

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* K.M.-1, K.M.-2, K.M.-3, and K.M.-4**

No. 23-459 (Kanawha County 22-JA-188, 22-JA-189, 22-JA-190, and 22-JA-191)

MEMORANDUM DECISION

Petitioner Father A.M.¹ appeals the Circuit Court of Kanawha County’s July 6, 2023, order terminating his parental rights to K.M.-1, K.M.-2, K.M.-3, and K.M.-4,² arguing that the circuit court erroneously adjudicated him as an abusing parent and terminated his parental rights. 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 April 2022, the DHS filed an abuse and neglect petition alleging that in November 2021, the petitioner attempted to kill the children’s mother by shooting her in the head while she was twenty-four weeks pregnant with K.M.-1 and while K.M.-2 was present. As a result of the shooting, the mother delivered K.M.-1 prematurely. The mother and K.M.-1 both survived. In August 2022, the petitioner was convicted of attempted murder in the first degree, malicious wounding, use of a firearm during the commission of a felony, wanton endangerment, gross child neglect creating a substantial risk of serious bodily injury or death, and two counts of possession of a firearm by a prohibited person. At the adjudicatory hearing in October 2022, the circuit court admitted an order certifying the petitioner’s convictions as evidence of abuse and neglect of the children. The circuit court found that the petitioner’s convictions were clear and convincing evidence that the children were abused. As a result, the circuit court adjudicated the petitioner as an abusing parent.

¹ The petitioner appears by counsel Edward L. Bullman, who filed this appeal pursuant to Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Andrew T. Waight. Counsel Marcus D. Black 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). Further, because the children share the same initials, we use numbers to differentiate them.

The dispositional hearing was held in June 2023. The case worker testified that the petitioner's incarceration prevented him from correcting the conditions of abuse of which he was adjudicated. The circuit court also noted that it presided over the petitioner's criminal trial and recalled the evidence presented therein, his convictions, and sentence. The circuit court found that the conditions of abuse or neglect could not be substantially corrected in the near future because the petitioner had "not made efforts to rectify the circumstances" that led to the filing of the petition. The circuit court further found that it was in the children's best interest to terminate the petitioner's parental rights. Accordingly, the circuit court terminated the petitioner's parental rights to the children.³ 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 in adjudicating him as an abusing parent based solely on conduct to which only K.M.-2 was exposed. He asserts that the remaining children were not placed in danger and, thus, not abused. We disagree. An "abused child" is defined, in relevant part, as "[a] child whose health or welfare is being harmed or threatened by . . . [a] parent . . . who knowingly or intentionally inflicts [or] attempts to inflict . . . mental or emotional injury[] upon the child or another child in the home." W. Va. Code § 49-1-201. The petitioner does not dispute that he was convicted of attempted murder of the children's mother. As the circuit court correctly found, the petitioner's egregious act of attempting to murder the children's mother inflicted mental and emotional injury on the children, including the children who were not present. Accordingly, we find that the circuit court properly adjudicated the petitioner as an abusing parent.

The petitioner next argues that the circuit court erred in terminating his parental rights because the children were placed with the mother, and he poses no danger to the children because he "will be incarcerated until the children are emancipated." We have explained that "simply because one parent has been found to be a fit and proper caretaker for his/her child does not automatically entitle the child's other parent to retain his/her parental rights if his/her conduct has endangered the child and such conditions of abuse and/or neglect are not expected to improve." *In re L.W.*, 245 W. Va. 703, 710, 865 S.E.2d 105, 112 (2021) (quoting *In re Emily*, 208 W. Va. 325, 344, 540 S.E.2d 542, 561 (2000)). Here, the circuit court found that there was no reasonable likelihood the petitioner could substantially correct the conditions of abuse and neglect in the near future and that termination was in the children's best interests—findings that the petitioner does not challenge on appeal.⁴ As a result, the circuit court did not err in terminating the petitioner's

³ The permanency plan for the children is to remain with their mother.

⁴ We further note that, although it appears that the court based this finding solely upon the petitioner's incarceration, this was done in accordance with this Court's direction. As we have explained, "[w]hen no factors and circumstances other than incarceration are raised at a disposition hearing . . . with regard to a parent's ability to remedy the condition of abuse and neglect in the near future," a circuit court is required to consider the reason for the incarceration, "the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration." *In re Cecil T.*, 228 W. Va. at 91, 717 S.E.2d at 875, Syl. Pt. 3, in part. The

parental rights. *See* W. Va. Code § 49-4-604(c)(6) (permitting circuit court to terminate parental rights upon finding no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future and when necessary for the child’s welfare).

For the foregoing reasons, the circuit court’s July 6, 2023, order is hereby affirmed.

Affirmed.

ISSUED: September 24, 2024

CONCURRED IN BY:

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

record shows that the circuit court, as the court that presided over the petitioner’s criminal trial, was thoroughly familiar with these factors.