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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* A.H.**

No. 23-596 (Jackson County CC-18-2016-JA-55, CC-18-2023-CIG-2, and CC-18-2023-CIG-4)

MEMORANDUM DECISION

Petitioner Grandmother G.M.[1] appeals the Circuit Court of Jackson County's August 25, 2023, order granting the father's petition for modification of the parenting plan and awarding custody of the child to the father. The petitioner argues that the circuit court erroneously found that the father was a fit parent, failed to consider the child's best interests, and considered the DHS's changed recommendation.[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.

The petitioner is the maternal grandmother of the child, who was the subject of an abuse and neglect proceeding that began in June 2016 when the DHS filed a petition against the child's parents. The petition alleged that the mother abused drugs and exposed the then-two-year-old-child to inappropriate persons, unsecured firearms, illegal substances, and drug paraphernalia. The petition further alleged that the father had a history of domestic violence and failed to protect the child from the mother. The parents were adjudicated as abusing parents after admitting to the allegations and were each granted improvement periods. In October 2016, the father was granted temporary legal and physical custody of the child. In May 2017, after successfully completing their improvement periods, the court returned legal and physical custody to the parents and approved their agreed parenting plan, which evenly split custody of the child between them.

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[1] The petitioner appears by counsel Hannah Tothe. The father appears by counsel Leah R. Chappell. 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 Ryan M. Ruth 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).

In September 2018, the mother filed a petition for modification of the parenting plan alleging that a material change in circumstances had occurred because the child was receiving a disproportionate amount of care from her in substantial deviation from the parenting plan. In June 2019, the circuit court granted the mother's petition for modification finding that a material change in circumstances had occurred because the father failed to exercise his parenting time with the child and that he continued to abuse drugs. The court awarded sole legal and physical custody[3] of the child to the mother, "suspended" the father's "parenting time," and permitted the father to visit with the child "solely at [the mother's] discretion, in accordance with the Child's best interests." Critically, the court did not terminate the father's parental or custodial rights to the child.

In March 2023, the mother passed away from a drug overdose. Shortly thereafter, the child's maternal aunt and maternal uncle each instituted proceedings against the father seeking legal guardianship of the child and claiming that the father was an unfit parent. The father then filed a petition for modification of the parenting plan and a motion for immediate custody of the child in the abuse and neglect case. In May 2023, the court held an initial, consolidated hearing on the guardianship cases and the father's petition and motion. At the hearing, the aunt and the uncle moved to intervene in the abuse and neglect case. The court took the parties' motions under advisement, named the aunt and uncle as temporary co-guardians of the child, and scheduled an in camera interview of the child. Following the hearing, the petitioner filed a motion to intervene in the abuse and neglect case "for the purpose of monitoring these proceedings and obtaining approval as a permanency option for the minor child . . . should reunification cease to be the primary or concurrent permanency plan."

In May 2023, the court conducted an in camera interview with the then-nine-year-old-child in the presence of the guardian. During the interview, the child explained that she has a good time when she is with her father, characterized her relationship with him as "good" but not "close," and disliked nothing about him. She also stated that she "would not feel safe" with the father, but she could not articulate a particular reason why explaining that she "just [did not] like being around him."

In June 2023, the court held a final hearing and permitted the aunt, the uncle, and the petitioner to intervene in the abuse and neglect case. All of the parties were given the opportunity to present evidence and cross-examine witnesses. The court heard testimony from the father about his drug addiction and treatment. He explained that he moved to Florida in 2020 in an effort to recover from his addiction to opiates. He stated that he enrolled in a program at Vanguard Medical Center ("Vanguard") in August 2020 to treat his drug addiction and that he was still actively participating in the program. As part of his treatment, the father explained that he was prescribed

[3] "'Sole legal custody' means one parent has the right and responsibility to make major decisions regarding the child's welfare including matters of education, non-emergency medical care, and emotional, moral, and religious development." W. Va. Code § 48-1-239(b). "'Sole physical custody' means a child resides with and is under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that the visitation would not be in the best interests of the child." *Id.* § -241(b).

Subutex, among other things; attended an appointment every month with his doctor; and submitted for scheduled drug screens every three months. The father also testified about his living arrangements, explaining that he rented a three-bedroom condominium with his parents and that the child would have her own bedroom. To support his testimony, the father introduced several exhibits, including tax returns, employment contracts, a rental agreement, photographs depicting his home and the child's visit to his home, and text messages with the child and the petitioner.

The father then introduced testimony of several family members, each of whom testified that the father was sober, had a normal parent-child relationship with the child, and was fit to care for the child. The father also introduced testimony of the child's paternal grandmother, who confirmed that she and the child's paternal grandfather co-rented a home with the father and that the father would have their full support in caring for the child. Finally, the father introduced testimony of Cynthia Kelly, an owner of Vanguard. Ms. Kelly testified that she had worked in the field of drug addiction since 2002, when Suboxone was approved to treat opiate addiction. She explained that Vanguard is a medical practice specializing in the treatment of drug addiction with Suboxone, among other things. Ms. Kelly stated that the father began his drug treatment at Vanguard in August 2020; described the success of the father's treatment as "excellent"; and explained that he had been compliant with all aspects of his treatment, including monthly office visits and drug screens. On cross-examination, Ms. Kelly acknowledged that the father no longer received random drug screens, that the collection of urine for his scheduled drug screens was unobserved, and that there was a risk he could cheat on his drug screens. However, she explained that it was not unusual to test urine from an unobserved collection because the collection cups register the temperature of the urine when it is collected. She further explained that all of the father's drug screens were negative for opiates and positive for his prescribed medications.

The court also heard testimony from the uncle and the petitioner, who testified in support of the uncle's guardianship petition. The uncle stated that he and his wife lived in Maine, were both employed, and would provide the child with "[s]tability in a two-parent household." The uncle further testified that the child was not close with the father and that the father was not a safe parent because of his history of drug use and domestic violence. On cross-examination, the uncle admitted that he also had a history of drug use and overdosed on heroin in 2017. He claimed that he completed a sixty-day rehabilitation program but did not receive any follow-up treatment, such as drug screening or counseling. The uncle also admitted that he knew since 2022 that the mother had relapsed and had forced the child to urinate in cups so that she could pass her drug tests but did nothing to protect the child.

The petitioner testified that she supported placing the child with the uncle,[4] despite his prior drug abuse, because that was the child's preference and the uncle had completed rehabilitation. She also testified that the father was unfit to care for the child because there had been "too much time in between" and she doubted the father's sobriety. However, the petitioner confirmed that the mother allowed the child to stay with the father for several nights in Florida, that she had seen the

[4] Despite testifying in support of the uncle's guardianship petition, the petitioner's counsel clarified at the hearing that the petitioner was requesting to "be considered as permanent placement" for the child "if the father failed on his position."

child Facetiming with the father, that the father was the first person to call her after the mother's death, and that he drove up from Florida the day after the mother's death to visit with the child. On cross-examination, the petitioner admitted that she confronted the mother about her abuse of nitrous oxide in December 2021 after the child discovered a large quantity of empty cannisters. The petitioner was "completely confident" that the mother stopped abusing nitrous oxide in January 2022 and denied knowing that the mother had relapsed prior to her death. However, she also admitted to having multiple conversations with the aunt in October 2022 about the mother's drug use and the deplorable condition of the mother's home but did not "see a need" to contact Child Protective Services.

Neither the DHS nor the guardian presented evidence. On behalf of the DHS, the prosecutor proffered that while the father had demonstrated that he was a fit parent, it was unclear whether moving the child to Florida would be in her best interest because she had minimal contact with the father prior to her mother's death. However, the DHS refused to take a position as to which home would be in the child's best interest because "everyone here loves her, everyone here appears to be safe, but we do recognize that a biological parent does, at least statutorily, have a preference." The guardian proffered that while the child's preference was to move to Maine with her uncle, "custody needs to go to the father. He's been shown as fit, there's really no reason to keep the child from him."

At the conclusion of the hearing, the court instructed the parties to submit proposed findings of fact and conclusions of law by June 21, 2023. The petitioner, the aunt, the uncle, and the father each submitted their proposals by the deadline. On August 10, 2023, the guardian filed a recommendation, in which he joined the father's proposed findings of fact and conclusions of law and requested the court to adopt the same. In support, the guardian stated that the father demonstrated he was a fit parent and his rights and interests to the child supersede those of any other family member or individual. Additionally, the guardian noted that the petitioner, the aunt, and the uncle took no legal measures to protect the child despite knowing the mother had relapsed a year before her death. The following day, the DHS filed a response to the father's proposed findings of facts and conclusions of law requesting the court to adopt the father's proposal for the same reasons outlined by the guardian. On August 15, 2023, the petitioner filed objections to and a motion to strike the guardian's recommendation and the DHS's response. She argued that the guardian and the DHS impermissibly changed their recommendation concerning the return of the child to the father's custody, and, if considered by the court, would violate her due process rights by denying her the opportunity to present rebuttal evidence or cross-examine witnesses regarding their new position.

On August 25, 2023, the circuit court entered an order granting the father's petition for modification and awarding him permanent custody of the child. In its detailed order, the court first recognized that the matter was primarily governed by Rule 46 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, which permits the court to modify an order in abuse and neglect proceedings upon finding that a material change in circumstances had occurred and that modification is in the child's best interest. In addition, the circuit court acknowledged that, in *Troxel v. Granville*, 530 U.S. 57 (2000), "the [United States] Supreme Court found that law intended to protect [nonparent relationships with children] implicate[s] the Fourteenth Amendment and it[s] protections against deprivation of life, liberty, or property without

due process at law." The court further observed that "the Supreme Court clearly identified the interest of parents in the care, custody and control [o]f their children as perhaps the oldest of the fundamental liberty interests recognized by the Court."

After identifying the applicable laws, the court found that the mother's death constituted a material change in circumstances necessitating a review of the parenting plan; that the mother sanctioned unsupervised and overnight visits between the child and the father after the parenting plan was modified in 2019; that the infrequency of the visits was "not always of the [father's] making"; that the father had been sober and employed with stable housing since 2020; and that the father had a good relationship with and appropriately parented the child. The court further found that the father was a fit and safe parent as he had "done nothing since the entry of the 2019 Order on Modification which would weigh against a finding [that] he [was] a fit and safe parent." Additionally, the court found that there was no evidence that the father was aware of the mother's drug use and neglect of the child prior to her death. The court also observed that the petitioner, the uncle, and the aunt each knew of the mother's "active addiction to nitrous oxide," and despite "their actual knowledge of the conditions to which the Mother subjected [the child]," did not seek guardianship of the child until the mother's death. Further, the court explained that the evidence of the petitioner, the uncle, and the aunt did not "minimize the weight and credibility of the evidence of the [father] regarding his fitness as a parent and whether placement of [the child] with the [father was] in [the child's] best interest." Finally, the court noted its consideration of the child's preferences but "decline[d] to extend weight to [the child's] preferences" because of her young age and its determination that the father was a fit parent. Based on those findings, the court concluded that that the child's best interests would be served by modifying the parenting plan to award the father permanent custody of the child. Accordingly, the court awarded permanent custody of the child to the father, terminated the temporary guardianship order, and denied the petitions for guardianship. It is from the order granting the father's petition for modification 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 asserts three assignments of error concerning the circuit court's decision to grant the father's petition for modification of the parenting plan and award him custody of the child. The petitioner first argues that the circuit court erroneously applied the "standard" found in *Troxel v. Granville*, 530 U.S. 57 (2000), because the father was an unfit parent. She asserts that the father was "unfit for neglect, dereliction of duty to the minor child, and misconduct due to using fentanyl." To support this assertion, the petitioner relies on Syllabus Point 1 in *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989), where we held that

> [a] parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of

[5] The permanency plan for the child is to remain with the father.

> the parent to the custody of his or her infant child will be recognized and enforced by the courts.

She contends that the father's unfitness was evidenced by his 2016 adjudication as an abusing parent because of his drug use, the suspension of his parenting time in 2019 because of his drug use and failure to exercise his allotted parenting time, his failure to prove that he was sober, his admission to "rarely" seeing the child, and his delay in contesting the order suspending his parenting time until the mother died.

As an initial matter, we note that the petitioner's brief does not explicitly identify the "standard" that she contends the circuit court erroneously applied.[6] *See State, Dep't of Health v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("[A] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs." (Internal citations omitted)). Nevertheless, we find no merit to the petitioner's argument because the circuit court properly concluded that the father was a fit parent. The father introduced *uncontradicted* testimony from multiple witnesses demonstrating that he had been sober since commencing treatment for his drug addiction in 2020; that he submitted for and tested negative on all drug screens for nearly three years; that he was still receiving treatment by a physician for his drug addiction; that the mother allowed him to have several unsupervised and overnight visits with the child; that he appropriately parented the child during his visits with her; and that he frequently communicated with the child via text messages, phone calls, and video chats. Moreover, the court found that "the evidence of the Intervenors d[id] not minimize the weight and credibility of the evidence of the [father] regarding his fitness as a parent." It is well established that "[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997). While the petitioner may disagree with the court's fitness determination, it is well-supported by the record. As such, the petitioner is entitled to no relief on this basis.

In her second assignment of error, the petitioner argues that the evidence did not support the circuit court's finding that modification of the parenting plan and awarding permanent custody of the child to the father was in the child's best interest. The petitioner asserts that the court "failed

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[6] In *Troxel*, the United States Supreme Court reviewed the constitutionality of a Washington state statute that permitted courts to award nonparents visitation rights with a child, over the parent's objection, if the court determined that visitation was in the child's best interest. 530 U.S. at 65. Indeed, the plurality opinion included a discussion regarding the liberty interest of fit parents in the care, custody, and control of their children and concluded that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 65-67. The Supreme Court also recognized that "there is a presumption that fit parents act in the best interests of their child." *Id.* at 68. Ultimately, the Supreme Court held that the statute infringed on the fundamental right of the parent to make decisions concerning the care, custody, and control of her child because courts were not required to accord proper deference to "a parent's decision that visitation would not be in the child's best interest." *Id.* at 66-67.

to identify any factors indicating that it was in the best interests of the child to return to the Father's care and custody," that the father did "not have a bond nor a relationship with the child," and that the child expressed "fear" about living with the father and wanted to live with her uncle. We find no merit to the petitioner's argument. In conducting its best interest analysis, the court explained that the father was the child's sole living biological parent, was fit to care for the child, and had a "good" relationship with the child. *See* Syl. Pt. 1, *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989) ("A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, . . . the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts."). The court weighed those considerations against the "significant bonds" she had with the petitioner and the other maternal relatives. Moreover, the court expressly declined to extend weight to the child's placement preference because of her young age, found the child's testimony about not feeling safe with the father not credible, and observed that the maternal relatives failed to protect the child from the mother's neglect despite knowing of the mother's active drug addiction. *See* W. Va. Code § 44-10-4 (permitting, but not requiring, a court to "consider the firm and reasonable preferences" of a child below the age of fourteen in certain circumstances); *cf.* Syl. Pt. 4, in part, *In re J.A.*, 242 W. Va. 226, 833 S.E.2d 487 (2019) (explaining that "[w]hen determining whether to permanently terminate the . . . rights and responsibilities of an abusing parent, West Virginia Code § 49-4-604([c])(6)(C) requires a circuit court to give consideration to the wishes of a child who is fourteen years of age or older or otherwise of an age of discretion as determined by the court" but "is not obligated to comply with the child's wishes"). In the end, the court determined that it was in the child's best interest to modify the parenting plan and place her in the custody of the father. In doing so, the circuit court clearly exercised its authority to assign weight and credibility to each of those factors based on the evidence presented, and we decline to disturb its determinations on appeal. *See In re D.S.*, -- W. Va. --, --, 914 S.E.2d 701, 707 (2025) (explaining that, when reviewing decisions of a circuit court in abuse and neglect proceedings, "[w]e review the circuit court's decision under the [applicable] deferential standards . . . and do not reweigh the evidence or make credibility determinations"). Thus, we discern no error in the circuit court's finding that modifying the parenting plan and awarding permanent custody of the child to the father were in the child's best interest.

Finally, the petitioner argues that the circuit court violated her due process rights when it "considered the changed position of the [DHS] after the hearing and without providing [her] the right to cross-examine [its] new position." As the petitioner was granted intervenor status in the abuse and neglect case, she correctly asserts that she was entitled to "'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *In re J.S.*, 233 W. Va. 394, 402, 758 S.E.2d 747 (2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *see also* Syl. Pt. 4, in part, *In re C.H. v. Faircloth*, 240 W. Va. 729, 815 S.E.2d 540 (2018) (holding that persons "who have been granted the right to intervene are entitled to all the rights and responsibilities of any other party to the action"). However, the record shows that the petitioner had a full and fair opportunity to review and present evidence at the custody hearing and that the DHS's recommendation was clearly based on the evidence adduced therein. Furthermore, the petitioner does not contend that the DHS's "changed position" was based on newly discovered evidence that was not introduced at the hearing or that she was denied the opportunity to present or cross-examine any witness at the hearing. As such, we discern no error in the circuit court's consideration of the DHS's response

to the father's proposed findings of fact and conclusions of law, and the petitioner is entitled to no relief in this regard.

For the foregoing reasons, the circuit court's August 25, 2023, order is hereby affirmed.

Affirmed.

ISSUED: June 26, 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