

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re J.A. and A.A.

No. 21-0832 (Raleigh County 20-JA-16 and 20-JA-17)

MEMORANDUM DECISION

Petitioner Mother T.K., by counsel Stanley I. Selden, appeals the Circuit Court of Raleigh County’s August 16, 2021, order terminating her parental rights to J.A. and A.A.¹ The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Patrick Morrissey and Brittany N. Ryers-Hindbaugh, filed a response in support of the circuit court’s order. The guardian ad litem (“guardian”), Stephen R. Davis, filed a response on the children’s behalf in support of the circuit court’s order. On appeal, petitioner argues that the circuit court erred in terminating her parental rights to the children on the basis of economic hardship and without imposing a less-restrictive dispositional alternative.²

¹Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

²The circuit court explicitly terminated petitioner’s “guardianship, legal and custodial rights” to the children below, which does not track the language of the statute. *See* W. Va. Code § 49-4-604(c)(6) (authorizing the termination of “parental, custodial, and guardianship rights” upon certain findings). Nevertheless, we find that the order and the court’s findings on the record are sufficient to finalize the termination of petitioner’s parental rights to the children. Indeed, this Court has upheld termination of parental rights where “[t]he dispositional order entered by the circuit court . . . [does] not track the language of West Virginia Code [§ 49-4-604]” when the Court was convinced, after reading the dispositional hearing transcript, that “the trial court first reached the conclusions required by [West Virginia Code § 49-4-604(c)(6)] before terminating [the parent’s] parental rights.” *In re Jamie Nicole H.*, 205 W. Va. 176, 184, 517 S.E.2d 41, 49 (1999) (addressing the sufficiency of the dispositional order sua sponte). In addition to the factual findings in the court’s order discussed later in this decision, the court made findings during the dispositional hearing that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected and concluded that the evidence supported

(continued . . .)

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In January of 2020, the DHHR filed a child abuse and neglect petition alleging that petitioner failed to supply the children with suitable housing. The DHHR alleged that its workers investigated the home and found it to be "cold . . . colder than the outside temperature" in December of 2019. Petitioner's home did not have electricity or running water. According to the DHHR, petitioner's home was missing insulation and walls to separate the rooms and was cluttered with belongings and clothes. Additionally, there was an opening in the floor, which made it possible to fall into the basement from the main floor. The DHHR also alleged that the children disclosed domestic violence between petitioner and the father, stating that petitioner "gets hit every day by daddy on the face, arms, and anywhere he can reach her." Petitioner did not appear for two scheduled preliminary hearings, despite being provided with adequate notice. The circuit court ratified the emergency removal of the children on January 28, 2020.

The circuit court held an adjudicatory hearing in March of 2020, but petitioner failed to appear. The court continued the adjudicatory hearing until June of 2020, during which petitioner stipulated that the children were abused or neglected "by virtue of the condition of the home and heated verbal arguments" with the father, which frightened the children. The court accepted petitioner's stipulation and adjudicated her as an abusing parent. Petitioner then moved for a post-adjudicatory improvement period, which the circuit court granted without objection. The case plan required petitioner to complete domestic violence counseling and parenting and adult life skills classes; participate in random drug screening and maintain sobriety; and maintain a clean and suitable home and adequate income. Additionally, the plan provided that if petitioner failed any drug screens, then drug rehabilitation would be added as a term of the improvement period.

The circuit court held an improvement period review hearing in September of 2020 and heard that, although a family case plan had been drafted, petitioner had not agreed to the plan by signing the same. The circuit court ordered petitioner to begin random drug screening and ordered the DHHR to inspect petitioner's home to determine what services could be offered to repair the home or find new housing. In April of 2021, the circuit court held a final improvement period review hearing. Petitioner did not appear.

"the termination of [the parents'] the parental interests." Thus, we find that the circuit court properly terminated petitioner's parental, custodial, and guardianship rights and refer to the circuit court's ultimate disposition as termination of petitioner's parental rights throughout this memorandum decision.

The circuit court held a dispositional hearing in May of 2021. Petitioner appeared and acknowledged that she recently tested positive for methamphetamine, although she indicated that she was entering drug treatment. Petitioner moved to continue the proceedings to allow her to procure drug treatment, and the DHHR did not object. Later in May of 2021, the DHHR filed a motion to terminate petitioner's parental rights. The DHHR alleged that petitioner failed to comply with the terms of her improvement period regarding domestic violence counseling and remedying the conditions of her home. The DHHR further alleged that petitioner was required to seek drug treatment, which she had failed to do. Based upon petitioner's failure to remedy these conditions of abuse and neglect, the DHHR asserted that the children had been in foster care in excess of fifteen of the preceding twenty-two months, which was beyond the limitation provided in West Virginia Code § 49-4-605(a)(1). Later in September of 2021, the circuit court held a hearing to review petitioner's post-adjudicatory improvement period. Petitioner did not appear, but counsel represented her. The circuit court did not rule on the motion to terminate petitioner's post-adjudicatory improvement period but scheduled a dispositional hearing.

The circuit court held a dispositional hearing in June of 2021. The court heard testimony from DHHR workers, a representative from the drug screening facility where petitioner was ordered to submit to drug screens, and the parents. The court also admitted photographs of petitioner's home and records of her drug screen test results. The evidence showed that petitioner had not completed any of the terms of her case plan. Petitioner participated in a single random drug screen in April of 2021, wherein she tested positive for methamphetamine, tetrahydrocannabinol, and alcohol. Following this positive drug screen, petitioner briefly attended a drug rehabilitation program but did not complete it. Additionally, petitioner was scheduled to participate in domestic violence counseling but failed to attend. The DHHR worker testified that she went to inspect petitioner's home at an agreed upon time, but petitioner did not answer the door. The evidence showed that the home had holes in the exterior walls and did not have windows in place. The DHHR worker attempted to visit the home a second time, in May of 2021, and was able to enter the home. According to the DHHR worker, the home was still missing insulation and proper flooring, the children's shared bedroom was being used as storage, and wiring was exposed throughout the home. Additionally, the dividing wall between the bathroom and the children's room was missing. The DHHR worker recalled that the parents could not provide an estimate as to when the repairs would be finished.

Petitioner testified that she and the father had made additional repairs to the home since the May visit. She asserted that the bathroom was finished, the home had utilities, and the children's room was ready for them to come home. Petitioner also admitted that she purchased Suboxone illegally and that, later, she sought Suboxone treatment for her addiction. Petitioner could not explain her drug screen that was positive for methamphetamine. The evidence showed that the father also tested positive for methamphetamine during the proceedings.

Following the presentation of evidence, the circuit court found that the DHHR had presented "tangible evidence" that the condition of the home was not suitable for children, while the parents presented "no tangible evidence" regarding progress to repair the home aside from their own statements. The court further found that although controlled substances were not "a driving force" of petitioner's case plan, the misuse of drugs was an element that petitioner needed to address. The court ordered petitioner to immediately submit to a drug screening and to

comply with random drug screenings thereafter. Finally, the court heard evidence that the children allegedly refused to attend visitation with petitioner and ordered the DHHR to introduce additional evidence as to the children's statements and develop a plan to reinstate visitation. Ultimately, the court held the DHHR's motion to terminate petitioner's parental rights in abeyance, providing the parents additional time to remedy the conditions to their home. The father assured the circuit court that the repairs could be completed.³

The circuit court held the final dispositional hearing in August of 2021. Petitioner's parenting and adult life skills provider testified that she had traveled to petitioner's home three times a week since the June of 2021 hearing, but petitioner was available for instruction on only two of those days. The provider explained that petitioner was not close to completing the parenting curriculum at the time of the final hearing. This provider also testified that she was tasked with transporting petitioner to the drug screening facility. However, on the two days the provider reached petitioner, petitioner refused to submit a drug screen sample. A representative from the drug screen facility confirmed that petitioner missed twenty-five scheduled drug screening appointments since the June of 2021 hearing and had not attended the domestic violence counseling offered at the facility. Petitioner submitted one sample for drug screening in early July of 2021, which was positive for tetrahydrocannabinol, buprenorphine, alcohol, and naloxone.

A DHHR worker testified that she scheduled a time to visit petitioner's home the week prior to the final dispositional hearing. She explained that petitioner's counsel notified petitioner in writing of the visit and attended the visit with the worker. However, neither petitioner nor the father were present at the home at the scheduled time. The DHHR worker photographed the outside of the home, documenting that the interior of the home was exposed through holes in the exterior, an empty exterior door frame with plywood laid across it, missing windows, and significant amounts of refuse outside of the home. Petitioner did not present any evidence but moved for a post-dispositional improvement period or post-termination visitation with the children.

Ultimately, the circuit court found that "based on a review of the evidence set forth, [petitioner's] home . . . remained in essentially the same condition as it appeared at the initiation of the action." The court concluded that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future and that it was necessary for the children's welfare to terminate petitioner's guardianship, legal, and custodial rights.

³During his testimony, the father stated, "I could have [the home] fit by tomorrow night for my kids to be home." The father, who testified that he was a certified carpenter, managed the repairs on the home with the help of two family friends. He later stated that, "If y'all tell me I can have my kids back next week . . . in three days [the house will] be done." He asserted that he could have additional work colleagues in his home to finish the repairs.

Accordingly, the circuit court terminated petitioner's rights to the children. The court's decision was memorialized by its August 16, 2021, order. Petitioner now appeals that order.⁴

The Court has previously held:

“Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

On appeal, petitioner argues that the circuit court erred in terminating her parental rights rather than imposing a less-restrictive dispositional alternative. She asserts that she demonstrated the conditions which led to the children's removal from the home could be corrected in the near future. With a single broad citation to the record, petitioner emphasizes the improvements that had been made to the home, namely that utility services were restored, windows were repaired or replaced, some remodeling had been completed, and the property had been cleaned up. She also states that she and the father were awaiting additional building supplies and that she was seeking alternative housing if the repairs could not be completed. Petitioner argues that despite her attempts to complete the case plan and provide a suitable home for the children, her parental rights were terminated. We find petitioner is entitled to no relief.

Pursuant to West Virginia Code § 49-4-604(c)(6), a circuit court may terminate a parent's parental rights upon finding that “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future” and that termination is necessary for the welfare of the children. West Virginia Code § 49-4-604(d)(3) provides that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected when

[t]he abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical,

⁴The father's guardianship, legal, and custodial rights were also terminated below. According to the parties, the permanency plan for the children is adoption in their current placement.

mental health, or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare, or life of the child[ren].

As set forth above, petitioner failed to follow through with a reasonable family case plan. Petitioner was required to complete domestic violence counseling, but the evidence showed that she did not attend a single session. Petitioner was required to complete parenting and adult life skills classes, but the provider testified that petitioner met with her only twice in the two-month period following the June of 2021 hearing and was not near completion of the parenting curriculum. Petitioner was required to participate in random drug screening and, after she tested positive for methamphetamine and tetrahydrocannabinol, a drug treatment program. However, the evidence showed that petitioner accomplished neither; she missed far more appointments to drug screen than she kept and did not complete a drug treatment program. Finally, petitioner was required to maintain a suitable residence and failed to do so. While the parties agreed that the condition of the home improved during the proceedings, the evidence also showed that the home was missing windows, flooring, and critical walls. The circuit court found that the home was “in essentially the same condition” as when the petition was filed, and petitioner cites to nothing in the record that leads this Court to conclude that that finding is clearly erroneous. Accordingly, the circuit court properly found that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future because petitioner failed to follow through with a reasonable family case plan. This finding is critical, as this Court has held that

“[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] . . . 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(d)] . . . that conditions of neglect or abuse can be substantially corrected.” Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). The circuit court was within its discretion to terminate petitioner’s parental rights upon the above finding. We find no error in its decision.

Petitioner also argues that the circuit court erred in terminating her parental rights on the basis of economic hardship. Petitioner avers that it was “abundantly clear” that she was unable to complete the repairs of the home due to a lack of financial means or the unavailability of

materials. Without any citation to the record, she asserts that the DHHR failed to follow through with the circuit court's orders to provide financial assistance to the parents.⁵

In support of her argument, petitioner cites to the definition of "neglected child" as follows:

A Neglected child means a child . . . [w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care, or education, when that refusal, *failure, or inability is not due primarily to a lack of financial means on the part of the parent, guardian, or custodian.*

W. Va. Code § 49-1-201 (emphasis added). Notably, the circuit court determines whether a child is abused or neglected during the adjudicatory phase of a child abuse and neglect proceeding. As provided by West Virginia Code § 49-4-601(i), "[a]t the conclusion of the adjudicatory hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether the child is abused or neglected."⁶ In this case, petitioner stipulated to adjudication, waived her right to an adjudicatory hearing, and waived her opportunity to present evidence that she lacked the financial means to provide for her children. "Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999). *Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009). However, the record shows that the father believed he could complete repairs on the home within days if the DHHR agreed to return the children to the home, which substantially undermines petitioner's argument on this point. Upon our review, petitioner's argument in this regard is meritless.

⁵Although this argument is clearly raised in petitioner's appellate brief, the DHHR made no attempt to address it on appeal. We remind respondents of the following relevant portion of Rule 10(d) of the West Virginia Rules of Appellate Procedure:

Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

⁶For clarity, a respondent parent is "abusing [or] neglecting" when their conduct "has been adjudicated by the court to constitute abuse or neglect as alleged in the petition charging child abuse or neglect." See W. Va. Code § 49-1-201. "Child abuse and neglect" is further defined as "any act or omission that creates an abused child or a neglected child as those terms are defined in [W. Va. Code § 49-1-201]." *Id.*

For the foregoing reasons, we find no error in the decision of the circuit court, and its August 16, 2021, order is hereby affirmed.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn