

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

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

In re A.L.-1 and A.L.-2

No. 23-554 (Wood County CC-54-2021-JA-231 and CC-54-2022-JA-294)

MEMORANDUM DECISION

Petitioner Father A.L.-3¹ appeals the Circuit Court of Wood County’s September 14, 2023, orders terminating his parental rights to A.L.-1 and A.L.-2, arguing that the circuit court erred by adjudicating the petitioner, terminating his parental rights, and declining to grant additional improvement periods.² Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court’s orders is appropriate. *See* W. Va. R. App. P. 21.

In October 2021, the DHS filed an abuse and neglect petition after A.L.-1 was born drug-affected. The petition alleged that the mother and the petitioner repeatedly exposed the baby to unsafe practices while in the hospital after birth despite warnings from hospital staff, including showering with the baby, sleeping together in the hospital bed with the baby, and putting blankets in the baby’s crib. The petition also noted that the petitioner was seeking inpatient drug rehabilitation treatment at the time of A.L.-1’s birth. In December 2021, the petitioner stipulated to the allegations in the petition, and the circuit court adjudicated him as a neglectful parent. The petitioner was accepted into the Wood County Family Treatment Court program, and the court ordered the petitioner to participate in the program as a condition of a post-adjudicatory improvement period. The mother was also accepted into the family treatment court program.

¹ The petitioner appears by counsel Eric K. Powell. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee Niezgoda. Counsel Michael D. Farnsworth Jr. 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). Additionally, because they share the same initials, we refer to the children as A.L.-1 and A.L.-2 and the petitioner as A.L.-3.

In October 2022, their second child, A.L.-2, was born. The DHS filed an amended petition to obtain legal custody of the child while the parents continued participating in the family treatment court program. Due to their compliance with the program and trial reunification with A.L.-1, the parents retained physical custody of A.L.-2. In November 2022, the petitioner successfully completed the family treatment court program. However, in January and February 2023, the mother reported two incidents of domestic violence which resulted in her filing domestic violence petitions. The petitioner also filed for a domestic violence petition against the mother, alleging that she threatened and harassed him. In February 2023, the petitioner tested positive for methamphetamine. The petitioner also informed a DHS worker that he overdosed on fentanyl. Based on the incidents of domestic violence and drug use, the DHS filed a second amended petition.

The circuit court held several adjudicatory hearings on the second amended petition, culminating in a final hearing held in July 2023. The court heard testimony from the mother and the petitioner regarding their relationship, the reported domestic violence, and substance abuse. The parents explained that they petitioned for multiple domestic violence protective orders against the other and the petitioner successfully obtained a protective order against the mother. The mother acknowledged that, in petitioning for protective orders, she previously reported physical abuse by the petitioner, including one incident in which she was holding one of the children, and showed a DHS worker a bruise on her arm from another incident. During the hearing, however, the parents recanted past allegations against one another and generally minimized their conduct. Regarding their substance use, the mother testified that both she and the petitioner had relapsed and struggled with substance abuse. The petitioner admitted to relapsing and later overdosing, resulting in the mother using Narcan to revive him. Ultimately, the circuit court adjudicated the petitioner as an abusing and neglecting parent based on domestic violence and the petitioner's substance abuse. The court found that there was extensive testimony "regarding what can only be described as a volatile relationship" resulting in frequent verbal altercations and disclosures of physical abuse that have been recanted. The court also found that the petitioner abused substances to the point where proper parenting was impaired, given his continued positive drug screens and overdose.

In August 2023, the petitioner filed a motion for a post-adjudicatory improvement period. In his motion, the petitioner explained that after his relapse in February 2023, he successfully completed a short-term drug rehabilitation program. The circuit court held dispositional hearings in September 2023. The petitioner testified and minimized domestic violence issues between himself and the mother, admitting only to having "arguments and discussions." He stated that a referral for domestic violence classes was supposed to be sent following a multidisciplinary team meeting but admitted that he did not follow-up on scheduling classes. He testified that he successfully completed a rehabilitation program in March 2023 and that any positive drug screens after he completed the program were false positives. A DHS worker testified that she sent referrals for both parents for parenting and adult life skills courses in March 2023 and that those referrals expired due to lack of participation. She sent referrals for courses again in July 2023, and the petitioner did participate in some classes and visitations. The worker also testified the petitioner tested positive for methamphetamine at the end of July 2023.

The court found that the evidence reflected a substantial amount of domestic violence and issues between the petitioner and the mother, which the petitioner failed to recognize, and that both

parents neglected the children based on that domestic violence. The court further found that the petitioner continued to test positive for illicit substances as late as July 31, 2023, even after completing family treatment court and a short-term rehabilitation program. The court found there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future, especially given that the extensive services already provided had not corrected the issues, and that termination was in the best interests of the children. Accordingly, the court terminated the petitioner's parental rights to the children by the entry of two separate dispositional orders entered on the same day.³ It is from these final dispositional orders 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). First, the petitioner argues that the circuit court erred by adjudicating him, regarding the second amended petition, as an abusing and neglecting parent in the absence of clear and convincing evidence. We have explained that in abuse and neglect cases, 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],'" though the statute "does not specify any particular manner or mode of testimony or evidence by which the [DHS] is obligated to meet this burden." Syl. Pt. 1, in part, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (quoting Syl. Pt. 1, in part, *In re S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)). Further, "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Brown v. Gobble*, 196 W. Va. 559, 564, 474 S.E.2d 489, 494 (1996).

West Virginia Code § 49-1-201, in relevant part, defines an "abused child" as one "whose health or welfare is being harmed or threatened by: . . . [d]omestic violence as defined in § 48-27-202 of this code." Further, West Virginia Code § 48-27-202 defines domestic violence as several types of conduct between family or household members,⁴ including the following:

- (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

The mother testified to several incidents of arguments and physical violence between the parents, including one in which the mother was holding one of the children. The petitioner's actions, at minimum, recklessly caused physical harm to the mother, constituting domestic violence. However, domestic violence, as defined by the code, is broader than just physical abuse; it includes creating fear of harm, harassment, and psychological abuse. The court found that the relationship

³ The mother's parental rights were also terminated. The permanency plan for the children is adoption in their current placement.

⁴ It is undisputed that the petitioner and the mother satisfy the definition of family or household members, as set forth in West Virginia Code § 48-27-204.

between the mother and the petitioner was “volatile.” Further, the circuit court adjudicated the petitioner as an abusing and neglecting parent based on the domestic violence *between* the petitioner and the mother in the home, resulting in harm to the children. The petitioner testified to obtaining a domestic violence protective order because the mother harassed and threatened him. The petitioner argues that the mother’s testimony was unreliable, the mother recanted her claims of physical abuse, and that the mother’s domestic violence protective orders were either not granted or later dismissed. However, the petitioner’s argument regarding the mother’s credibility cannot entitle him to relief, as we refuse to disturb the circuit court’s credibility determinations on appeal. *See Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997). The circuit court’s finding of domestic violence between the mother and the petitioner is supported by the record. Additionally, the petitioner’s adjudication was also based upon his continued substance abuse, and the record reflects that the petitioner relapsed on controlled substances prior to the children being removed from the home. As such, we find no error in the petitioner’s adjudication.

Second, the petitioner argues that the circuit court erred by finding there was no reasonable likelihood the conditions of abuse or neglect could be substantially corrected in the near future. West Virginia Code § 49-4-604(d) defines “no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected” to mean that the parent has “demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help.” The petitioner continued using controlled substances despite completing family treatment court and an additional drug rehabilitation program. The circuit court specifically found that there was no reasonable likelihood the conditions could be corrected in the near future given that the extensive services already provided have not solved the problems, and this finding was supported by the record.

In support of this argument, the petitioner also argues that the DHS failed to provide services necessary to correct the “perceived domestic violence issues.” Regarding the issues of domestic violence, we have explained that

[i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child’s expense.

In re Timber M., 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (quoting *In re Charity H.*, 215 W. Va. 208, 217, 599 S.E.2d 631, 640 (2004)). During the proceedings below, the petitioner repeatedly denied or minimized any issues of domestic violence, making that problem untreatable and an exercise in futility at the children’s expense. Further, the petitioner testified at disposition that he was aware of domestic violence services but that he had not followed through to begin classes. Thus, we find no error in the circuit court’s conclusion that there was no reasonable likelihood the conditions of abuse and neglect could be corrected in the near future.

Third, the petitioner argues that the circuit court erred by terminating his rights rather than granting additional time for improvement.⁵ West Virginia Code § 49-4-610(3)(D) requires a parent who has been granted any improvement period since the initiation of the proceedings to demonstrate that the parent “has experienced a substantial change in circumstances” in order to obtain a second improvement period. The petitioner points to no evidence that he satisfied this burden below. Additionally, at disposition, A.L.-1 had been in foster care for approximately sixteen of the previous twenty-two months. West Virginia Code § 49-4-610(9) provides that, when a child has been in foster care for more than fifteen of the most recent twenty-two months, the court must find “compelling circumstances by clear and convincing evidence” to grant further time for improvement. The record reflects the petitioner’s noncompliance despite completing drug rehabilitation programs. The circuit court found there were no compelling circumstances to justify granting the petitioner an additional improvement period, and this finding is supported by the record.

For the foregoing reasons, we find no error in the decision of the circuit court, and its September 14, 2023, orders are 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

⁵ The petitioner makes a separate argument regarding improvements periods for each child, arguing that he should have been granted an additional post-adjudicatory improvement period in reference to A.L.-2 and a post-dispositional improvement period in reference to A.L.-1. However, we will simply analyze whether the circuit court erred by failing to grant the petitioner further improvement periods beyond his initial post-adjudicatory improvement period.