

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

In re L.V. and A.V.

No. 20-0240 (Raleigh County 19-JA-34-K and 19-JA-35-K)

**FILED
December 16, 2020**

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mother B.V., by counsel Robert Patterson Dunlap, appeals the Circuit Court of Raleigh County’s January 27, 2020, order terminating her parental rights to L.V. and A.V.¹ The West Virginia Department of Health and Human Resources (“DHHR”), by counsel S. L. Evans, filed a response in support of the circuit court’s order. The guardian ad litem, Colleen M. Brown-Bailey, 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 failing to provide her notice of the adjudicatory hearing and abused its discretion in terminating her parental rights.

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 February of 2019, the DHHR filed a child abuse and neglect petition alleging that petitioner abused controlled substances while pregnant with L.V. and engaged in domestic violence with the father in the presence of the children. The DHHR alleged that petitioner reported receiving no prenatal care while pregnant with L.V., and the father refused to allow the child to be tested for potential complications. When petitioner was hospitalized for the birth of L.V., hospital staff observed bruising on her arms and legs, but she was adamant that no domestic violence occurred in the home. The DHHR alleged the father was “overbearing,” physically removed petitioner’s IV that contained penicillin, and expressed violent outbursts during the hospital stay. The DHHR alleged that petitioner admitted to smoking marijuana for anxiety and reported that the father smoked marijuana to “cope with his ‘mental issues.’” Petitioner reported that the father was

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).

clinically diagnosed with schizophrenia, but had chosen to discontinue his medication and rely on marijuana as a treatment. The DHHR further alleged that A.V. disclosed that her father made petitioner hold her down while he whipped her with a belt and that the belt left marks and bruises. A.V. reported that she was afraid of petitioner and the father when they fight and that law enforcement responded to the home as a result of her parents fighting. The DHHR obtained petitioner's criminal background history and alleged he was arrested for domestic violence earlier in February of 2019.

The circuit court convened a preliminary hearing in March of 2019, and the parties agreed to an in-camera interview of A.V. The circuit court held the in-camera hearing later that month. The court later found that the child "described incidents of physical abuse, such as whippings by [the] father with a belt which left bruises." The child related "that she regularly witnessed incidents of severe domestic violence between [her] parents. She further expressed extreme fear of her parents and was fearful of coming into contact with them."

In May of 2019, the circuit court held a second preliminary hearing. Petitioner appeared and represented herself, having declined counsel on a prior date. The father also appeared and represented himself. Petitioner and the father presented respective motions to dismiss the case on the basis that they were "common law people" of the State of West Virginia and therefore not subject to the jurisdiction of the circuit court. In their motions, the parents "characterize[d] their children as their 'property'" and requested the immediate return of their "property." The circuit court found that it had proper jurisdiction over the child abuse and neglect proceedings and denied the motion. At this point, the father began reading into the record a series of quotations and legal citations that were included in the motions to dismiss. Despite multiple warnings from the circuit court, the father continued to read and interrupt the proceedings, and the court ordered that he be removed from the courtroom. Petitioner exited with the father. Thereafter, the circuit court found that imminent danger existed to the children and ratified their removal from petitioner's care.

The circuit court held an adjudicatory hearing in June of 2019, and petitioner did not appear. Prior to the June 17, 2019, hearing, petitioner and the father filed a notice that they did "not believe it was in [their] best interest to make a 'physical', special visitation on said date due to fear of trespass against [them]." The DHHR presented evidence consistent with its petition. The circuit court found that there was a "significant amount of domestic violence" between the parents, "physical violence in the home, mostly perpetrated by [the father]," and evidence of illicit drug use. The court further found that the children were "subject to harsh discipline, including beatings" and that A.V. "lived in fear" of her parents. Accordingly, the circuit court adjudicated the children as abused children, and petitioner as an abusing parent.

In July of 2019, the circuit court held a dispositional hearing. Petitioner appeared, and, after the circuit court advised the parents of their right to counsel, she decided to proceed without representation. The DHHR called a case worker to testify to the parents lack of contact with the department, during which the parents "interfered with the examination of the witness" and the father "demanded to be charged with a crime and be given a jury trial." The father further "demanded that the child be evaluated by a psychiatrist or psychologist" and that the evaluation be recorded by video. The circuit court granted the motion for an evaluation, but ruled that the recording method would be left to the discretion of the evaluator. The circuit court also granted

petitioner's request for a copy of the case file as she intended to hire counsel to represent her. The proceeding was continued, pending the results of the evaluation.

The circuit court reconvened the dispositional hearing in October of 2019.² Petitioner appeared in person and by counsel. The father appeared in person and with counsel, but counsel moved to withdraw due to a breakdown in communication with the father. The father agreed and decided to continue without representation. The psychologist who evaluated A.V. testified that she diagnosed the child with post-traumatic stress disorder and attention deficit hyperactivity disorder. She testified that during the evaluation, the child reported experiencing significant trauma and a resulting fear of her parents. The psychologist opined that the child would require long-term therapy. She believed that the child's "fear of her parents was so extreme and debilitating that the parents' exposure to the child should be severely limited or excluded." The parents' DHHR case worker testified that the parents had made no effort to communicate with the DHHR. The worker also said that DHHR received a bill from the parents for the time they expended on the case at a rate of forty-cents per second, totaling over one-million dollars. The worker explained that a family case plan could not be formulated due to the parents' refusal to cooperate with the DHHR thus far. Petitioner denied that the child feared her and denied that she would allow the children to be harmed by herself or another. Petitioner also presented the testimony of a family member who denied that domestic violence occurred between the parties and that the child was afraid of her parents.

The circuit court held an evidentiary hearing in December of 2019 at petitioner's request. She presented a video of A.V. opening presents on Christmas of 2018. According to the circuit court, "[t]he video depicted a happy child opening Christmas gifts that she was pleased to receive." However, the court "observed that such a video, taken on a special holiday occasion, presents only a solitary snapshot of family life . . . and does not necessarily reflect an accurate picture of day-to-day living in the home." The court further found that the video did not "negate the overwhelming evidence of maltreatment presented." Petitioner also introduced a "learned treatise" related to "disorders that may have a causal link with vaccinations of children."

The circuit court issued its ruling by its January 27, 2020, order. In that order, the circuit court found that the "[e]xtreme and protracted conduct of domestic violence [] occurred between [the parents] in the presence of [A.V.]" The circuit court further found that the evidence "clearly and convincingly establishe[d] that [the father] frequently whipped the child . . . excessively, leaving marks and bruises upon the child's body." The court continued that "[the] parents have yelled at the child and threatened her on a constant basis, causing her to be fearful of them. . . . They have psychologically mistreated the child . . . to the point where she is fearful of them and does not feel safe." In regard to the parents, the circuit court found that they had "failed to cooperate with the [DHHR] in any meaningful and proper way, and have exhibited bizarre behavior in these cases." The court concluded that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future as the parties demonstrated an inadequate capacity to solve the problems of neglect and abuse on their own or

²The circuit court attempted to hold a dispositional hearing in August of 2019. However, petitioner failed to appear. Petitioner's newly hired counsel moved to continue the proceedings based on her absence, which the circuit court granted.

with help. Thus, the circuit court terminated petitioner's parental rights to the children. Petitioner now appeals that order.³

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 first argues that the circuit court failed to properly provide her notice of the adjudicatory hearing and, thus, violated her due process rights. Petitioner simultaneously argues that she was not listed as a recipient of the order scheduling the adjudicatory hearing and that said order provided an incorrect time and date for that hearing. However, we find petitioner's argument to be without merit. Petitioner correctly cites that “notice of the hearing shall be served upon both parents . . . giving to those persons at least five days' actual notice of a preliminary hearing and at least [ten] days' notice of any other hearing.” W. Va. Code § 49-4-610(e)(1). As noted above, petitioner filed a notice related to the June 17, 2019, adjudicatory hearing on June 10, 2019. Further, petitioner dated her signature on that notice on May 30, 2019.⁴ Petitioner's notice included the accurate date and time of the hearing, was signed by both parents, and asserted that it was not in their “best interest to make a ‘physical’, special visitation on said date due to fear of trespass” against them. Based on these facts, it is clear that petitioner had actual notice of the adjudicatory hearing on May 30, 2019, which was more than ten days prior to that hearing. Accordingly, we find petitioner is entitled to no relief.

Petitioner also argues that the circuit court erred in terminating her parental rights rather than imposing a less-restrictive dispositional alternative. She references the family member's testimony at the dispositional hearing and argues that the circuit court should have granted her

³The father's parental rights were also terminated below. According to the parties, the permanency plan for the children is adoption in their current foster placement.

⁴In her brief on appeal, petitioner clearly ignores that she signed her first notice on May 30, 2019. She instead references a second notice that also mentioned the adjudicatory hearing date, which she apparently signed and filed on June 14, 2019. In this second notice, petitioner requested “the immediate restoration of [her] property,” referring to her children.

“greater latitude as a [self-represented] litigant” for the adjudicatory process. Petitioner further contends that the DHHR should have offered a post-dispositional improvement period and additional time to remedy the conditions of abuse and neglect so that reunification with her children was a viable option. Petitioner’s argument is without merit.

West Virginia Code § 49-4-604(c)(6) provides that 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 of parental rights is necessary for the welfare of the child. Pursuant to West Virginia Code § 49-4-604(d)(5), a circuit court may determine 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 repeatedly or seriously injured the child physically or emotionally, . . . and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems, or assist the abusing parent or parents in fulfilling their responsibilities to the child.

Notably, petitioner offers no challenge to the circuit court’s finding that there was no reasonable likelihood that she could correct the conditions of neglect or abuse in the near future. Nevertheless, it is clear this finding is fully supported by the record. As found by the circuit court, petitioner and the father subjected A.V. to consistent beatings that left marks and bruises and rendered her afraid of her parents. The parents also subjected her to consistent domestic violence and the emotional abuse that accompanies it. As a result of their actions, A.V. no longer felt safe in their care and, according to her psychological evaluator, would need long-term therapy to cope with her parents’ past actions. Moreover, petitioner failed to acknowledge that this abuse occurred or that the child actually feared her. This Court has recognized that

[i]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child’s expense.

In re Timber M., 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted). Thus, even if granted an opportunity for treatment, petitioner’s failure to acknowledge the basic allegations pertaining to the abuse and neglect rendered treatment futile. Accordingly, we find no error in the circuit court’s finding that there was no reasonable likelihood that petitioner could correct the conditions of neglect and abuse in the near future.⁵

⁵Alternatively, the parents’ failure to cooperate with the DHHR in any meaningful way also justifies the circuit court’s finding that there was no reasonable likelihood that petitioner could correct the conditions of neglect and abuse in the near future. *See* W. Va. Code § 49-4-604(d)(2) (a circuit court may find that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future when “[t]he abusing parent or parents

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). Thus, the circuit court’s finding that there was no reasonable likelihood that petitioner could correct the conditions of neglect and abuse forecloses the less-restrictive dispositional alternatives that she seeks on appeal. It bears repeating, however, that petitioner’s failure to acknowledge the conditions of neglect and abuse would lead to a futile post-dispositional improvement period at the children’s expense. We find no error in the circuit court’s termination of petitioner’s parental rights.⁶

For the foregoing reasons, we find no error in the decision of the circuit court, and its January 27, 2020, order is hereby affirmed.

Affirmed.

ISSUED: December 16, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison

have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child’s return to their care, custody and control”).

⁶Petitioner also argues that the circuit court violated her First Amendment right when it authorized the DHHR to vaccinate the children, to which she was opposed on religious grounds. She argues that, as the natural parent of the child, she is guaranteed the right to raise her children in a manner that she deems appropriate. However, given that this Court has affirmed the termination of petitioner’s parental rights, we find that this argument is now moot. “‘Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.’” *State ex rel. W. Va. Secondary Schools Activities Comm’n v. Oakley*, 152 W.Va. 533, 537, 164 S.E.2d 775, 778 (1968).