

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re P.B.

No. 23-681 (Wood County CC-54-2022-JA-280)

MEMORANDUM DECISION

Petitioner Father M.B.¹ appeals the Circuit Court of Wood County’s October 24, 2023, order terminating his parental rights to the child, arguing that the court erred in denying him an extension of his improvement period and post-termination visitation.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 October 24, 2023, dispositional order and remanding for further proceedings is appropriate, in accordance with the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

In October 2022, the DHS filed a petition³ alleging that the petitioner engaged in domestic violence in the child’s presence and that the home in which the child resided was in deplorable condition due to, among other things, trash and animal feces. According to the DHS, the petitioner had recently been arrested following an altercation with the child’s mother wherein, after an argument, the petitioner followed the mother into her vehicle and “began hitting her and pushed her head against the seat.” The mother then stabbed the petitioner. The DHS further alleged that there was a domestic violence protective order in place that prohibited the petitioner from contact with the child.

¹ The petitioner appears by counsel Eric K. Powell. The West Virginia Department of Human Services appears by counsel Attorney General John B. McCuskey and Assistant Attorney General James Wegman. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. Counsel Michael D. Farnsworth Jr. 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”).

² We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

³ The DHS later filed an amended petition that is irrelevant to the resolution of this appeal.

The petitioner thereafter entered a written stipulation in which he admitted to exposing the child to domestic violence and failing to ensure the child was residing in a safe and appropriate home. At a hearing in November 2022, the court accepted the petitioner's stipulation, adjudicated him of abusing and neglecting the child, and granted him a post-adjudicatory improvement period. According to the record, the petitioner was required to participate in several services, including parenting and adult life skills services, a parental fitness evaluation, individual counseling, and random drug screens. Initially, the petitioner was compliant with services and, in fact, completed an inpatient substance abuse treatment program. However, a court appointed special advocate ("CASA") recommended that the petitioner's improvement period place "an emphasis on refraining from using illicit substances" as a result of the petitioner's recent marijuana use. Based on the petitioner's overall compliance, the court granted him an extension of his improvement period at a hearing in May 2023.

According to a report from June 2023, after a positive drug screen, the petitioner admitted to recent methamphetamine use. The petitioner then missed multiple drug screens and stopped contacting the DHS, which he blamed on having lost his phone. In August 2023, the petitioner tested positive for amphetamine, methamphetamine, and marijuana. Additionally, CASA later reported that the petitioner was discovered attempting to falsify a drug screen by bringing in a bottle of urine. In September 2023, the petitioner continued to test positive for amphetamine, methamphetamine, and marijuana on multiple screens and was not participating in substance abuse treatment, which prompted the circuit court to warn the petitioner "that he needed to seek out help" for his substance abuse. The following month, the petitioner filed a motion for an extension of his improvement period.

In October 2023, the court held a dispositional hearing. The petitioner testified to his participation in services throughout the proceedings and that he was waiting on an opening in a short-term inpatient treatment program. However, according to a DHS report prepared in advance of the hearing, the petitioner made no contact with the DHS since the previous hearing and missed a drug screen roughly one week prior to the dispositional hearing. Accordingly, the DHS recommended termination of the petitioner's parental rights. The court denied the petitioner's motion for an extension of his improvement period, finding that the petitioner was given numerous opportunities throughout the proceedings. The court found that although the case had been pending for over one year, the petitioner admitted to using methamphetamine and marijuana just days prior to the hearing and failed to "take[] any substantial steps toward" substance abuse treatment. The court also found that the petitioner lacked credibility, "given the fact he was deceitful by submitting someone else's urine in order to defeat a drug test to conceal his use of controlled substances." The court also found that there was no reasonable likelihood that the petitioner could substantially correct the conditions of abuse and neglect and that termination was in the child's best interests. After terminating the petitioner's parental rights, the court explicitly awarded him post-termination visitation "at the discretion of the placement" but further ruled that the petitioner was "not permitted to request visitation until he has completed an inpatient substance abuse program and

petitions the Court for the ability to request visitation from the placement.”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). The petitioner first argues that the court erred in denying him an extension of his improvement period. At the outset, we must reconcile the petitioner’s position with the record before the Court. In his brief, the petitioner argues that he moved to extend his post-*dispositional* improvement period. Although the petitioner’s October 2023 motion in the appendix record is also styled as one for an extension of a post-dispositional improvement period, the petitioner points to no portion of the record where the circuit court granted him a post-dispositional improvement period. *See* W. Va. R. App. P. 10(c)(7) (requiring that a brief “must contain appropriate and specific citations to the record on appeal”). Instead, he points only to the portion of the record where the court granted his motion for a post-*adjudicatory* improvement period in November 2022. This distinction is critical to the resolution of the petitioner’s appeal, because it is undisputed that the circuit court granted the petitioner an extension of his post-adjudicatory improvement period in May 2023. As this Court has explained, “West Virginia Code § 49-4-610(6) (eff. 2015) authorizes only *one* extension of a post-adjudicatory improvement period.” Syl. Pt. 5, *State ex rel. P.G.-I v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021). Because the circuit court already granted the petitioner the one extension allowed by statute at a hearing in May 2023, it was precluded from granting a second extension of the post-adjudicatory improvement period. Therefore, the petitioner is entitled to no relief. Further, because the petitioner raises no challenge to the subsequent termination of his parental rights, we affirm that decision.

However, in regard to the petitioner’s second assignment of error, we find that the circuit court erred in its ruling concerning post-termination visitation with the child. While the petitioner is correct that it was error to leave visitation at the discretion of the foster parents,⁵ we further find that the circuit court’s rulings on post-termination visitation were inconsistent and occurred in the absence of any consideration of the necessary factors. We have previously held as follows:

“When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child’s wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child’s well being

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

⁵*See In re K.S.*, 246 W. Va. 517, 531, 874 S.E.2d 319, 333 (2022) (concluding it was improper to leave post-termination visitation to the other parent’s discretion and that it is incumbent on the circuit court to formulate a “proper visitation plan” where visitation is found appropriate).

and would be in the child’s best interest.” Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 11, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002). Here, the circuit court’s order does not include any findings as to whether there was a close emotional bond between the petitioner and the child or whether post-termination visitation would be in the child’s best interests. Instead, the court merely declared that the petitioner was granted visitation at the placement’s discretion, but then imposed a requirement on the petitioner to later move to obtain that visitation. In short, this ruling contradicts our prior instruction that such visitation is not the right of the parent, but a right of the child. *See In re Christina L.*, 194 W. Va. at 455 n.9, 460 S.E.2d at 701 n.9. Therefore, the circuit court’s ruling on visitation must be vacated and the matter remanded for further consideration of this issue. *See Syl. Pt. 3, In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009) (quoting Syl. Pt. 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001) (requiring vacation and remand where “the process established by the [applicable rules and] statutes . . . has been substantially disregarded or frustrated”). On remand, the circuit court must analyze whether post-termination visitation is proper given the necessary considerations and shall award post-termination visitation only if it finds continued contact would not be detrimental to the child’s well-being and would be in the child’s best interests. If the circuit court determines that visitation is appropriate, it must put in place a proper visitation plan and not leave visitation to the placement’s discretion.

For the foregoing reasons, we vacate, in part, the circuit court’s October 24, 2023, dispositional order inasmuch as it pertains to the issue of the petitioner’s post-termination visitation; and we remand this matter to the circuit court for further proceedings consistent with the applicable rules and statutes. With respect to the termination of the petitioner’s parental rights to P.B., the October 24, 2023, order is affirmed. The Clerk is directed to issue the mandate contemporaneously herewith.

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

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