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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* Z.B., P.W., R.W., A.W., M.R., and S.R.**

No. 23-306 (Monongalia County 22-JA-20, 22-JA-21, 22-JA-22, 22-JA-23, 22-JA-24, and 22-JA-25)

MEMORANDUM DECISION

Petitioner Father D.R.[1] appeals the Circuit Court of Monongalia County's May 1, 2023, order terminating his parental rights to M.R. and S.R and custodial rights to Z.B., P.W., R.W., and A.W., arguing that the circuit court erred by adjudicating him as an abusing parent and terminating his parental and custodial rights.[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 March 2022, the DHS filed a petition alleging that the petitioner committed acts of domestic violence in front of the children, including threatening the mother with a knife; abused drugs to the detriment of his parenting skills; and violated a temporary protection plan.[3] The petition noted that the petitioner and the mother had numerous referrals involving domestic violence and substance abuse and that, in 2012, the petitioner pled guilty to child abuse resulting in injury by a parent, guardian, or custodian.

In July and August 2022, the circuit court held adjudicatory hearings at which a DHS employee testified that the children disclosed that the petitioner was physically violent toward the mother and that the parents were "always fighting, hitting, and cussing." The witness stated that a child disclosed an incident where the petitioner brandished a knife at the mother. The petitioner

[1] The petitioner appears by counsel Elizabeth B. Warnick. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrisey and Assistant Attorney General Katica Ribel. Counsel Teresa J. Lyons 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").

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

[3] The petitioner is M.R. and S.R.'s biological father.

testified and denied all allegations of domestic violence but admitted that there was arguing in the home. He denied the allegations contained in a petition for a domestic violence protective order ("DVPO") that the mother filed in April 2022 and admitted that he relapsed on drugs after the children were removed. Then, the mother testified that the petitioner physically abused her by shoving and spitting on her and that he had relapsed on drugs. The court found that the petitioner abused and neglected the children by committing acts of domestic violence in their presence. In September 2022, the petitioner filed a written motion for a post-adjudicatory improvement period in which he represented that he would, among other things, "submit to random drug screens."

In October 2022, the circuit court granted the petitioner's motion for a post-adjudicatory improvement period. The terms included, among other things, random drug screens and domestic violence counseling. The court ordered that any failure to appear for a screen would be considered a positive result. During a January 2023 review hearing, the court noted that the one drug screen the petitioner took was positive for cocaine, methamphetamine, and fentanyl. Further, the petitioner failed to appear for any additional drug screens and did not attend domestic violence counseling.

In March 2023, the court held a dispositional hearing at which the court heard testimony that the petitioner failed to attend multiple drug screens and tested positive for multiple substances, including cocaine, buprenorphine, and THC, when he did screen. The psychologist who administered the petitioner's parental fitness evaluation stated that the petitioner was using drugs but refused to acknowledge a substance abuse problem and that he tended to minimize the domestic violence occurring in the home. Then, the court continued the hearing. At the continued dispositional hearing in April 2023, a DHS employee testified that the petitioner failed to comply with his improvement period by failing to attend parenting and life skills classes and failing to drug screen. The witness further testified that the petitioner tested positive for drugs multiple times throughout his improvement period. A service provider testified that the petitioner had not yet completed domestic violence therapy, as required by the terms of his improvement period. In its dispositional order, the court found that termination was the least restrictive alternative, the children's best interests necessitated termination of the petitioner's rights, and there was no reasonable likelihood that the petitioner could correct the conditions of abuse and neglect in the near future. Moreover, the court expressed concern due to the petitioner's inability to recognize his domestic violence and substance abuse issues. Ultimately, the court terminated the petitioner's parental rights to M.R. and S.R. and his custodial rights to Z.B., P.W., R.W., and A.W. It is from the dispositional order that the petitioner appeals.[4]

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 argues that the

[4] The mother of Z.B., P.W., R.W., A.W., and M.R voluntarily relinquished her parental rights. Z.B.'s father relinquished his parental rights; R.W.'s father is deceased; and A.W.'s father relinquished his parental rights. The permanency plan for Z.B. is to be placed in a diagnostic facility and then placed in an appropriate foster home. P.W. is placed with his father, who completed an improvement period. R.W., A.W., and M.R. are to be adopted in their respective placements. S.R. reached the age of majority.

court erroneously found clear and convincing evidence of domestic violence at adjudication. Our law dictates that the court's adjudicatory findings "must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence." W. Va. Code § 49-4-601(i). The clear and convincing standard is "intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Cramer v. W. Va. Dep't of Highways*, 180 W. Va. 97, 99 n.1, 375 S.E.2d 568, 570 n.1 (1988). In an abuse and neglect proceeding, a child is considered abused when their "health or welfare is being harmed or threatened by . . . domestic violence as defined in § 48-27-202." W. Va. Code § 49-1-201.

> "Domestic violence" or "abuse" means the occurrence of one or more of the following acts between family or household members, as that term is defined in section two hundred four of this article:
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> (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
>
> (2) Placing another in reasonable apprehension of physical harm;
>
> (3) Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts[.]

W. Va. Code § 48-27-202.

Here, the petitioner asserts that the court erroneously adjudicated him as an abusing parent because his conduct did not rise to the level of domestic violence. However, the evidence adduced at adjudication indicated that he pushed, shoved, and spit on the mother[5] and that the children witnessed such shoving and pushing. This includes corroborating evidence such as law enforcement intervention and the DVPO entered against the petitioner. To support this argument, the petitioner references the court's statement that "[m]aybe there's not physical contact, but the language that these two used against each other was awful." However, the petitioner omits the court's preceding statement that the court "believe[d] by clear and convincing evidence that [the petitioner] was physical with [the mother] by shoving her and spitting on her. Both would constitute a battery." The petitioner also references his testimony that he did not commit domestic violence and calls into question the veracity and credibility of the mother's testimony. The petitioner asks this Court to engage in a credibility determination, and we decline to do so. *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."). The evidence supports the circuit court's adjudication of the petitioner as an abusing parent due to his acts of domestic violence in the presence of the children, and he is entitled to no relief in this regard.[6]

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[5] It is undisputed that the petitioner and the mother were family or household members as defined in West Virginia Code § 48-27-204.

[6] The petitioner further argues that the circuit court erred by considering evidence that he violated the DVPO that was entered after the petition was filed. However, this argument is meritless as "facts developed after the filing of the petition . . . may be considered in evaluating

The petitioner also argues that the circuit court erred by terminating his parental and custodial rights based upon substance abuse because substance abuse was not incorporated into the court's adjudicatory findings. The petitioner cites to our recent holding in *In re K.L.*, 247 W. Va. 657, 885 S.E.2d 595 (2022), to support his argument, but he ignores the following:

> We do not suggest that drug screening may only be required in cases where adjudication is based upon substance abuse. In this case, we find that petitioner's failure to drug screen was an improper basis for termination—*not because he was not adjudicated as having a substance abuse issue*—but because it was not properly incorporated into the terms of petitioner's improvement period and a statutorily required family case plan.

Id. at 669, 885 S.E.2d at 607 (emphasis added). In *In re K.L.*, despite the failure to incorporate the issue into the improvement period and case plan,[7] the parent's alleged substance abuse was the "sole focus" of the proceedings and failure to drug screen during the parent's post-dispositional improvement period was the "core underpinning" for termination. *Id.* at 665, 885 S.E.2d at 603. Here, the petitioner specifically agreed to drug screens as part of his improvement period. Moreover, the petitioner admitted to relapsing, demonstrating not only the need for him to screen but also his own awareness as to his substance abuse issue. Accordingly, the petitioner's reliance on *In re K.L.* is misplaced.

Critically, the petitioner's substance abuse was not the "sole focus" of the proceedings or the "core underpinning" for termination. *Id.* The petitioner's parental rights were terminated for conditions that were properly set forth in the petition and for which he was adjudicated, namely, his perpetration of domestic violence. The court may terminate parental rights upon a finding that there is "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected in the near future and[] when necessary for the welfare of the child." W. Va. Code 49-4-604(c)(6); *see* 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" (quoting Syl. Pt. 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980))). There is no such likelihood when "the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help" W. Va. Code § 49-4-604(d). The petitioner failed to follow through with his improvement period terms by failing to complete his parenting and life skills classes, as well as domestic violence services. Moreover, the court found that the petitioner failed to recognize his participation in domestic violence in the presence of the children. *See In re Timber M.*, 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) ("In order to remedy

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the conditions which existed at the time of the filing of the petition." *In re Brandon Lee B.*, 211 W. Va. 587, 590, 567 S.E.2d 597, 600 (2001). The petition alleged domestic violence, and the petitioner's continued perpetration of domestic violence was properly considered when determining the conditions that existed at the time of the petition's filing.

[7] The petitioner claims that no case plan was filed below, yet the docket sheet contained in the appendix record reveals two entries titled "[DHS] Family Case Plan." The petitioner failed to include either document in the appendix record on appeal.

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." (quoting *In re Charity H.*, 215 W. Va. 208, 217, 599 S.E.2d 631, 640 (2004))). Based on the evidence revealing the petitioner's failure to acknowledge and remediate the conditions of abuse and neglect, the circuit court found that there was no reasonable likelihood that the petitioner could substantially correct the conditions of abuse and neglect that led to the filing of the initial petition and the children's best interests required termination of the petitioner parental and custodial rights. We conclude that the circuit court did not err in making these findings.

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

Affirmed.

ISSUED: August 27, 2024

CONCURRED IN BY:

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