

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

*In re* H.L. and E.L.

No. 21-1045 (Grant County 20-JA-34 and 20-JA-35)

**MEMORANDUM DECISION**

Petitioner Mother C.L., by counsel Jeremy B. Cooper, appeals the Circuit Court of Grant County’s November 30, 2021, order terminating her parental rights to H.L. and E.L.<sup>1</sup> The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Patrick Morrissey and Katica Ribel, filed a response in support of the circuit court’s order. The guardian ad litem, Marla Zelene Harman, filed a response on behalf of the children in support of the circuit court’s order. Petitioner filed a reply. On appeal, petitioner argues that because the circuit court erred in adjudicating her, termination of her parental rights was also in error.

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 governing law, the briefs, and the record presented, the Court finds that the circuit court erred in adjudicating petitioner upon insufficient evidence, thereby rendering the termination of petitioner’s parental rights erroneous as well. This case satisfies the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure, and a memorandum decision is appropriate to vacate and remand for further proceedings consistent with this decision.

In September of 2020, the DHHR filed a petition alleging that the children were abused and neglected. The petition was clear that petitioner and the children’s father did not reside together, although it alleged that it was “unknown at this time who has legal/physical custody” of the children. At the time the petition was filed, both children resided with their grandmother, and the DHHR alleged that petitioner did not pay child support for either child. The main allegations in the petition concerned the father, who subjected the children to physical abuse, forced the children to smoke marijuana, and forced H.L. to show him her breasts on multiple occasions.

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<sup>1</sup>Consistent 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). Additionally, the proceedings in the circuit court concerned additional children that have no biological relationship to petitioner and are not at issue on appeal.

According to the petition, H.L. resided with petitioner for a short time after leaving the father's home but had "just recently moved into her grandmother's" after leaving petitioner's home "due to [petitioner] having a drug abuse problem and mold in her home." H.L. also disclosed that her now adult sister indicated that the father made petitioner "send him pictures of [the sister's] developing chest" when she was still underage. Based on the foregoing, the DHHR alleged that the children were abused and/or neglected. Following the petition's filing, petitioner waived her preliminary hearing. The same day as the preliminary hearing, petitioner tested positive for amphetamine and methamphetamine.

Following the petition's filing, the circuit court failed to take up the issue of petitioner's adjudication for approximately one year. It appears from the record that, from the outset, the parties were in agreement that petitioner was "consenting to a guardianship of her children and being dismissed from the action." Petitioner expressed a desire for this outcome at the initial multidisciplinary team ("MDT") meeting, and this was conveyed to the court at a hearing in October of 2020. As a result, petitioner appears to have become an afterthought throughout the proceedings, as the focus remained on the father's sexual abuse and the stepmother's attempts at correcting the conditions through an improvement period. Further exacerbating the issue is the fact that petitioner did not attend many hearings, although she was represented by counsel at these hearings. On this issue, petitioner sent a letter to the court in May of 2021 requesting new counsel upon allegations that her attorney failed to communicate with her, including a failure to notify her of hearing dates. It does not appear that the court took any action on this information, as the record shows that petitioner's representation remained unchanged as late as September of 2021.

The circuit court held an adjudicatory hearing in April of 2021 that focused solely on the children's father. During the hearing, the DHHR presented testimony from the West Virginia State Police officer that investigated the father. According to the officer, the father admitted to providing the children with marijuana on a routine basis and soliciting H.L. to expose herself to him. This witness did not provide any evidence concerning petitioner. Despite the fact that no evidence concerning petitioner was presented, the court found that "[t]he adult respondents failed to protect the children from pervasive drug use." The court also found that the children were abused and neglected.

As of a June of 2021 hearing, the issue of petitioner consenting to a guardianship had still not been resolved. During the hearing, petitioner's counsel again explained that the mother expressed a desire to consent to legal guardianship for the children at an MDT meeting. Counsel for the DHHR agreed, stating that "Yeah, that's correct." Upon these representations, the court agreed and stated that "We're going to do this on . . . [July] 19<sup>th</sup>."

It appears, however, that the next hearing was held in August of 2021. At the outset of the hearing, counsel for the DHHR explained that "I think we are here for dispositional relative to [the father], and we're also here for the continuing of the improvement plan—I believe, it was for [petitioner]." The guardian then asserted, "No, we're actually at disposition hearing, I believe," and correctly pointed out that it was the stepmother who was granted an improvement period, which had been terminated. The court then clarified that "we're here for a disposition on both of them; is that right?" The guardian confirmed that this was correct, although she further noted that

the order she prepared noticing the hearing was incorrect as “[i]t says disposition and hearing to approve the case plan.”

The DHHR then stated its intention to “put on quick testimony from the Department on all the people that are involved—all the parents here.” At that point, a DHHR worker testified to the parents’ participation in the proceedings. Regarding, petitioner, the following exchange took place:

Q. Has [petitioner] participated at all in this case?

A. Yes, she has participated in something. She was at the first M.D.T., where she gave indication . . . that she was willing to do a legal guardianship for [the children] . . . .

Q. Okay. But, after that, something fell through on the guardianship; is that correct?

A. I had gotten word from [petitioner’s counsel]—I think it was in early May—that it appeared that maybe there was a change of mind at the time; and then I was out of work for a month for a personal issue. When I came back, it looked like we were back on with the legal guardianship.

And, so, what it appears to be, as far as present, for a case plan or for an improvement period, [petitioner] was not into that. It was just she was willing to do a legal guardianship, so her kids would be taken care of by [relatives] . . . .

Q. So she hasn’t participated as far as any alcohol, substance abuse, parenting class, or anything along those lines?

A. She took a couple of drug tests for us—of which, she failed—and that’s it.

Later, the DHHR worker was asked “of these five parents, has any one of them fully complied with what the Department would require them to do to get their children back?” The worker responded that “[t]he only exception . . . may be [petitioner], where she was willing to do a legal guardianship at the onset of the case. . . . Outside of that, no.” *This constitutes the entirety of the testimony concerning petitioner.* Counsel for the DHHR then asked the witness what the recommendation was “as far as the children with all these parents,” to which the witness responded that it was the DHHR’s position that termination of parental rights was appropriate because there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected.

Petitioner’s counsel then questioned the witness, asking if petitioner had been adjudicated. Counsel for the DHHR explained, “That’s why I was putting on testimony.” Counsel for the DHHR further explained that “[w]e backed off.” The court then interjected that it could not terminate petitioner’s parental rights without first adjudicating her. At that point, the following discussion was had:

[PETITIONER’S COUNSEL]: She was here last hearing and indicated at that hearing she was still amendable to that legal guardianship. I thought that’s what we were doing.

THE COURT: Well, why didn’t she show up—do you know that?

[PETITIONER’S COUNSEL]: I don’t know that.

At the conclusion of the hearing, the court explained that “we’ll schedule [petitioner] for September 15<sup>th</sup>.”

In September of 2021, the court convened a hearing. The hearing began with the following exchange:

THE COURT: Where do we stand today? Or we’re here for disposition?

[COUNSEL FOR THE DHHR]: Actually, Judge, I think we’re here for adjudicatory on several of these—or disposition. We previously terminated [one of the fathers].

....

[COUNSEL FOR THE DHHR]: [Petitioner] has agreed to a legal guardianship here, so we’re looking to do an adjudicatory against [three other adult respondents].

....

[GUARDIAN]: Well, but she’s not appeared for the legal guardianship, so it was actually set for her also . . . .

At that point, counsel for the DHHR called as a witness the same DHHR worker who testified at the August of 2021 hearing. The following exchange occurred:

Q. Okay. Now, in regards to [petitioner and three other adult respondents], have they provided, to our knowledge, since the last hearing—and I believe the last hearing we had we set forth that they hadn’t provided any financial or emotional support; is that correct?

A. That is correct.

Q. And have they changed—any of this changed? Have they provided any financial, any emotional, any sort of support for these kids at all?

A. No, sir, I have not had anything, nor has the Department.

Petitioner then cross-examined the witness, who testified that petitioner “has taken a couple of drug tests,” although the witness could not recall the dates. The witness then testified that petitioner failed one of the screens, as she tested positive for “methamphetamine and something else.” The witness also confirmed that petitioner had not visited the children. When asked if petitioner was agreeable to a legal guardianship, the witness responded, “Yes, that’s where I thought we were at with her as well.”

Following the DHHR worker’s testimony, the circuit court said, “I’m going to find at this time that they are abused and/or neglected.” This constitutes the entirety of the court’s findings on the record in regard to petitioner’s adjudication. In the subsequent order, the court found that “[t]he adult respondents . . . have failed to protect the children from pervasive drug use.” The court further found that the “adult respondents” failed to materially participate in the proceedings, required services with Day Report and Community Corrections, and failed to provide emotional or financial support *during the course of the case*. Finally, the court found that petitioner failed to appear for months and had abandoned the proceedings. Accordingly, the court concluded that the children were abused and neglected.

In October of 2021, the circuit court held a dispositional hearing. Petitioner appeared in person for this hearing. During the hearing, the DHHR presented testimony from a DHHR employee who indicated that nothing had changed since the prior hearing regarding the adult respondents’ failure to provide “material support or any emotional or financial or any support to the children,” with the exception of one respondent “indicat[ing] that she was interested in doing something.” The witness further explained that the DHHR recommended termination of all adult respondents’ parental rights. Petitioner cross-examined the witness, who explained that the DHHR’s services for petitioner consisted of two drug screens, after which the witness was advised that petitioner “was willing to go to a legal guardianship.” According to the witness, he had not “had any further follow up with that.” The guardian then cross-examined the witness, who testified that there was no reasonable likelihood the conditions of abuse and neglect could be substantially corrected in the near future and that the children needed permanency. The court then stated, “I will terminate the parental rights of [all adult respondents].” At the conclusion of the hearing, petitioner expressed a desire to appeal the termination of her parental rights. The court agreed to have a different attorney appointed for petitioner, and then stated, “That’s what we need, to throw more good money down a hole.”

In the resulting dispositional order, the circuit court found that petitioner was presently unwilling or unable to provide adequately for the children’s needs and that continuation in her home was contrary to the children’s welfare because she could not provide a safe home and had, essentially, abandoned the children through her nonparticipation. The court found that petitioner failed to participate with the DHHR’s rehabilitative services and, in fact, prevented the adoption of a family case plan because of her lack of participation. Accordingly, the court found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect in the near future and that the children required permanency through adoption. Based on

the foregoing, the court terminated petitioner's parental rights to the children.<sup>2</sup> It is from the dispositional hearing that petitioner appeals.

This Court has previously established the following standard of review:

“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). Additionally, we have explained that

“[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children [alleged] to be abused or neglected has been substantially disregarded or frustrated, the resulting order . . . will be vacated and the case remanded for compliance with that process and entry of an appropriate . . . order.” Syllabus point 5, in part, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Syl. Pt. 3, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009).

On appeal, petitioner argues that the circuit court erred in adjudicating her because there was no evidence presented concerning how, exactly, she abused or neglected the children. According to petitioner, all of the extremely limited evidence that the DHHR introduced in regard to her focused on her conduct *after* the petition's filing. As such, petitioner argues that the DHHR failed to satisfy its burden of establishing conditions existing at the time of the petition's filing. We agree.

We begin by noting that the court's findings in regard to adjudication are lacking, as the court failed to differentiate between several of the parents or provide any specificity in making its determination that the children were abused and neglected. To the extent that the court found that petitioner abused the children, we note that West Virginia Code § 49-1-201 defines “[a]bused child,” in relevant part, as

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<sup>2</sup>The father's parental rights were also terminated. The permanency plan for the children is adoption in the current placement.

[a] child whose health or welfare is being harmed or threatened by: (A) A parent, guardian, or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home.

The court's finding that petitioner abused the children cannot stand because there is simply no evidence in the record that petitioner either inflicted, attempted to inflict, or knowingly allowed another person to inflict any sort of injury upon the children. While the DHHR alleged in the petition that petitioner was aware of possible past abuse the father perpetrated upon a now adult child, there is no evidence in the record establishing this to be true and the court made no findings to this effect. Importantly, "[t]he petition may not be taken as confessed." W. Va. Code § 49-4-601(k). Accordingly, it is clear that adjudicating petitioner of abusing the children was in error.

Next, West Virginia Code § 49-1-201 defines "[n]eglected child," in relevant part, as a child "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent . . . to supply the child with necessary food, clothing, shelter, supervision, medical care, or education[.]" Looking to the court's findings concerning petitioner's neglect, it is clear that the vast majority related to issues that arose *after* the petition's filing, such as petitioner's failure to participate in the proceedings, comply with services, or provide emotional or financial support *during the proceedings*. Simply put, the court's findings concerning conditions that arose after the petition's filing are insufficient upon which to base petitioner's adjudication.

Indeed, West Virginia Code § 49-4-601(i) requires that

[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 and whether the respondent is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into the order of the court. *The findings must be based upon conditions existing at the time of the filing of the petition* and proven by clear and convincing evidence.

(Emphasis added). Further, we have explained that

if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the Rules of Procedure for Child Abuse and Neglect Proceedings [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

Syl. Pt. 6, in part, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013) (citation omitted). Here, the court did not exercise this inherent authority. Because the DHHR did not amend the petition to include any allegations concerning petitioner's conduct *during the proceedings*, the court's

adjudication of petitioner upon conditions that arose *after* the petition's filing was not in compliance with West Virginia Code § 49-4-601(i).

As such, the only finding the court made in regard to petitioner's adjudication that could relate to the appropriate time period was that "[t]he adult respondents . . . have failed to protect the children from pervasive drug use." However, while it is true that the father forced the children to abuse drugs while in his home, the court took no steps to explain how this fact related to petitioner's failure to supply the children with any of the necessities set forth in West Virginia Code § 49-1-201. Even more concerning is that there was no evidence introduced upon which to base this finding. The officer that investigated the father testified that the father admitted to supplying the children with drugs, but he did not testify about petitioner's conduct. Beyond that, the only evidence concerning petitioner apparent from the record is testimony from DHHR employees concerning her conduct *after* the petition was filed, none of which related in any way to an alleged failure to protect the children from the father.

We have had cause to address a similar situation, wherein we noted that "[t]he DHHR presented scant evidence to establish that [a] Father had abused and/or neglected his child by failing to protect her from [a] Mother's substance abuse." *In re C.W.*, No. 19-0505, 2020 WL 2765855, at \*3 (W. Va. May 27, 2020)(memorandum decision). In resolving the issue, we concluded that "scant evidence does not satisfy the 'clear and convincing' level of evidence required for an adjudication." *Id.* (citing W. Va. Code § 49-4-601(i); Syl. Pt. 1, in part, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)). We find that the same applies equally to petitioner's adjudication in the matter currently before the Court. The DHHR's evidence could, generously, be described as scant, which is insufficient to support adjudication. As such, we conclude that petitioner's adjudication was in error.

Finally, we conclude that the court's failure to properly adjudicate petitioner renders termination of her parental rights erroneous as well. This Court has repeatedly stressed that

"before a court can begin to make any of the dispositional alternatives under W. Va. Code, [49-4-604], it must hold a hearing under W. Va. Code, [49-4-601], and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syllabus Point 1, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983).

Syl. Pt. 3, in part, *In re A.P.-I*, 241 W. Va. 688, 827 S.E.2d 830 (2019). Indeed, "[o]ur insistence on procedural integrity in abuse and neglect cases is not hollow formality. Our statutes, cases, and rules mandate a two-phase approach in abuse and neglect proceedings to 'support[] the constitutional protections afforded to parents in permanent child removal cases.'" *Id.* at 695, 827 S.E.2d at 837 (citation omitted). Accordingly, we must vacate the portion of the circuit court's November 30, 2021, order as it improperly terminates petitioner's parental rights.<sup>3</sup>

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<sup>3</sup>As that order terminated the parental rights of other adult respondents, we must clarify that vacation applies to petitioner only. This memorandum decision does not apply in any way to the court's actions concerning those other respondents, and the termination of their parental rights remains in effect.

For the foregoing reasons, we vacate the circuit court's November 30, 2021, order terminating petitioner's parental rights and further remand the matter for additional proceedings, beginning with a properly noticed adjudicatory hearing, consistent with the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and Chapter 49 of the West Virginia Code. Should the DHHR present additional evidence to satisfy its burden of proof concerning its allegations against petitioner as set forth in the petition, the court is directed to enter an adjudicatory order with detailed findings of fact and conclusions of law sufficient to support adjudication, if appropriate, and for further proceedings consistent with the applicable statutes and rules. The Clerk is hereby directed to issue the mandate contemporaneously herewith.

Vacated and remanded, with direction.

**ISSUED:** August 31, 2022

**CONCURRED IN BY:**

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