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

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* W.M.**

No. 23-356 (Kanawha County 23-JA-59)

MEMORANDUM DECISION

Petitioner Father L.M.[1] appeals the Circuit Court of Kanawha County's May 19, 2023, order terminating his parental rights to the child, W.M.,[2] arguing that the circuit court erred by denying his right to notice and due process and in denying post-termination visitation. 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 March 2023, the DHS filed a petition against the parents following the child's birth and umbilical cord test result that was positive for methamphetamine, amphetamine, buprenorphine, and norbuprenorphine. According to the petition, the mother abused substances during her pregnancy, did not seek prenatal care, and admitted to Child Protective Services ("CPS") that she had been abusing substances since high school. The petitioner, who lived with the mother, appeared to be under the influence of substances at the hospital at the time of the child's birth. Therefore, the DHS alleged that the child was abused and neglected.

The petitioner waived his right to a preliminary hearing, and the matter was set for adjudication. At the adjudicatory hearing held in April 2023, the circuit court heard testimony of a CPS worker, a hospital social worker, and the parents. The testimony revealed that the child was born drug affected, and the court admitted the child's umbilical cord test results into evidence. The mother insisted that she discovered she was pregnant only forty days before giving birth, and,

[1] The petitioner appears by counsel Joseph A. Curia III. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrisey and Assistant Attorney General James Wegman. Counsel Jennifer R. Victor appears as the child'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").

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

although she admitted to a history of addiction, she denied abusing substances during pregnancy, claiming that she "[did not] know how [methamphetamine] got into [her] system." The court found this testimony lacked credibility. The petitioner denied being under the influence at the hospital when the child was born and further denied ever using illegal substances. Notably, the petitioner testified that he did not believe that the mother was abusing substances, although the two lived together for more than one year. He further expressed his "shock" when the mother gave birth. He testified that the mother had an ultrasound eleven months prior to the child's birth and she was not pregnant at that time, so when "her stomach was swollen" they believed she had a tumor. At the conclusion of the testimony, the court adjudicated both parents as abusing and neglecting and found the child to be abused and neglected. As to the petitioner, the court specifically found as follows: "[The petitioner] knew or should have known that [the mother] has a substance abuse problem and that [the mother] was pregnant with his child. [The petitioner] failed to protect the child[] from [the mother's] substance abuse and from her abuse and neglect," and "[t]he acts and omissions of [the parents], on or before the filing of the petition, constitute abuse and neglect."

The circuit court proceeded to disposition in May 2023, at which time the DHS and guardian supported termination of the petitioner's parental rights. The court heard testimony of a CPS worker who described the petitioner's inconsistent drug screening, stating that the petitioner "picks and chooses" when to appear for screens. Approximately one month prior to disposition, the petitioner tested positive for buprenorphine without providing a valid prescription. The CPS worker further testified that the petitioner continued to deny the mother's substance abuse issues despite residing with her and evidence of her numerous positive drug screen results at "dangerous levels" for methamphetamine, amphetamine, and buprenorphine. The CPS worker did not recommend post-termination visitation because the petitioner had not created a bond with the child and exhibited "extremely aggressive," "erratic," and "hostile" behaviors toward case workers and the kinship placement throughout the proceedings. The petitioner testified on his own behalf, denying illicit substance use. He claimed that he must have tested positive for buprenorphine because he opened the mother's Suboxone package with scissors. He denied any negative behavior, interjecting "that's a lie" during the CPS worker's testimony and expressing "frustration" with "the sneakiness that they do." Based on the foregoing, the court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future and that it was necessary for the welfare of the child to terminate the petitioner's parental rights.[3] The court further denied any post-termination visitation based on the child's best interests. It is from the dispositional order that the 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, the petitioner first argues that the circuit court erred by adjudicating him as an abusing and neglecting parent on a basis not alleged in the DHS's petition, thereby denying his right to due process. Specifically, the petitioner asserts that he was adjudicated for failing to protect the child when the only allegation against him in the petition was that he appeared to be under the influence of illicit substances. In support of this argument, the petitioner argues that specific allegations are required "to afford the charged

[3] The mother's parental rights were terminated by the same order, and the permanency plan for the child is adoption by kinship placement.

parent with notice of why the termination proceeding is being conducted and to afford him an opportunity to address the charge." *See In re Samantha M.*, 205 W. Va. 383, 392, 518 S.E.2d 387, 398 (1999). However, the petitioner's argument ignores the DHS's clear allegations in the petition that the mother abused drugs throughout her pregnancy while living with the petitioner and that the child was abused because he had been "harmed or threatened by a parent . . . who . . . knowingly allow[ed] another person to inflict injury . . . upon the child." *See* W. Va. Code § 49-1-201.

In addressing a mother's drug use during pregnancy and a father knowingly permitting such abuse, we explained that "the statutes governing abuse and neglect proceedings allow a finding of abuse to be based upon a parent's knowledge that another person is harming his/her child." *See In re A.L.C.M.*, 239 W. Va. 382, 392, 801 S.E.2d 260, 270 (2017). Furthermore, "[t]he term 'knowingly' as used in [West Virginia Code § 49-1-201] . . . require[s] . . . that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred." *Id.* (quoting Syl. Pt. 7, *W. Va. Dep't of Health & Hum. Res. ex rel. Wright v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)). Therefore, "for a child to be determined an 'abused child' the parent charged with such abuse need not commit the abuse him/herself, so long as he/she knew that the subject abuse was being perpetrated." *In re A.L.C.M.*, 239 W. Va. at 392, 801 S.E.2d at 270. Here, the DHS's petition outlined specific allegations regarding the mother's substance abuse before and during her pregnancy while the petitioner was living with her. There was sufficient evidence presented at adjudication for the circuit court to find that the petitioner "knew or should have known" of the mother's abusive and neglectful behavior. The imperative facts alleged in the petition, and proven at adjudication, were the petitioner's knowledge that abuse was being perpetrated, which the court appropriately found as a basis to adjudicate the petitioner. The petitioner cannot argue he did not have notice of the foregoing, and we find no error.

We further find no error in the circuit court's decision to terminate the petitioner's parental rights. The petitioner argues that his parental rights were terminated on grounds of substance abuse and not upon the basis for which he was adjudicated. Although the petitioner does not cite specific, controlling authority, it is true that "termination of parental rights may not be fundamentally premised on conditions of abuse and/or neglect upon which a parent has not been properly adjudicated." *In re K.L.*, 247 W. Va. 657, 666, 885 S.E.2d 595, 604 (2022). However, we find the petitioner's argument is misplaced. The court properly terminated the petitioner's parental rights upon a finding that the conditions of abuse and neglect could not be substantially corrected in the near future and that termination was necessary for the child's welfare. *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)). The court's findings were premised on the petitioner's failure to recognize the existence of a problem with the mother's substance abuse or with his own behavior throughout the proceedings. *See In re Timber M.*, 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) ("'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.' *In re: Charity H.*, 215 W. Va. 208, 217, 599 S.E.2d

631, 640 (2004).”). Based on the evidence in the record revealing the petitioner’s overall lack of cooperation during the case, we find no error in the court’s decision.

Finally, the petitioner argues that the circuit court erred in denying post-termination visitation. In analyzing the appropriateness of post-termination visitation, we have held that the circuit court must consider whether ‘“continued contact would not be detrimental to the child’s well being and would be in the child’s best interest.’ Syl. Pt. 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).” Syl. Pt. 11, in part, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002) . In asserting that continued contact would be in the child’s best interests, the petitioner relies upon his own self-serving testimony. However, the court specifically found that post-termination visitation would be contrary to the child’s best interests. Our review of the record supports the court’s conclusion, particularly given the child’s young age and the CPS worker’s testimony at disposition regarding the petitioner’s aggressive behavior and lack of a bond with the child. *See In re Christina L.*, 194 W. Va. at 448, 460 S.E.2d at 694, Syl. Pt. 5, in part (holding that in regard to post-termination visitation, “[a]mong other things, the circuit court should consider whether a close emotional bond has been established between parent and child”); *see also In re Alyssa W.*, 217 W. Va. 707, 711, 619 S.E.2d 220, 224 (2005) (explaining that “a close emotional bond generally takes several years to develop”). Accordingly, we find no error in the court’s denial of post-termination visitation.

For the foregoing reasons, we find no error in the decision of the circuit court, and its May 19, 2023, order is hereby affirmed.

Affirmed.

ISSUED: May 13, 2024

CONCURRED IN BY:

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