

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re K.Z.

No. 23-627 (Monongalia County 23-JA-36)

MEMORANDUM DECISION

Petitioner Father G.B.¹ appeals the Circuit Court of Monongalia County’s September 27, 2023, order terminating his parental rights to K.Z., arguing that the court erred in making the findings upon which termination was based and in denying him a post-dispositional improvement period.² 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 January 2023, the DHS filed a petition alleging that the petitioner engaged in domestic violence with the mother in the child’s presence and had a substance abuse problem, having tested positive for cocaine. According to the petition, the petitioner permitted the child’s mother to live in the home, despite a prior order terminating her custodial rights. Further, the record shows that this was the third abuse and neglect case against the petitioner involving this child based on the petitioner’s substance abuse.

At an adjudicatory hearing in February 2023, the court entered an order finding that the petitioner abused and neglected the child based upon his stipulation to substance abuse and domestic violence. The court later granted the petitioner’s motion for a post-adjudicatory improvement period, despite the DHS’s objection. As terms and conditions, the court ordered that

¹ The petitioner appears by counsel Elizabeth B. Warnick. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee Niezgoda. Counsel Teresa Lyons appears as the child’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).

the petitioner, among other things, submit to random drug screens,³ participate in parenting and adult life skills services, participate and complete batterer intervention and prevention program (“BIPP”) classes, and complete a psychological evaluation and follow all recommendations. The petitioner’s psychological examination ultimately resulted in a “guarded” prognosis based, in part, upon the petitioner’s history of substance and alcohol abuse. The evaluator made additional recommendations in line with the terms and conditions of the petitioner’s improvement period, including substance abuse treatment.

In July 2023, the parties appeared for an initial dispositional hearing, during which the petitioner moved for an extension of his post-adjudicatory improvement period. However, the record demonstrates that the petitioner delayed initiating services, resulting in the parenting provider closing his services in April 2023. Only after the services were closed did the petitioner finally initiate those classes. Further, the record shows that by the time of this hearing, the petitioner had attended only eight of the required thirty-three BIPP sessions, having either missed or audited four sessions in the short time he had been complying. Ultimately, the court denied the motion to extend the post-adjudicatory improvement period, but instructed the petitioner to continue complying with services pending the rescheduled dispositional hearing.

In the interim, the petitioner filed a motion for a post-dispositional improvement period. When the matter came on for a final dispositional hearing in August 2023, the DHS presented testimony from the psychologist who conducted the petitioner’s evaluation. The psychologist expressed concern over the petitioner’s pattern of substance abuse, repeated abuse and neglect proceedings, and related criminal issues, including “at least five DUIs . . . [and] a possession charge.” According to the psychologist, the petitioner continued to use alcohol even though “it caused significant problems” and was able to demonstrate change during the various proceedings, but then “reverses back to a behavior pattern that’s consistent over time” when those proceedings end. Although the evidence indicated that the petitioner was participating in substance abuse treatment, the psychologist was concerned that he waited two months following the psychological examination to begin treatment. The DHS presented further evidence that the petitioner missed two drug screens and tested positive for alcohol four times during the proceedings by providing samples that were at “the highest level that the lab will . . . report.” Although the petitioner had complied with many of the terms of his improvement period, including anger management, BIPP sessions, and parenting and adult life skills classes, he had not successfully completed any of those services due, in part, to his delay in initiating them. The court then heard evidence about the petitioner’s inappropriate conduct with the child, including talking to her about the case on multiple occasions and facilitating the mother’s unauthorized communication with the child. According to the child’s foster mother, the child experienced significant anxiety over visits with the petitioner. Finally, the petitioner testified to his employment, housing situation, and participation in services.

Ultimately, the court denied the petitioner’s motion for a post-dispositional improvement period. The court found that the petitioner was inconsistent in his improvement period and, despite some compliance, had a history of relapsing and reconciling with the mother, whom he blamed for

³ The record indicates that, at some point, the petitioner was also required to screen for alcohol.

many of his issues. The court also relied on the petitioner's indication that he stopped drinking "for this case," as opposed to out of a desire to correct the conditions of abuse and neglect. The court further highlighted the child's young age and the amount of time she had spent in foster care in finding that she required stability. Based on the evidence, the court found that there was no reasonable likelihood that the petitioner could substantially correct the conditions of abuse and neglect in the near future and that the child's welfare required termination of his parental rights. Accordingly, the court terminated the petitioner's parental rights.⁴ The petitioner appeals from the dispositional order.

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 it was error to deny his motion for a post-dispositional improvement period. In order to obtain a post-dispositional improvement period after having previously received an improvement period, a parent is required to "demonstrate[] that since the initial improvement period, the [parent] has experienced a substantial change in circumstances" and "that due to that change in circumstances, the [parent] is likely to fully participate." See W. Va. Code § 49-4-610(3)(D). Here, the petitioner asserts that his late compliance with the requirements of his post-adjudicatory improvement period constitutes a substantial change in circumstances such that a post-dispositional improvement period was warranted. We do not agree. As the circuit court correctly found, the petitioner was inconsistent in his participation, having significantly delayed the initiation of many of his services. Critically, this included waiting several months to seek substance abuse treatment despite his substance abuse issues spanning three separate proceedings over many years.⁵ Further, it is in the circuit court's discretion to deny an improvement period when no improvement is likely. See *In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002). Although the petitioner was able to regain custody of the child in two prior proceedings, the court believed that the petitioner's history of repeatedly relapsing and resuming his violent relationship with the mother demonstrated that he was unlikely to successfully remedy the problems through another improvement period. This was underscored by the court's conclusion that the petitioner had not stopped drinking out of a desire to remedy his long history of substance abuse, but simply because of the ongoing proceedings. Essentially, the petitioner asks this Court to give more weight to evidence of his late, partial

⁴ The mother's parental rights were also terminated. The permanency plan for the child is adoption in the current placement.

⁵ In support of his assignments of error, the petitioner makes reference to the fact that the DHS's petition did not include allegations of past abuse and neglect proceedings. It is true that the petition did not include specific information regarding the petitioner's involvement in prior cases. However, at the preliminary hearing, the guardian made reference to these cases, and the circuit court later ordered that the parties would have access to the relevant case files. As we have explained, "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 W. Va. 587, 590, 567 S.E.2d 597, 600 (2001). Accordingly, the circuit court was free to consider evidence of the petitioner's past performance in abuse and neglect proceedings predicated on his substance abuse because that evidence assisted the court in its evaluation of the conditions that existed in the current matter.

participation, but we decline to disturb the circuit court’s determinations in this regard. *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, the circuit court did not abuse its discretion in denying the petitioner’s motion for a post-dispositional improvement period.

Next, the petitioner argues that the circuit court erred in terminating his parental rights upon an erroneous finding that there was no reasonable likelihood that he could substantially correct the conditions of abuse and neglect in the near future. In support, the petitioner asserts that none of the circumstances set forth in West Virginia Code § 49-4-604(d)(1) to (6)—which describe situations in which there is no reasonable likelihood conditions can be corrected—are applicable here, but ignores the clear language that the conditions listed there “are not exclusive.” Here, the court explicitly found that, despite the petitioner’s late, partial compliance, he was incapable of fully remedying the conditions of abuse and neglect in light of his extended history of repeated relapses and reconciliation with the mother. *See id.* § 49-4-604(d) (defining “[n]o reasonable likelihood that conditions of neglect or abuse can be substantially corrected” as “mean[ing] . . . the abusing adult . . . [has] demonstrated an inadequate capacity to solve the problems of abuse or neglect on [his] own or with help”). The petitioner further ignores the court’s finding that, despite “quite a bit of improvement at the end,” the petitioner demonstrated “an overall lack of improvement consistently throughout this case” and that his late improvement was “completely consistent with the two prior cases that have resulted in [the petitioner] reverting back to the behaviors that were present before the case was filed.” Simply put, the court considered the petitioner’s late efforts and found them lacking. *See* Syl. Pt. 4, in part, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014) (At disposition, “the level of a parent’s compliance with the terms and conditions of an improvement period is just one factor to be considered” as “[t]he controlling standard . . . remains the best interests of the child”).

The petitioner further argues that termination was in error because the court incorrectly found that it was necessary for the child’s welfare. According to the petitioner, the court “placed great emphasis on the minor child’s placement with the foster parents” and, essentially, chose them over returning the child to the petitioner. This argument misstates the circuit court’s findings, as it appropriately considered evidence of the effect that the repeated removals from the petitioner’s custody had on the child and determined that the child’s welfare required permanency by terminating the petitioner’s parental rights. *See In re Cesar L.*, 221 W. Va. 249, 258, 654 S.E.2d 373, 382 (2007) (emphasizing the importance of finality for children and that they “not be continually shuttled from placement to placement”). As such, we conclude that the court had ample evidence upon which to base these findings and, therefore, termination of the petitioner’s parental rights was appropriate. *See* W. Va. Code § 49-4-604(c)(6) (permitting termination of parental rights upon finding there is no reasonable likelihood conditions of abuse and neglect can be substantially corrected and when necessary for a child’s welfare).

For the foregoing reasons, we find no error in the decision of the circuit court, and its September 27, 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