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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.S.**

No. 24-662 (Fayette County CC-10-2023-JA-143)

MEMORANDUM DECISION

Petitioner Father K.S.[1] appeals the Circuit Court of Fayette County's October 18, 2024, order terminating his parental rights to A.S., arguing that the circuit court erred by considering improper facts at adjudication and that termination was not the least restrictive dispositional alternative.[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 DHS filed a petition in November 2023, alleging that the mother of A.S. tested positive for amphetamines upon giving birth. The DHS further alleged that the petitioner expressed an intent to abandon A.S. because he had never seen or visited her. The DHS filed an amended petition in July 2024 alleging that the petitioner was unable to care for the child due to his incarceration and substance abuse. Specifically, the DHS asserted that the petitioner was arrested and sentenced to a period of incarceration after he violated the terms and conditions of an adult treatment court program in which he was enrolled.

The circuit court held the adjudicatory hearing in August 2024. At the outset, counsel for the petitioner indicated that he "would stipulate to the allegations in the petition in and of themselves insofar as he is incarcerated." Then, the petitioner testified that prior to the birth of A.S., he pled guilty to delivery of a controlled substance and received an alternative sentence of treatment court and inpatient treatment. Around November 2023, the petitioner relapsed, violating

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[1] The petitioner appears by counsel Mackenzie Anne Holdren. The West Virginia Department of Human Services appears by counsel Attorney General John B. McCuskey and Assistant Attorney General Kristen E. Ross. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. Counsel Elizabeth K. Campbell 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).

the terms of his alternative sentence, and the court imposed the underlying sentence of incarceration. The petitioner added that his next parole hearing was scheduled for early 2027. At the conclusion of the petitioner's testimony, his counsel again stressed that the petitioner did not "disagree[] with the substance of what [wa]s included in the petition," as the petitioner could not "deny that he is incarcerated . . . for a significant period of time." However, the petitioner's counsel argued that she was "not of the opinion that that rises to abuse or neglect." Ultimately, the court found, by clear and convincing evidence, that the petitioner neglected A.S. as a result of his inability to support, maintain, or educate the child due to his incarceration and substance abuse. Therefore, the court adjudicated the petitioner as an abusive and neglectful parent.

The circuit court held the dispositional hearing in September 2024. Evidence was presented that the petitioner was sentenced for felony manufacturing or delivering of a controlled substance and conspiracy to manufacture or deliver a controlled substance. The petitioner also pled guilty to conspiracy and aiding an adult in confinement by transporting heroin into a holding cell in the Fayette County Sheriff's Department. A Child Protective Services ("CPS") worker testified that the petitioner's projected discharge date was 2036, though he would be eligible for parole in two years. The CPS worker further testified that they were unaware of any services that the DHS could provide to the petitioner while he was incarcerated. At the conclusion, the petitioner moved for a post-adjudicatory improvement period, which the circuit court denied. The court found that the petitioner's lengthy incarceration prevented him from providing support, permanency, or stability to A.S. Further, the court found that the petitioner had not meaningfully addressed his substance abuse issues, and that his sobriety was forced by incarceration. Ultimately, the circuit court found that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future and that it was necessary for the child's welfare that the petitioner's rights be terminated. Accordingly, the circuit court terminated the petitioner's parental rights.[3] 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's adjudication was improper. Specifically, the petitioner asserts that he could not be adjudicated based upon his incarceration because he had no child support obligation and was legally barred from contacting the child. We must stress, however, that the portions of the record to which the petitioner cites in support of these claims indicate that his child support obligation was set to zero approximately eight months *after* the DHS filed its initial petition and that he was barred from contacting the child *at adjudication* pending disposition. Simply put, the petitioner's reliance on court orders made after the filing of the petition have no bearing on his responsibility to have provided the child with necessities prior to the initiation of these proceedings. In fact, we have repeatedly stressed that it is the conditions of abuse or neglect that exist at the time of the petition's filing that are relevant to a parent's adjudication. *See* Syl. Pt. 1, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (noting the requirement in West Virginia Code § 49-4-601(i) that the DHS prove "conditions existing at the time of the filing of the petition . . . by clear and convincing [evidence]." (quoting Syl. Pt. 1, *In re S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981))).

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

Further, this Court has held that a parent's incarceration "that results in the inability of the parent to provide necessary food, clothing, shelter, medical care, education or supervision is a form of neglect under the definition of 'neglected child' set forth in West Virginia Code § 49-1-201 (2018)." Syl. Pt. 3, *In re B.P.*, 249 W. Va. 274, 895 S.E.2d 129 (2023). Therefore, we find no merit in the petitioner's argument.[4]

The petitioner also argues that the circuit court erred in terminating his parental rights because the DHS failed to demonstrate that he could not comply with the terms of an improvement period. This argument misstates the applicable burden of proof, as it is the *respondent* who bears the burden of proving, by clear and convincing evidence, that he or she is likely to participate in the improvement period. *See* W. Va. Code § 49-4-610(2)(B); *In re J.D.-1*, 247 W. Va. 270, 279, 879 S.E.2d 629, 638 (2022) ("Indeed, the respondent bears the burden of showing that he or she should be granted the opportunity to remedy the circumstances that led to the filing of the abuse and neglect petition."). Here, the petitioner failed to offer any evidence to support his motion for an improvement period. However, the DHS offered testimony that it was unable to provide the petitioner with services during his incarceration. As this court has explained, a circuit court has discretion to deny an improvement period when no improvement is likely. *In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002).

Finally, we conclude that termination of the petitioner's parental rights was appropriate because the circuit court found that the conditions of abuse and neglect could not be substantially corrected in the near future. In this regard, the circuit court issued an extensive dispositional order analyzing the required factors related to the petitioner's incarceration. *See* Syl. Pt. 3, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011) (requiring a circuit court to consider "the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability, and continuity" when no factors other than incarceration are raised in regard to a parent's inability to correct conditions of abuse and neglect). Here, the court emphasized that the petitioner was sentenced for felony drug offenses, his projected release is in 2036, and his incarceration prevents him from providing A.S. with support, permanency, or stability. Notably, the petitioner does not dispute these findings. In addition to finding the conditions of abuse and neglect could not be corrected in the near future, the circuit court found that termination was necessary for the child's welfare, which the petitioner also fails to challenge. Courts are permitted to terminate parental rights on these findings. *See* W. Va. Code § 49-4-604(c)(6); *see also* Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011) ("Termination of parental rights . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood . . . that conditions of neglect or abuse can be substantially corrected." (quoting Syl. Pt. 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980))). Accordingly, we conclude that the circuit court did not err in terminating the petitioner's parental rights.

[4] The petitioner also alleges that the circuit court erred in adjudicating him upon a failure to protect the infant from the mother's drug use, an allegation not contained in any petition. It is unnecessary to address this argument, however, because, as discussed above, the petitioner's adjudication for neglecting the child by virtue of his incarceration was appropriate.

For the foregoing reasons, we find no error in the decision of the circuit court, and its October 18, 2024, order is hereby affirmed.

Affirmed.

ISSUED: September 10, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison