

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re A.S. and M.S.

No. 23-640 (Wetzel County CC-52-2021-JA-31 and CC-52-2021-JA-32)

MEMORANDUM DECISION

Petitioner Mother V.D.¹ appeals the Circuit Court of Wetzel County’s September 29, 2023, order terminating her parental rights to the children A.S. and M.S., arguing that the circuit court erred by adjudicating her as an abusing parent, denying her motion for a post-adjudicatory improvement period, and terminating her parental rights.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 September 2021, the DHS filed a petition alleging that the petitioner abused and neglected the children by engaging in domestic violence and abusing drugs in the children’s presence and by failing to protect the children from their stepfather’s violent and sexually inappropriate behavior. According to the petition, the children, who were twelve and thirteen years old at the time, reported witnessing and intervening in multiple physical and verbal altercations between the petitioner and the stepfather, during which the stepfather would push, slap, or kick the petitioner or threaten to cut the petitioner’s throat. Additionally, M.S. reported that the stepfather exposed his genitals to her and that the petitioner “snort[ed]” Xanax. The petition also alleged that the children reported feeling unsafe in their home and had resorted to self-harm in order to cope. Additionally, the children reported that the petitioner had threatened them with physical abuse if they did not lie to Child Protective Services (“CPS”).

¹ The petitioner appears by counsel John M. Jurco. The West Virginia Department of Human Services appears by counsel Attorney General John B. McCuskey and Assistant Attorney General Lee Niezgoda. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. Counsel Shane M. Mallett 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).*

The circuit court held multiple adjudicatory hearings, culminating in a final hearing in August 2022. The court heard testimony from the petitioner, the stepfather, and a CPS worker. The stepfather admitted that he and the petitioner argued, which he characterized as typical of any married couple, and that during those arguments he would call her derogatory names. However, he denied hitting the petitioner and exposing himself to M.S. The petitioner testified that the stepfather had pushed her but had never hit her. She denied all other allegations in the petition, claiming that the children were lying. The CPS worker who filed the petition testified consistent with the allegations contained in the petition. In the resulting adjudicatory order, the circuit court found that the DHS had proven all of the allegations in the petition by clear and convincing evidence and adjudicated the petitioner of abusing and neglecting the children.³ Thereafter, the petitioner filed a written motion for a post-adjudicatory improvement period.

From April 2023 to August 2023, the circuit court held a series of dispositional hearings. The CPS worker testified that the children did not want to return to the petitioner's care and that their disclosures had been consistent throughout the case. A former CPS worker then testified that the petitioner downplayed domestic violence and repeatedly injured the children. The stepfather's adult daughter testified, recounting an incident at the petitioner's home in April 2022 where the stepfather screamed at the petitioner and dragged her out of a room, threatening to kill her. The petitioner then testified, denying the aforesaid incident and minimizing the domestic violence in the home. Nevertheless, she acknowledged that she and the stepfather "put the children through hell." The petitioner further testified that the children lied about the stepfather exposing himself to M.S. and asserted that the domestic violence issues between her and the stepfather were resolved. A court appointed special advocate testified that the children consistently declined to participate in visits with the petitioner and expressed that they wanted to remain in their current placement. The advocate also testified that because the petitioner still did not believe the children and minimized the domestic violence in the home, she was unlikely to remediate the conditions of abuse and neglect. At the final dispositional hearing in August 2023, the court terminated the petitioner's parental rights.

In the resulting dispositional order, the court found that the petitioner continually minimized the domestic violence between her and the stepfather and failed to acknowledge the sexual abuse perpetrated by the stepfather.⁴ The court denied the petitioner's motion for a post-adjudicatory improvement period because it would not benefit the petitioner as her admission to engaging in domestic violence was "tepid, at best." The court concluded that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future, that the petitioner demonstrated an inadequate capacity to resolve those conditions on her own or with help, that she repeatedly injured the children emotionally, and that termination

³ We note that the court specifically found that the petitioner was not a battered spouse.

⁴ When used in Chapter 49 of the West Virginia Code, "sexual abuse" includes "[a]ny conduct where a parent, guardian, or custodian displays his or her sex organs to a child." W. Va. Code § 49-1-201.

was in the children’s best interests. Ultimately, the court terminated the petitioner’s parental rights. It is from this order that the petitioner appeals.⁵

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 by adjudicating her of abusing and neglecting the children.⁶ In order to adjudicate a parent, the court must find that the allegations of abuse and neglect were proven by clear and convincing evidence. *See* W. Va. Code § 49-4-601(i); *see also Cramer v. W. Va. Dep’t of Highways*, 180 W. Va. 97, 99 n.1, 375 S.E.2d 568, 570 n.1 (1988) (explaining that the clear and convincing standard is “intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases”). While the petitioner argues that the evidence below was insufficient, we note that the court considered, among other things, the children’s Child Advocacy Center interviews and testimony that the petitioner engaged in domestic violence. As such, it is clear that the circuit court had sufficient evidence to support the petitioner’s adjudication. The petitioner further argues that the circuit court’s findings were insufficient. As we have explained, “the court must make specific factual findings explaining how each child’s health and welfare are being harmed or threatened by the allegedly abusive or neglectful conduct.” Syl. Pt. 3, in part, *In re B.V.*, 248 W. Va. 29, 886 S.E.2d 364 (2023). The court here made such specific findings, as it concluded that “the [DHS] has proven all allegations in the Petition . . . by clear and convincing evidence.” Although the court did not go into exacting detail, it specifically found that the DHS proved every allegation contained in the petition. Accordingly, we conclude that the court did not err in adjudicating the petitioner of abuse and neglect.⁷

Second, the petitioner argues that the circuit court erroneously denied her motion for a post-adjudicatory improvement period and lists several reasons that she claims demonstrate that she was likely to participate. *See* W. Va. Code § 49-4-610(2) (requiring the parent demonstrate

⁵ The children’s father’s parental rights remain intact, but his contact is limited as the result of a previous family court proceeding. The permanency plan is legal guardianship in the current placement.

⁶ In support, the petitioner claims that she could not be adjudicated of failing to protect the children from sexual abuse. This argument, however, has no basis in the record, as the petition clearly alleged that the petitioner “knowingly and intentionally” failed to protect the children and continually subjected the children to the stepfather’s violent and sexually inappropriate behaviors. The petitioner argues that this language limited the failure to protect to only the domestic violence. We reject this interpretation.

⁷ The petitioner also asserts that the circuit court violated Rule 27 of the Rules of Procedure for Child Abuse and Neglect Proceedings by failing to enter the adjudicatory order within ten days of the conclusion of the hearing. However, the petitioner fails to identify where she objected to the delay below. Because “our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered,” we decline to consider this argument. *Noble v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) (quoting *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)).

that they are likely to participate in the improvement period by clear and convincing evidence). However, the petitioner ignores that “the circuit court has discretion to refuse to grant an improvement period when no improvement is likely.” *In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002). Moreover, “[i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge . . . 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)). Based upon the petitioner’s failure to acknowledge the severity of the domestic violence in the home and the sexual abuse perpetrated by the stepfather, the court denied her motion for an improvement period, and we discern no error therein.

Finally, the petitioner argues that the circuit court erred by terminating her parental rights and that a less restrictive alternative, such as disposition pursuant to West Virginia Code § 49-4-604(c)(5), was appropriate. The petitioner correctly asserts that “[t]ermination of parental rights . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(c)(6)] that conditions of neglect or abuse can be substantially corrected.” Syl. Pt. 4, in part, *State v. CNS*, 173 W. Va. 651, 319 S.E.2d 775 (1984) (quoting Syl. Pt. 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)). However, the petitioner incorrectly asserts that because she admitted to engaging in domestic violence and participated in certain services, she was entitled to disposition pursuant to West Virginia Code § 49-4-604(c)(5). The court considered this evidence, but also considered the petitioner’s accusation that the children were lying, her failure to acknowledge the sexual abuse, and her “tepid, at best,” admission that domestic violence was occurring in her home. Based upon ample evidence, the court determined that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future and that termination was in the children’s best interests. Termination of parental rights is required upon such findings. *See* W. Va. Code § 49-4-604(c)(6). As such, the petitioner is entitled to no relief.

For the foregoing reasons, we find no error in the decision of the circuit court, and its September 29, 2023, order is hereby affirmed.

Affirmed.

ISSUED: January 29, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV