

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **B.H., J.C., and E.C.**

No. 23-599 (Nicholas County CC-34-2023-JA-58, CC-34-2023-JA-59, and CC-34-2023-JA-60)

MEMORANDUM DECISION

Petitioner Mother K.F.¹ appeals the Circuit Court of Nicholas County’s September 18, 2023, order terminating her parental rights to B.H., J.C., and E.C., arguing that the circuit court erred by denying her motion for an improvement period when there was evidence that she would be likely to participate.² Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming, in part, and vacating, in part, the circuit court’s July 27, 2023, September 5, 2023, and September 18, 2023, orders is appropriate in accordance with the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

In May 2023, the DHS filed a petition alleging that the petitioner, who had been an adult respondent in two prior abuse and neglect cases, had an extensive history of domestic violence. The incident giving rise to the instant petition involved domestic violence between the petitioner and the father of B.H. (“the father”), who had his parental rights terminated to that child in December 2021. According to the petition, the petitioner was arguing with the father in his vehicle while B.H. was present and nearly caused an accident. The petitioner was arrested for charges of child neglect and domestic assault following this event. The DHS sought custody of B.H. only, as the other two children, J.C. and E.C., were in the care of a different, nonabusing father.

The circuit court held an adjudicatory hearing in July 2023, at which time both the father and a law enforcement officer described the domestic violence incident alleged in the DHS’s

¹ The petitioner appears by counsel Brandy L. Hughart. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Kristen E. Ross. Counsel Amber R. Hinkle appears as the children’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).

petition. The father explained that, on the day in question, he and the petitioner were in his single cab truck with then-two-year-old B.H. sitting in the middle. An argument ensued and the petitioner “freaked out . . . started kicking the dash, grabbing the gearshift . . . [and] the steering wheel,” which caused the vehicle to “bounce[] off the guardrail.” According to the father, he “thought she was trying to wreck [them].” Upon arriving to the father’s parents’ home, the petitioner “grabbed [the child] . . . and they walked off the hill to the neighbor’s.” The law enforcement officer who responded to the father’s emergency call corroborated much of the father’s testimony and took photos of the damage to the father’s vehicle that were consistent with his description of the petitioner’s conduct. However, the petitioner denied that the child was present during the incident, insisting that B.H. was with her grandmother that day. Nonetheless, the petitioner admitted that she continued to co-parent with the father after his parental rights were terminated despite knowing that she was prohibited from being in contact with the father or allowing the father to contact B.H. Based on the foregoing, the court did not find the petitioner’s testimony regarding B.H.’s absence from the incident to be credible. As such, the court found clear and convincing evidence that the children were abused and neglected, and in its July 27, 2023, order, adjudicated the petitioner as an abusing and neglecting parent. Notably, no evidence was presented regarding J.C.’s and E.C.’s exposure to domestic violence.

Following the hearing, the DHS filed an amended petition, alleging that the petitioner failed to protect B.H. by knowingly and willfully violating a court order that prohibited contact with the father. A second adjudicatory hearing was held in August 2023, at which the court took judicial notice of the prior evidence and heard additional testimony from the petitioner, who wished to clarify her admitted violation of the court’s order prohibiting contact with the father. The petitioner stated that, “it was [her] understanding that when [the father] gave up his rights, that he could still have supervised visits after the case was closed” because she “read up on it online.” The court found that the petitioner “completely disregarded the court’s prior order” of no contact. By order dated September 5, 2023, the court confirmed its July 27, 2023, order adjudicating the petitioner as an abusing and neglecting parent of the children. It is important to note that neither adjudicatory order included specific findings as to each child, but generally found “the children” were abused and neglected.

Prior to disposition, the petitioner filed a motion for a post-dispositional improvement period. The circuit court proceeded to disposition in September 2023, at which time the DHS and guardian supported termination of the petitioner’s parental rights. The court heard testimony of a nurse practitioner who diagnosed the petitioner with bipolar disorder in May 2023 and advised that the petitioner’s treatment plan included medication and therapy. The petitioner testified that, despite having improvement periods in her prior abuse and neglect proceedings, she did not implement the tools she was taught at that time, insisting it was because of her undiagnosed bipolar disorder. However, the petitioner admitted that she had not participated in counseling for her bipolar disorder as recommended by the nurse practitioner. The court found that this was the petitioner’s third case regarding domestic violence issues and her new diagnosis of bipolar disorder was “not a credible excuse or explanation” for the petitioner’s actions, given that she was diagnosed in May 2023 and had not started counseling. Further finding that the petitioner had been dishonest and uncooperative, the court denied the petitioner’s motion for a post-dispositional improvement period. The court also 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 was in the children’s best interests. It is from the dispositional order that the petitioner appeals.³

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). At the outset, we must address an apparent error in the circuit court’s adjudication and subsequent termination regarding J.C. and E.C., as it does not appear that the court properly exercised jurisdiction over these children.⁴ As we have stated, “[t]o exercise subject matter jurisdiction, the court must make specific factual findings explaining how each child’s health and welfare are being harmed or threatened” and “generalized findings applicable to all children named in the petition will not suffice” *See* Syl. Pt. 3, in part, *In re B.V.*, 248 W. Va. 29, 886 S.E.2d 364 (2023). Here, the court made a generalized finding at adjudication that all of the children were abused and neglected, without specifically explaining how their health and welfare were harmed or threatened. Upon our review of the record, it is unclear whether J.C. and E.C. were subject to the abusive and neglectful behavior alleged by the DHS’s petition and subsequently proven at adjudication, as they may have been in the care of their nonabusing father. This Court is unable to undertake a proper review of whether the circuit court appropriately exercised jurisdiction due to the absence of findings at adjudication as well as the dearth of evidence in the record on appeal as to whether J.C. and E.C. were exposed to the abuse and neglect perpetrated by the petitioner. Therefore, we find error in the adjudication of the petitioner as it relates to J.C. and E.C. and, to this limited extent, the circuit court’s adjudicatory orders of July 27, 2023, and September 5, 2023, must be vacated and remanded. It follows that termination of the petitioner’s parental rights to J.C. and E.C. was in error, as a circuit court cannot proceed to consider disposition without first making the necessary findings at adjudication. *See* Syl. Pt. 3, *In re A.P.-1*, 241 W. Va. 688, 827 S.E.2d 830 (2019). Therefore, the circuit court’s dispositional order of September 18, 2023, must also be vacated and remanded to this limited extent.

However, we find no error as these orders pertain to B.H. On appeal, the petitioner argues that the circuit court erred by denying her motion for a post-dispositional improvement period when there was evidence that she would be likely to participate. Pursuant to West Virginia Code § 49-4-610(3), a circuit court “may grant an improvement period . . . when . . . [t]he respondent moves in writing for the improvement period” and “demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period.” Although the petitioner asserts that she complied with services, she concedes on appeal that she had not started therapy for her bipolar disorder in violation of her treatment plan. The petitioner’s own testimony revealed the detrimental effects of her bipolar disorder, yet she failed to seek treatment,

³ The father of B.H. had his parental rights terminated in a prior proceeding, and the permanency plan for this child is adoption by a kinship placement. The father of J.C. and E.C. is nonabusing, and the permanency plan for these children is to remain in his care.

⁴ “This Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein.” Syl. Pt. 2, *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 801 S.E.2d 216 (2017) (quoting Syl. Pt. 2, *In re Boggs’ Est.*, 135 W. Va. 288, 63 S.E.2d 497 (1951)).

as recommended by the nurse practitioner. Moreover, the petitioner had participated in improvement periods in prior abuse and neglect cases, and the court found that the “new diagnosis of bipolar disorder is not a credible excuse” for having continued to engage in domestic violence and violating court orders. Circuit courts have the discretion to deny an improvement period when no improvement is likely, and we can discern no abuse of discretion here based on the foregoing. *See In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002).⁵ We further find no error in the circuit court’s order terminating the petitioner’s parental rights to B.H. based on our review of the record, given that the court had ample evidence upon which to base its findings that there was no reasonable likelihood that the petitioner could substantially correct the conditions of abuse and neglect and that termination of her rights was in the child’s best interests. *See* W. Va. Code § 49-4-604(c)(6) (permitting circuit courts to terminate an individual’s parental rights upon these findings).⁶

For the foregoing reasons, we affirm that portion of the September 18, 2023, order terminating the petitioner’s parental rights to B.H.; however, as to J.C. and E.C, we vacate the circuit court’s July 27, 2023, and September 5, 2023, adjudicatory orders and September 18, 2023, dispositional order, and remand this matter for further proceedings consistent with this decision.⁷ The Clerk is directed to issue the mandate contemporaneously herewith.

Affirmed, in part; vacated, in part; and remanded, with directions.

⁵ The petitioner also asserts error with adjudication, arguing that it was error for the court to find that she was in violation of the court’s “no contact” order. However, it is unnecessary to address this argument because the court had a proper basis upon which to adjudicate her—perpetration of domestic violence in the child’s presence—which she does not challenge on appeal. In fact, domestic violence has been present across multiple cases, as the petitioner was adjudicated for domestic violence with the father in a prior proceeding. The petitioner’s actions exhibit her pattern of behavior that she knew was problematic, regardless of the no contact order, and demonstrates a threat of harm to the child. *See* W. Va. Code § 49-1-201 (“A child whose health or welfare is being harmed or threatened by . . . domestic violence,” is an “abused child”). Therefore, we discern no error in the court adjudicating the petitioner as an abusing and neglecting parent of B.H.

⁶ The petitioner raises an additional assignment of error, arguing that the circuit court improperly considered documents that were filed to the court’s record but not admitted into evidence, including the psychological evaluation report, the guardian’s report, and the DHS’s case plan. Upon our review, we determine that any error to this effect is harmless because the court had significant other evidence upon which it relied in its decision to terminate the petitioner’s parental rights. As this Court has recognized, “[m]ost errors, including constitutional ones are subject to harmless error analysis.” *State ex. Rel. Waldron v. Scott*, 222 W. Va. 122, 126, 663 S.E.2d 576, 580 (2008). Therefore, we conclude that the petitioner is entitled to no relief.

⁷ To the extent that the circuit court’s July 23, 2023, September 5, 2023, and September 18, 2023, orders implicate the respective fathers of the children, those portions thereof shall remain in full force in effect.

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