d 595, 604 (2022) (recognizing the lack of adjudication in regard to petitioner having a substance abuse problem and stating that “at no time was substance abuse legally determined to constitute a “condition[] of neglect or abuse” requiring acknowledgment or correction as pertained to petitioner.”). However, upon our review, we find petitioner's argument misplaced, as termination of petitioner's parental rights was premised on the conditions of abuse and neglect upon which he was properly adjudicated. This case is distinguishable from *In re Lilith H.* and *In re K.L.*, two cases in which the basis for termination was wholly unrelated to reasons for adjudication. In the case of *In re Lilith H.*, the parents were adjudicated exclusively on the basis of a dispute between the father and father-in-law and the parents' failure to protect the children from being exposed to the fight. 231 W. Va. at 175, 744 S.E.2d at 285. The circuit court then terminated the parents' parental rights for their failure to address domestic violence issues between the two of them. *Id.* at 177-78, 744 S.E.2d at 287-88. In the case of *In re K.L.*, the father was adjudicated specifically for issues of medical and educational neglect. 247 W. Va. at 660, 885 S.E.2d at 598. However, the father's dispositional hearing and the court's ultimate decision to terminate his parental rights centered around his substance abuse issues. *Id.* at 661-63, 885 S.E.2d at 599-601. Here, petitioner was adjudicated for providing substances to the mother while she was pregnant, which petitioner admitted he obtained illegally. While petitioner attempts to narrowly construe the basis of the court's termination in order to make it appear incongruent with his adjudication, he not only continued to illegally abuse substances, but his termination was premised on his failure to acknowledge the problem for which he was adjudicated. Specifically, petitioner's own testimony minimized his wrongdoing in this regard, as he insisted that he provided the illegally obtained substances to the mother for the child's best interests.

We can discern no error in the circuit court's termination of petitioner's parental rights based on petitioner's failure to acknowledge that obtaining substances illegally and providing them to the pregnant mother of his child is a problem. *See In re Timber M.*, 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted) (“In order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem . . . results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.”). This evidence supports the circuit court's findings and

conclusions that there is no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected and that termination was in the child's best interests. *See* W. Va. Code § 49-4-604(c)(6) (permitting circuit court to terminate parental rights upon finding no reasonable likelihood conditions of abuse and neglect can be substantially corrected in the near future and when necessary for child's welfare); *see also* Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011) (permitting termination of parental rights "without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood . . . that conditions of neglect or abuse can be substantially corrected" (citation omitted)). Termination of petitioner's parental rights was necessary for the child's welfare, particularly in light of petitioner's continued drug use that even led petitioner to leave a visit with the child early to use drugs. In that vein, we have pointed out that "the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent's custody is a significant factor in determining the parent's potential to improve sufficiently and achieve minimum standards to parent the child." *In re Katie S.*, 198 W. Va. 79, 90 n.14, 479 S.E.2d 589, 600 n.14 (1996) (citations omitted).

Further, it is critical to note that drug testing and treatment were agreed upon terms of petitioner's improvement period. As we have explained, compliance with the terms of an improvement period is an important component in determining whether the conditions of abuse and neglect have been remedied. *See* Syl. Pt. 6, *In Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) ("At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall . . . determine whether . . . sufficient improvement has been made . . . to justify the return of the child."). Moreover, the evidence shows that petitioner was fully aware of the terms of his improvement period and what result could come from noncompliance. In fact, the service provider specifically warned petitioner that his conduct during the improvement period could negatively impact his case. As we have stated, "we cannot find that the Rules of Procedure for Child Abuse and Neglect Proceedings or the related statutes have been substantially disregarded or frustrated" where a parent "was fully aware" of what was expected. *See In re C.A.*, No. 16-0470, 2016 WL 4987285, at *3 (W. Va. Sept. 19, 2016) (memorandum decision). Accordingly, petitioner is entitled to no relief.⁴

For the foregoing reasons, we find no error in the decision of the circuit court, and its April 7, 2023, order is hereby affirmed.

Affirmed.

ISSUED: April 15, 2024

⁴Petitioner raises additional arguments in the alternative related to treatment court. However, petitioner offers no applicable legal support for these arguments on appeal and in that regard, we have stated, "[a]lthough we liberally construe briefs in determining issues presented for review, issues . . . not supported with pertinent authority, are not considered on appeal." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996). As such, we decline to consider these arguments on appeal.

CONCURRED IN BY:

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