

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

*In re* N.M.

No. 23-583 (Kanawha County 20-JA-596)

**MEMORANDUM DECISION**

Petitioner Father I.B.<sup>1</sup> appeals the Circuit Court of Kanawha County’s October 2, 2023, order terminating his parental rights to N.M.,<sup>2</sup> arguing that the circuit court erred in terminating his parental rights without affording him an opportunity to participate in an improvement period. 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.

The proceedings below began in November 2020 when the DHS filed an abuse and neglect petition against the child’s mother alleging that the child was born drug-affected. In January 2023, the circuit court terminated the mother’s parental rights. Throughout the mother’s proceedings, the identity of the child’s father was unknown. In February 2023, the petitioner wrote a letter to the circuit court claiming to be the child’s biological father and contesting the child’s impending adoption. The petitioner was ordered to submit to a paternity test that confirmed he was the child’s father.

On May 9, 2023, the DHS filed an amended petition alleging that the petitioner had abandoned the child. An adjudicatory hearing was held on May 31, 2023. The petitioner did not attend but was represented by counsel. The DHS presented evidence that the petitioner waited three years to inquire about the child, had never seen the child, and had not paid any child support. Based on the evidence, the circuit court found that the child was abandoned and neglected. As such, the circuit court adjudicated the petitioner as an abusing parent for abandonment and failing

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<sup>1</sup> The petitioner appears by counsel Michael M. Cary. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Deputy Attorney General Steven R. Compton. Counsel Jason S. Lord appears as the child’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).

to support the child financially and emotionally. The petitioner filed a motion for a post-adjudicatory improvement period.

A dispositional hearing was held on August 17, 2023. The case worker testified that the petitioner was currently incarcerated, that the DHS did not know the petitioner's anticipated release date, and that services cannot be offered while the petitioner is incarcerated. The case worker further testified that the child had medical needs that required specialized care and that the petitioner could not provide or learn to provide that care to the child while incarcerated. The petitioner testified that he did not know about the child until recently because he was incarcerated for an armed robbery conviction during the mother's pregnancy and after the child's birth. He stated that the child's mother told him he was the child's father while he was out on parole in 2022 and that he told the mother he wanted a paternity test. The petitioner explained that he did not contact the DHS at that time because the mother told him that "she was in correspondence with her lawyer and [the child's] lawyer trying to get that to happen." While waiting for confirmation of his paternity, the petitioner stated that he "step[ped] up to the plate" by visiting with the child several times a week and buying her birthday presents. The petitioner admitted that he violated his parole in January 2023 and was reincarcerated, despite knowing that he may be the child's father. He explained that he may be released again on parole in November 2023; otherwise, he would not be released until 2025. The petitioner also acknowledged that he had only been out of incarceration for a total of four months of the child's life.

After considering the evidence, the circuit court denied the petitioner's request for an improvement period, finding that the petitioner's failure to avail himself of services demonstrated that he was unlikely to comply with the terms and conditions of or successfully complete an improvement period. The circuit court also found that the petitioner had an inadequate capacity to resolve the problems of abuse and neglect because he "had knowledge of the [child], failed to respond following confirmation of his paternity, has had no contact with the child, and continues the financial and emotional abandonment of the child." Additionally, the circuit court found that the petitioner did not follow through with a reasonable family case plan and "opted for a lifestyle of criminal activity which ha[d] separated him from the [child] throughout her life." As a result, the circuit court concluded 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 parental rights was in the child's best interest. Accordingly, the circuit court terminated the petitioner's parental rights.<sup>3</sup> 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 argues that the circuit court erred in terminating his parental rights without affording him the opportunity to participate in an improvement period. In support of his argument, the petitioner contends that he was willing to participate in services and was compliant with the court's order for paternity testing. We find the petitioner's argument unavailing. Pursuant to West Virginia Code § 49-4-610(2)(B), the circuit court has discretion in granting a post-adjudicatory improvement period not to exceed

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<sup>3</sup> The parental rights of child's mother were also terminated below. The permanency plan for the child is adoption.

six months. *See* Syl. Pt. 6, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) (“It is within the court’s discretion to grant an improvement period within the applicable statutory requirements . . .”). Here, the petitioner testified that his release date was uncertain but could be as late as 2025, which would require an improvement period to extend well beyond the statutory maximum of six months. And, although the petitioner argues on appeal that he was willing to participate in services while incarcerated, the court found that the petitioner had yet to avail himself of any services. Thus, the petitioner failed to carry his burden for obtaining an improvement period. *See* W. Va. Code § 49-4-610(2)(B) (requiring that, in order to obtain an improvement period, the parent must “demonstrate[], by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period”). Accordingly, we find that the circuit court did not abuse its discretion by denying the petitioner’s motion for an improvement period.

We further find that it was not erroneous for the circuit court to terminate the petitioner’s parental rights. While the petitioner does not argue it as error, he notes that the termination of his parental rights was based solely on his incarceration. We have held that “[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 must “evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it.” *In re Cecil T.*, 228 W. Va. at 91, 717 S.E.2d at 875, Syl. Pt. 3, in part. At a minimum, the 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.” *Id.* at 97, 717 S.E.2d at 881. The record shows that the circuit court heard testimony about the offense that resulted in the petitioner’s incarceration, that his release date was uncertain, and that he had spent nearly all of his adult life incarcerated. Thus, the circuit court’s conclusion that there was no reasonable likelihood that the conditions of abuse and neglect would be substantially corrected was based upon sufficient evidence. The record further shows that the child was two years old at the dispositional hearing, had special needs requiring advanced care, and only had a few months of limited contact with the petitioner before he was reincarcerated. As such, the circuit court clearly considered the child’s “paramount need for permanency, security, stability and continuity” in determining that the child’s welfare necessitated termination. *Id.* Accordingly, the termination of the petitioner’s parental rights was proper. *See* W. Va. Code § 49-4-604(c)(6) (permitting termination of parental rights upon finding “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future” and that termination is necessary for the welfare of the child).

For the foregoing reasons, the circuit court’s October 2, 2023, order is hereby affirmed.

Affirmed.

**ISSUED:** November 6, 2024

**CONCURRED IN BY:**

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