

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

*In re* M.C.-H.

No. 23-304 (Mercer County CC-28-2022-JA-13)

**MEMORANDUM DECISION**

Petitioner Father R.H.<sup>1</sup> appeals the Circuit Court of Mercer County’s May 2, 2023, order terminating his parental, custodial, and guardianship rights to his child, M.C.-H.<sup>2</sup> He argues that the court erred by failing to grant the least restrictive dispositional alternative and by leaving post-termination visitation to the foster parents’ discretion. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming, in part, vacating, in part, and remanding the circuit court’s May 2, 2023, order is appropriate in accordance with the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

In January 2022, the DHS filed an abuse and neglect petition following the birth of the child, alleging that petitioner’s parental rights to three other children were involuntarily terminated in 2019 due to domestic violence issues. Petitioner was later adjudicated upon evidence of his failure to remedy the conditions of domestic violence that resulted in the termination of his parental rights to the other children. Following his adjudication, petitioner was granted an improvement period.

The DHS filed a motion to terminate petitioner’s parental rights in January 2023, and the circuit court scheduled a dispositional hearing for later that month. A DHS worker testified at the

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<sup>1</sup>Petitioner appears by counsel John G. Byrd. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Andrew T. Waight. Counsel William O. Huffman 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”).

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

hearing that petitioner was not cooperating with the terms of his case plan. Specifically, he still had not gained employment, minimally participated in visitation with the child and parenting classes, inconsistently drug screened, and failed to obtain suitable housing. Regarding petitioner's housing, the DHS worker testified that he continued to live at the paternal grandmother's home. The DHS worker believed the grandmother's home to be inappropriate given that there were issues of domestic violence involving other individuals living in the home. At the conclusion of the evidence, the court deferred disposition to allow petitioner to complete the remainder of his improvement period.

The DHS filed a second motion to terminate petitioner's parental rights in April 2023, and the circuit court scheduled a final dispositional hearing for May 2023. Petitioner did not appear for the hearing but was represented by counsel. Counsel for the DHS advised the court that petitioner made it known to the parties that he was not planning to appear for the hearing because of an existing warrant for his arrest. A police officer testified that in March 2023, petitioner was the perpetrator of a domestic violence incident at the grandmother's home. When the 9-1-1 dispatcher called law enforcement, the officers assumed it was a domestic violence situation based on the number of times they had been called to the residence in the past for domestic violence issues. Upon their arrival, they heard yelling and screaming and observed a broken window and blood on the porch. Petitioner fled the residence before they arrived; however, he was later found hiding under the back deck. Petitioner appeared "obviously intoxicated," had a laceration on his arm, and was covered in blood. The grandmother told the officer that petitioner broke the window and "destroyed" the house. The mother later went to the police department and filled out a complaint form alleging that petitioner was physically violent and tried to choke her.

The circuit court then heard additional testimony of DHS workers, Day Report Center ("DRC") workers, and other service providers who discussed petitioner's failure to participate fully in services. A DHS worker outlined petitioner's case plan requirements, which included obtaining stable housing, securing employment, participating in parenting services and visitation, and completing drug screens. A service provider testified that he still had not obtained stable housing as he and the mother were kicked out of the grandmother's home and were living in a motel that petitioner disclosed paying for through sexual intercourse. The same service provider observed petitioner's visits with the child, during which he spent most of the time watching videos on his cell phone, taking cigarette breaks, and sometimes napping. At one point, petitioner stated to the service provider that since the domestic violence incident, "visits were a waste of time" because he knew he would not get the child back. A DRC worker testified that petitioner inconsistently drug screened and of the few drug screens he completed, he tested positive for alcohol and THC and admitted using hydrocodone. Based on the evidence presented, the court found there were serious safety concerns for the child and that, due to the ongoing domestic violence and aggravated circumstances, it would not be in the child's best interests to be returned to petitioner's care. The court further found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future and that it was necessary for the welfare of the child to terminate petitioner's parental, custodial, and guardianship

rights.<sup>3</sup> Additionally, the court ordered that any post-termination visitation shall be at the discretion of the child’s foster parents. It is from the final dispositional order that 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). Petitioner argues that the court erred in terminating his parental, custodial, and guardianship rights, rather than implementing a less restrictive dispositional alternative. On this issue, we find no error. We have held,

“[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(c)(6)] 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). Here, the circuit court specifically found that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected. The court had previously found that this case includes aggravated circumstances, thus the DHS was not required to make reasonable efforts to preserve the family under West Virginia Code § 49-4-604(c)(7); however, the court nevertheless granted petitioner an improvement period, permitting him the opportunity to demonstrate that the conditions of neglect or abuse could be corrected. Petitioner not only failed to fully participate in services offered or comply with case plan terms, but also showed no interest in the child. *See In re Katie S.*, 198 W. Va. 79, 90 n.14, 479 S.E.2d 589, 600 n.14 (1996) (“the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent’s custody is a significant factor in determining the parent’s potential to improve sufficiently and achieve minimum standards to parent the child” (citation omitted)). Moreover, the evidence clearly showed that petitioner’s behavior actually worsened throughout the pendency of the case when he committed an act of domestic violence only one month before the final dispositional hearing. Petitioner’s ongoing violent conduct demonstrates that it was necessary for the welfare of the child that the court terminate petitioner’s rights. In this regard, we find no error in the circuit court’s decision.

However, we find it necessary to vacate the circuit court’s ruling on the issue of post-termination visitation. While petitioner is correct that it was error to leave visitation at the discretion of the foster parents,<sup>4</sup> we further find that it was error to have awarded post-termination

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<sup>3</sup>The mother’s parental, custodial, and guardianship rights were also terminated and the permanency plan for the child is adoption by the same foster parents who adopted his older siblings.

<sup>4</sup>*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).

visitation 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 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 relative to whether post-termination visitation would be in the child’s best interests. Rather, it simply stated that post-termination visitation would be at the discretion of the foster placement. The court should have considered whether there was a close emotional bond, and “[o]ur cases indicate that a close emotional bond generally takes several years to develop.” *See In re Alyssa W.*, 217 W. Va. 707, 711, 619 S.E.2d 220, 224 (2005). Therefore, the circuit court’s award of visitation must be vacated and the issue remanded for further consideration. 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 proper, it must put in place a “proper visitation plan” and not leave visitation to the foster parents’ discretion. *See In re K.S.*, 246 W. Va. at 531, 874 S.E.2d at 333.

For the foregoing reasons, we affirm that portion of the May 2, 2023, order terminating petitioner’s parental, custodial, and guardianship rights to the child M.C.-H.; however, as to post-termination visitation, we vacate the circuit court’s May 2, 2023, order and remand for further proceedings consistent with this decision.<sup>5</sup> The Clerk is directed to issue the mandate contemporaneously herewith.

Affirmed, in part; Vacated, in part; and Remanded with directions.

**ISSUED:** April 15, 2024

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<sup>5</sup>The circuit court’s May 2, 2023, order also terminated the mother’s parental, custodial, and guardianship rights, and she did not appeal that decision. Accordingly, the portions of the order terminating the mother’s rights remain in full force and effect.

**CONCURRED IN BY:**

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