STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia ex rel. R.H.,
Petitioner

vs) No. 17-0002

The Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, West Virginia, The West Virginia Department of Health and Human Resources, and A.H.,
Respondents

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner R.H.,[1] by counsel James M. Pierson, seeks a writ of mandamus requiring the Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, to allow him to intervene in a pending abuse and neglect case pertaining to his grandchildren. In the alternative, the petitioner asks for a writ of mandamus requiring the circuit court to afford him a meaningful opportunity to participate in the abuse and neglect proceedings. In response, the West Virginia Department of Health and Human Resources ("DHHR"), by counsel Michael Jackson, and the children's guardian ad litem Jennifer R. Victor, assert that a writ of mandamus is not warranted.

After carefully considering the parties' written and oral arguments, we deny the petition for mandamus. As there is no substantial question of law and no right to mandamus relief, we dispose of this matter in a memorandum decision pursuant to Rule 21 of the Rules of Appellate Procedure.

[1]Because this case involves children and sensitive matters, we follow our practice of using initials to refer to the children and the parties. *See* W.Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

I. Factual and Procedural Background

This Court has not been provided with a record in this matter.[2] However, based on the briefs filed by the petitioner, the DHHR, and the guardian ad litem, we have been able to derive the following information that appears to be undisputed. The petitioner's daughter, A.H., has four children. She left some or all of these children at the petitioner's home and disappeared on April 25, 2016; reportedly, no one was able to locate or contact her after this date. D.W. is the father of two of A.H.'s children, B.W. and G.W., but D.W. has been absent from his children's lives for several years. On May 16, 2016, the DHHR filed an abuse and neglect petition alleging, inter alia, that A.H. and D.W. had abandoned their children. During a preliminary hearing on May 27, 2016, the circuit court awarded temporary legal custody of the children to the DHHR. The court formally placed B.W. and G.W. in the petitioner's home pending the outcome of the abuse and neglect proceedings.[3]

According to the petitioner, on September 20, 2016, he filed with the circuit court a "Petition for Adjudication as Psychological Parent of the Infant Children and Motion to Intervene for Purposes of Establishing Psychological Parent." The circuit court considered this motion at a hearing in November of 2016 where the petitioner provided sworn testimony. According to the petitioner, the court denied his motion to be declared a psychological parent but nonetheless allowed the petitioner's counsel to monitor the abuse and neglect proceedings. The petitioner reports that he, personally, was sent out of the courtroom, but his lawyer was permitted to stay for the remainder of the hearing. According to the DHHR and the guardian ad litem, during the November 2016 hearing, the circuit court adjudicated A.H. and D.W. as abusing parents for having abandoned their children.

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[2]The petitioner explains that he has no access to the confidential circuit court record because the circuit court denied his motion to intervene. However, he could have moved this Court for an order directing that the original record be submitted under seal for our in camera review. *See* W.Va. R. App. P. 8 (permitting party to file motion to proceed on designated record instead of appendix record). He also could have provided this Court with a copy of the motion that *he* filed in circuit court. The DHHR and the guardian ad litem provided a recitation of facts and procedural history in their respective response briefs, but did not submit appendix records under seal to support those facts.

[3]A.H.'s other two children were placed with their respective, non-abusing biological fathers, who have advised this Court that they take no position on the petition for mandamus.

The petitioner states that, thereafter, he was personally allowed to participate in a meeting of the Multidisciplinary Treatment Team ("MDT") regarding the children.[4] However, he says his lawyer was refused entrance to the meeting by another meeting participant. The petitioner reports that his lawyer tried to contact the judge's staff about access to the meeting, but was unsuccessful. There is no indication in the petitioner's brief that he ever filed a motion with the circuit court regarding his and/or his lawyer's participation in this or future MDT meetings.

According to the DHHR and the guardian ad litem, the circuit court held a dispositional hearing on January 5, 2017, and terminated the parental rights of both A.H. and D.W.[5] The DHHR and the guardian ad litem inform this Court that the permanency plan for the children B.W. and G.W. is permanent placement with the petitioner. The guardian ad litem represents that she has already recommended to the circuit court that B.W. and G.W. be adopted by the petitioner, and she is prepared to assist the petitioner in obtaining a subsidized adoption.

The petitioner filed his petition for a writ of mandamus with this Court on January 3, 2017. On January 5, 2017, he filed a motion asking this Court to stay the abuse and neglect case because he had learned the circuit court was about to hold a hearing to address the permanent placement of B.W. and G.W. Based upon the petitioner's representations, on January 5, 2017, this Court stayed the circuit court's permanency proceedings pending our review of the mandamus petition. A rule to show cause order was issued on February 14, 2017, and the DHHR and the guardian ad litem filed timely response briefs. This Court heard oral arguments on April 18, 2017, and the petition for mandamus is now ready for decision.

II. Standard of Review

It is well-settled that "[a] writ of mandamus will not issue unless three elements coexist–(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va.

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[4]Pursuant to West Virginia Code § 49-4-405(a) (2015), the MDT's duties are to, inter alia, "assess, plan and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families." Prior to disposition, the MDT advises the court on services and placement to best serve the children. *Id.* § 49-4-405(c).

[5]The guardian ad litem reports that as part of the disposition, the two non-abusing fathers and their respective children were dismissed from the abuse and neglect case.

538, 170 S.E.2d 367 (1969). This Court has also explained that "[s]ince mandamus is an 'extraordinary' remedy, it should be invoked sparingly." *State ex rel. Billings v. City of Point Pleasant*, 194 W.Va. 301, 303, 460 S.E.2d 436, 438 (1995). With this in mind, we consider the issues raised.

III. Discussion

As a preliminary matter, we are somewhat stymied to understand why, from a practical standpoint, the petitioner has elected to pursue this petition for mandamus. He obviously wishes to adopt B.W. and G.W., and that is exactly what the guardian ad litem and the DHHR have recommended and are poised to pursue. The petitioner's mandamus petition and motion to stay have delayed the very relief he seeks. These actions have also delayed the children's opportunity to obtain needed permanency in their lives. Although the petitioner may disagree with the circuit court's denial of his motion to be declared a psychological parent, he certainly does not need that designation to adopt B.W. and G.W. now that the biological parents' rights have been terminated.

Turning to the petitioner's mandamus arguments, he asserts that he has had physical custody of these children both before and during the pendency of the abuse and neglect proceedings. As such, he claims the right to be a party in the abuse and neglect case pursuant to the provisions of West Virginia Code § 49-4-601(h) (2015):

> (h) **Right to be heard.** In any proceeding pursuant to this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. Foster parents, preadoptive parents, and relative caregivers[6] shall also have a meaningful opportunity to be heard.

(footnote added). This statute gives rights to persons "having custodial or other parental rights or responsibilities to the child[,]" including the rights to testify and present and cross-

[6]A "caregiver" is "any person who is at least eighteen years of age and: (A) Is related by blood, marriage or adoption to the minor, but who is not the legal custodian or guardian of the minor; or (B) Has resided with the minor continuously during the immediately preceding period of six months or more." W.Va. Code § 49-1-204 (2015).

examine witnesses. *See id.* In contrast, the statute mandates that foster parents, preadoptive parents, and relative caregivers be given only the right to be heard. *See id.*[7]

The petitioner is not the children's biological parent and is not, at present, their adoptive parent.[8] Thus, our focus is on whether he qualifies as a "party . . . having custodial . . . rights or responsibilities" which would also entitle him to the greater rights bestowed by West Virginia Code § 49-4-601(h). For purposes of Chapter 49 of the West Virginia Code, "custodian" is defined as "a person who has or shares actual physical possession or care and custody of a child, regardless of whether that person has been granted custody of the child by any contract or agreement." W.Va. Code § 49-1-204 (2015). In *Bowens v. Maynard*, 174 W.Va. 184, 324 S.E.2d 145 (1984), this Court held that a person who was given legal custody of five children by means of a written document executed by the children's biological mother, had the right to intervene in an ongoing abuse and neglect proceeding against the biological parents. However, this Court later clarified *Bowens* to explain that the "custody" discussed in this context refers to a person who became a child's custodian "*prior* to the initiation of abuse and neglect proceedings[.]" *In re Jonathan G.*, 198 W.Va. 716, 727, 482 S.E.2d 893, 904 (1996). The Court confirmed that a person who obtains physical custody *after* the initiation of abuse and neglect proceedings–such as a foster parent–does not enjoy the same statutory right of participation as is extended to parents and pre-petition custodians. *Jonathan G.*, 198 W.Va. at 729, 482 S.E.2d at 906. This conclusion is supported by the two-tiered framework of West Virginia Code § 49-4-601(h). Thus, for the petitioner to qualify as a custodian under § 49-4-601(h) where he would have the right to be heard, testify, and call witnesses in the abuse and neglect proceedings, he must have held custodial rights to the children prior to the initiation of the abuse and neglect petition.

The meager facts derived from the parties' briefs in this mandamus case simply do not establish the existence of a pre-petition custodianship. At most, we can determine that the

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[7]West Virginia Code § 49-4-601 gives "custodians" other rights, as well. For example, the abuse and neglect petition and a notice of hearing must be served upon "both parents and any other custodian" of the child. *Id.* § 49-4-601(e)(1). Furthermore, "[n]otice shall be given to . . . any relative providing care for the child." *Id.* § 49-4-601(e)(2). The statute also provides that the child, the parents, and the child's "legally established custodian or other persons standing in loco parentis" have the right to be represented by counsel. *Id.* § 49-4-601(f)(1).

[8]"'Parent' means an individual defined as a parent by law or on the basis of a biological relationship, marriage to a person with a biological relationship, legal adoption or other recognized grounds." W.Va. Code § 49-1-204. "Parental rights" is defined as "any and all rights and duties regarding a parent to a minor child." *Id.*

children were left at the petitioner's home for a three-week period before the abuse and neglect petition was filed. Moreover, considering the title the petitioner gave to his circuit court motion, it appears his request to intervene was premised solely upon his assertion of psychological parenthood. Whether he presented sufficient facts to prove he was a psychological parent was a matter for the circuit court to weigh and is beyond the scope of this petition for mandamus.[9] Based on the information and argument provided to this Court, we cannot conclude that the petitioner has a clear legal right to intervene as a party in the abuse and neglect action. *See Kucera*, 153 W.Va. at 539, 170 S.E.2d at 367, syl. pt. 2 (holding that for mandamus to lie, petitioner must have clear legal right to relief sought).

In addition, the petitioner has not established that he lacks an adequate remedy. *See id.* (holding that petitioner must lack other adequate remedy for writ of mandamus to issue). The petitioner could appeal the circuit court's order denying his motion to intervene. *See e.g., In re M.H.*, No. 15-0804, 2016 WL 3449231 (W.Va. June 16, 2016) (memorandum decision) (considering appeal of relative who alleged circuit court erroneously denied motion to intervene in abuse and neglect case); *In re S.S.*, No. 14-1039, 2015 WL 1332668 (W.Va. Mar. 16, 2015) (memorandum decision) (same); *In re A.C.*, No. 12-0726, 2012 WL 5205707 (W.Va. Oct. 22, 2012) (memorandum decision) (same).

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[9]This Court has not been provided with copies of the petitioner's motion or of any order denying the same, thus we are uncertain of the basis for the circuit court's ruling. However, the guardian ad litem represents that during the November 2016 hearing, the petitioner did not testify to sufficient facts to establish that he was the children's psychological parent. As we have explained, "a psychological parent is one who essentially serves as a second parent to a child[.]" *In re Senturi N.S.V.*, 221 W.Va. 159, 167, 652 S.E.2d 490, 498 (2007) (citations omitted). Specifically, a "psychological parent" is

> a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. . . . The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.

Syl. Pt. 3, in part, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005). In "exceptional cases" a court, in its discretion, may allow a psychological parent to intervene in a custody proceeding. *Id.* at 630, 619 S.E.2d at 143, syl. pt. 4. The issue before the circuit court during the November 2016 hearing was the adjudication of the biological parents; it was not a custody hearing.

In his alternative request for relief, the petitioner asks this Court to require the circuit court to provide him with a meaningful opportunity to be heard in the abuse and neglect proceedings. We agree that the petitioner does have a right to be heard regarding the children's permanency. He is the person currently caring for B.W. and G.W., and he has been providing this full-time care during the one-year period that the abuse and neglect case has been pending, if not longer. As such, he is uniquely situated to know the children's needs. It is also undisputed that he is the children's prospective adoptive parent. He is legally entitled to the "meaningful opportunity to be heard" that must be accorded foster parents, preadoptive parents, and relative caregivers pursuant to West Virginia Code § 49-4-601(h).

In *Jonathan G.*, while refusing to allow long-term foster parents to intervene as parties in an abuse and neglect case, the Court did address their right to a meaningful opportunity to be heard. 198 W.Va. at 729, 482 S.E.2d at 906. In short, while a circuit court must allow the foster parents to be heard, the level and type of their participation is left to the circuit court's sound discretion:

> The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with *Bowens v. Maynard*, 174 W.Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.

Jonathan G., 198 W.Va. at 719, 482 S.E.2d at 896, syl. pt. 1. Similarly, in *Kristopher O. v Mazzone*, 227 W.Va. 184, 706 S.E.2d 381 (2011), this Court considered a petition for writ of prohibition filed by foster parents who had unsuccessfully attempted to intervene in an abuse and neglect case. Although the Court declined to address the foster parents' motion to intervene, we concluded that the circuit court exceeded its legitimate powers and violated statutory law by denying the fosters parents the opportunity to participate in the permanency hearing. *Id.* at 191, 706 S.E.2d at 388. These principles would extend to preadoptive parents and relative caregivers who are listed together with foster parents in West Virginia Code § 49-4-601(h).

By statute, the petitioner and his attorney are also entitled to attend MDT meetings. West Virginia Code § 49-4-405(b) (2015) provides that for child abuse and neglect cases, "the treatment team consists of" several people including "[t]he child's parent or parents,

guardians, any copetitioners, custodial relatives of the child, foster or preadoptive parents[.]" *Id.* § 49-4-405(b)(3). Because he has had physical custody of the children pursuant to a court order since the abuse and neglect proceedings began, the petitioner qualifies for participation on the treatment team as the children's custodial relative or foster parent. In addition, the treatment team consists of "[a]ny attorney representing an adult . . . member of the treatment team[.]" *Id.* § 49-4-405(b)(4).

The problem with the petitioner's alternate request for relief is his failure to establish that the circuit court has, in fact, denied him a meaningful opportunity to be heard. The petitioner has told us that he was permitted to testify at the adjudicatory hearing, his lawyer was permitted to monitor the remainder of that hearing, and the petitioner personally participated in a meeting of the MDT. There has not yet been a permanency hearing because the proceedings were stayed upon the petitioner's motion. Moreover, although the petitioner reports that his lawyer was excluded from the MDT meeting by another meeting participant, the proper avenue for relief would have been to file a motion with the circuit court–not simply attempt an informal communication with the judge's staff. This Court is confident that when the abuse and neglect proceedings are resumed, the circuit court will afford the petitioner a meaningful opportunity to be heard as part of the permanency decision-making process.

IV. Conclusion

For all of the foregoing reasons, we conclude the petitioner has failed to establish both a clear legal right to mandamus relief and the lack of another adequate remedy. Accordingly, we deny the petition for a writ of mandamus and immediately lift the stay. Because of the importance of obtaining permanency for these children in an expeditious manner, the Clerk of this Court is directed to issue the mandate forthwith.

Writ Denied.

ISSUED: May 5, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker