

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

***In re N.M. and J.M.***

**No. 23-531** (Marion County CC-24-2023-JA-25 and CC-24-2023-JA-26)

**MEMORANDUM DECISION**

Petitioner Mother A.M.<sup>1</sup> appeals the Circuit Court of Marion County’s August 28, 2023, order terminating her custodial rights to N.M. and her parental rights to J.M., arguing that the circuit court erred by finding that she abused and neglected the children and denying her motion for a post-adjudicatory improvement period.<sup>2</sup> 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 an abuse and neglect petition alleging that the petitioner and the children’s father abused illicit substances, engaged in domestic violence in the presence of the children, and exposed the children to deplorable living conditions.<sup>3</sup> Specifically, law enforcement responded to a report of domestic violence in the home, which resulted in the father filing a domestic violence petition and the petitioner being briefly placed in jail. During their investigation, Child Protective Services (“CPS”) workers learned that the petitioner was often the aggressor of the domestic violence and that she had given the father a black eye two weeks earlier. A CPS worker interviewed the older child, N.M., who disclosed that the police often came to the house, his parents yelled and hit each other, and he gets scared when this occurs. The petition further

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<sup>1</sup> The petitioner appears by counsel David B. DeMoss. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee Niezgoda. Counsel Amanda Adams Leslie 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”).

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

<sup>3</sup> The petitioner is not the biological mother of N.M.; however, N.M.’s mother is deceased, and this child resided with the petitioner and his father, who is the biological father of both children.

outlined the petitioner's history of substance abuse, including her unlawful use of heroin and cannabis. When interviewed by CPS, the petitioner admitted that she would screen positive for cannabis at that time but claimed that she was planning to get a medical cannabis card. Moreover, the petitioner had a prior abuse and neglect proceeding involving another child, through which she received a disposition under West Virginia Code § 49-4-604(c)(5).

The circuit court held two adjudicatory hearings in April and June 2023, at which time the court heard testimony from CPS workers and law enforcement, who confirmed the allegations in the DHS's petition. One CPS worker testified that since the filing of the petition, the petitioner tested positive for cocaine and cannabis. The petitioner did not testify or present any evidence during these hearings. However, the father testified in reference to the allegations against him and denied that the petitioner hit him and claimed that he intended to file the domestic violence petition against his own mother. The court did not find the father's testimony credible and, considering the evidence presented, adjudicated the petitioner as an abusing and neglecting parent due to her drug use and domestic violence. The court specifically found clear and convincing evidence of domestic violence based on the credibility of the DHS's witnesses and further stated that "there was no question that the [petitioner] had . . . engaged in drug use based on [her] admissions to the same and [her] drug screens." The petitioner thereafter filed a written motion for a post-adjudicatory improvement period.

The circuit court proceeded to disposition in August 2023. The DHS presented evidence at this hearing that the petitioner was inconsistently drug screening and, when she did drug screen, tested positive for cannabis but still had not obtained a medical cannabis card. Because of the petitioner's failure to consistently drug screen, she was unable to visit the children and had not seen them since removal. The petitioner requested that the DHS provide a continuous monitor for drug testing so that she could avoid appearing for drug screens as frequently because she was experiencing medical issues. When CPS workers asked the petitioner to provide a letter from her doctor regarding these medical issues, they learned for the first time that the petitioner was pregnant with another child. It was only two weeks prior to disposition that the petitioner began participating in services, and the CPS worker testified that this was because the petitioner learned that the DHS was seeking termination. Furthermore, according to the CPS worker, the petitioner "to date . . . did not acknowledge that she did anything wrong in this situation." The petitioner once again elected not to testify or present any evidence. At the conclusion of the hearing, the court determined that the petitioner refused to acknowledge the severity of the allegations and had not meaningfully participated in this case. Because the petitioner failed to demonstrate that she would be likely to participate in an improvement period, the court denied the petitioner's motion. The court further found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and that termination of the petitioner's rights was in the children's best interests. Accordingly, the court terminated the petitioner's custodial rights to N.M. and her parental rights to J.M. It is from the dispositional order that the petitioner appeals.<sup>4</sup>

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<sup>4</sup> The father's parental rights were terminated by the same order, and the permanency plan for the children is adoption by their foster placement.

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). The petitioner argues that the circuit court erred in finding clear and convincing evidence that she abused or neglected her children because the law enforcement officer did not personally witness domestic violence occur. However, the controlling statutes and our prior holdings require no such direct evidence. As we have explained, in order for the circuit court to adjudicate a parent, West Virginia Code § 49-4-601(i) "requires the [DHS] . . . to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing [evidence].'" Syl. Pt. 1, in part, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (quoting Syl. Pt. 1, *West Virginia Dep't of Health and Hum. Res. ex rel. Wright v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996)); see also *In re A.M.*, 243 W. Va. 593, 598, 849 S.E.2d 371, 376 (2020) ("Clear and convincing evidence means that more than a mere scintilla of evidence has been presented to establish the veracity of the allegations of abuse and/or neglect, but it does not impose as exacting an evidentiary burden as criminal proceedings which generally require proof beyond a reasonable doubt."). Here, the evidence meets this standard, as the record reveals that the law enforcement officer responded to the father's report of a physical altercation between him and the petitioner and that there was a history of domestic violence incidents at the petitioner's home that resulted in police intervention. The father's petition for a domestic violence protective order was admitted into evidence. Although the father later denied that any domestic violence occurred, the circuit court did not find his testimony credible.<sup>5</sup> See *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) ("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact."). As such, it is clear that the circuit court had ample evidence upon which to adjudicate the petitioner on the basis of domestic violence.

In asserting further error in the circuit court's adjudicatory decision, the petitioner argues that the children were already placed into the DHS's custody when her drug screens returned positive; therefore, there was not clear and convincing evidence of abuse and neglect. However, the petitioner disregards her own admission to CPS that she was unlawfully using illicit substances at the time the petition was filed. See *In re S.C.*, 248 W. Va. 628, 633, 889 S.E.2d 710, 715 (2023) (finding that adjudication was appropriate when the father "failed drug screens and *admitted* to abusing [drugs]" while caring for the child (emphasis added)). Further, we have previously explained that "facts developed after the filing of the petition . . . may be considered in evaluating the conditions which existed at the time of the filing of the petition." *In re Brandon Lee B.*, 211

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<sup>5</sup> The petitioner refers, in passing, to the CPS worker's testimony as hearsay. However, the petitioner points to no portion of the appendix record to show that she objected to this testimony on the basis of hearsay, and she provides no argument before this Court that the evidence was inadmissible. As such, we find that the petitioner has waived this issue. See *Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) ("Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)."); see also *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) ("Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but are 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).").

W. Va. 587, 590, 567 S.E.2d 597, 600 (2001). Therefore, we can discern no error in the court’s adjudicatory findings as they are “plausible in light of the record viewed in its entirety.” Syl. Pt. 1, in part, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

Finally, the petitioner argues that the circuit court erred in denying her motion for a post-adjudicatory improvement period. To obtain a post-adjudicatory improvement period, the petitioner was required to demonstrate that she was likely to fully participate. *See* W. Va. Code § 49-4-610(2)(B). Despite this burden, the petitioner presented no evidence in support of her motion. The petitioner argues that her last-minute participation in services demonstrated her likelihood of improvement. However, the DHS’s evidence revealed the opposite, considering the petitioner’s inconsistent drug screening, positive results for illicit substances when she did screen, dishonesty with CPS regarding her recent pregnancy, and failure to visit the children since their removal. It is in the circuit court’s discretion to deny an improvement period when no improvement is likely, and we find no abuse of discretion here. *See In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002).

Accordingly, we find no error in the decision of the circuit court, and its August 28, 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