IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2019 Term

No. 19-0068

IN RE: T. M. AND S. M.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal from the Circuit Court of Webster County
The Honorable Jack Alsop, Judge
Case Nos. 17-JA-121 and 122

REVERSED AND REMANDED WITH DIRECTIONS

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JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.' Syl., *McCormick v. Allstate Ins. Co*., 197 W. Va. 415, 475 S.E.2d 507 (1996)." Syl. Pt. 1, *In re S. W.*, 236 W. Va. 309, 779 S.E.2d 577 (2015).

2. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

3. Pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, the circuit court retains jurisdiction to oversee the custodial placement of children subject to abuse and neglect proceedings at the close of those proceedings, irrespective of the disposition of the petition under West Virginia Code § 49-4-604(b) (2019), as well as any future custody, visitation, or support proceedings. Only where a petition has been dismissed for failure to state a claim or children are returned to cohabitating parents may the family court regain jurisdiction for any future proceedings involving the children.

4. The mandatory deferral of jurisdiction over the children involved in abuse and neglect proceedings to the circuit court necessarily requires the circuit court to make any custodial and decision-making allocations the family court was foreclosed from making if the children are reunified with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings.

5. A circuit court is obligated to apply the factors and considerations set forth in West Virginia Code §§ 48-9-206 (2018) and -207 (2001) in allocating custodial and decision-making responsibilities when reunifying children subject to abuse and neglect proceedings with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings. Where findings of abuse and/or neglect have been established, the circuit court must further employ the mandatory considerations and procedures set forth in West Virginia Code § 48-9-209 (2016), in order to protect the children from further abuse and/or neglect.

WORKMAN, J.:

This is an appeal by the non-offending mother, A. M. [1] (hereinafter "petitioner"), of the circuit court's dispositional order giving primary custody of the two children, T. M. and S. M., to respondent father B. M. (hereinafter "respondent"), following his successful completion of an improvement period in this abuse and neglect proceeding. The circuit court found that the award of primary custody to respondent was in the children's best interests based upon their expressed preference to reside with respondent and its conclusion that he provided a more stable environment for the children. Petitioner asserts that the circuit court erred in its placement determination and, in particular, improperly gave deference to the children's expressed preference where their preference allegedly did not rise to the level of "firm and reasonable" as characterized in West Virginia Code § 48-9-206(a)(2) (2018).

Upon careful review of the briefs, the appendix record, the arguments of the parties, and the applicable legal authority, we find that the circuit court failed to give proper consideration to the custodial, decision-making, and limiting factors set forth in West Virginia Code §§ 48-9-206, 207, and 209 in making its custodial allocation upon dismissal of the abuse and neglect petition against respondent. We therefore reverse and remand

[1] Consistent with our practice in cases involving sensitive facts, we identify the parties by initials only. *See In re Jeffrey R.L.*, 190 W.Va. 24, 26 n.1, 435 S.E.2d 162, 164 n.1 (1993).

with instructions for the circuit court to conduct an analysis of those factors and enter an order allocating custodial and decision-making responsibility which complies with the requirements of West Virginia Code §§ 48-9-206, 207, and 209. In so doing, the circuit court is further directed to ensure proper consideration of the children's preferences, as set forth more fully herein.

I. FACTS AND PROCEDURAL HISTORY

The Department of Health and Human Resources (hereinafter "DHHR") filed an abuse and neglect petition in December, 2017, against respondent after he overdosed on pills in an effort to commit suicide and threatened to "shoot up" anyone who approached his home. The children, T. M. and S. M. (then ages 10 and 13, respectively), were home at the time; petitioner and the children wrestled a rifle away from him and S. M. jumped on respondent's back to prevent him from retrieving a pistol from his vehicle. Respondent was apparently upset that petitioner had been involved with another man. After this incident, petitioner left the home, moving with the children into her mother's home, and respondent was hospitalized due to his overdose.

Respondent admitted to all of the allegations in the petition and was adjudicated abusive and neglectful. He then began an improvement period, consisting of a "treatment program,"[2] and was apparently successful in the improvement period. At all

[2] The record is not clear on the precise terms of respondent's improvement period.

times, petitioner was designated as a non-offending parent and, during the pendency of the proceedings, was given primary physical custody of the children, with visitation to respondent.

During the course of the proceedings, petitioner moved from her mother's home to her sister's home because there was insufficient space at her mother's house. Subsequently, petitioner's boyfriend was apparently found to have been engaging in the solicitation of minors via the internet and was criminally charged. Although the record is not well-developed with regard to this issue, it appears that upon this discovery, petitioner separated from the boyfriend, but in a hearing before the circuit court lied about having continued contact with him.[3] Petitioner was convicted of a misdemeanor as a result of this misrepresentation and spent a night in jail, losing her job as a result.[4] Petitioner apparently subsequently left her sister's home and moved in with a different boyfriend in July, 2018 and lived with this boyfriend in his home at the time of the dispositional hearing.[5]

[3] The circuit court was obviously familiar with this incident and therefore short-circuited much discussion regarding it during the dispositional hearing. However, it appears that petitioner responded to a social media message from the boyfriend and lied about having this contact with him in the circuit court.

[4] Notably, respondent faced no criminal charges for the incident giving rise to the abuse and neglect petition.

[5] Updates to the Court indicate that petitioner no longer resides with this boyfriend and now resides with a different boyfriend.

During the course of the abuse and neglect proceedings, petitioner and respondent filed for divorce in family court. A divorce was granted in March, 2018, by the family court. By way of property settlement, petitioner gave up rights to the marital home, where she had lived with respondent for fifteen years, but kept a vehicle, camper, boat, and four-wheeler. With regard to the children, the family court order notes only that the circuit court had jurisdiction over them.

Upon respondent's successful completion of his improvement period, the circuit court held a dispositional hearing on November 29, 2018. Testimony was taken from petitioner and respondent, the visitation supervisor, the children's therapist, and a Child Protective Services (hereinafter "CPS") representative. The children did not testify, nor did the court examine them in camera.

Petitioner testified regarding the children's performance in school and their good relationship with her boyfriend. She testified that prior to her separation from respondent, she provided the majority of the caretaking for the children, despite both she and respondent working. She requested full custody, with the children residing with her during the week and spending weekends with respondent. She testified that she was not currently working and preferred to be a stay-at-home mother. When questioned about where she would reside if she broke up with her boyfriend, petitioner indicated she had no plan in place. Petitioner testified that she believed that the children had expressed a

preference to live with respondent because he had cell and internet service at his home and she did not.

Respondent testified that he had worked for the local public service district for a year and a half and that his employer was quite lenient in permitting time off such that he could accommodate the children's activities and school schedule. He also stated that he had an adult daughter who could assist in caretaking during the summer. Respondent further testified that he had a girlfriend who also had children and stayed at his house when she did not have custodial time with her children. When asked if he planned to move his girlfriend into his home, respondent indicated: "I ain't going to say that it won't happen[.]" Respondent assured the court he anticipated no further suicidal incidents because he had completed therapy and understood he had "resources" in the future to deal with stress.

The CPS representative indicated that the children's placement preferences had vacillated throughout the proceedings, but both ultimately indicated a desire to live with respondent. When asked the children's reasoning for this preference, the CPS representative testified that "[t]hey have not given a reason, they just say they want to go live with their dad." When pressed further, the CPS representative testified, "they just want to go live with their dad. There was no specific—because I asked them if something happened or if there is anything going on, and they said no, they just want to go live at their

dad [sic]." Accordingly, the DHHR recommended that legal and physical custody be given to respondent, with visitation for petitioner.

The guardian ad litem likewise represented to the court that initially, both children wanted equally-shared custody with their parents; however, T. M. subsequently expressed a preference to live primarily with respondent. S. M. initially expressed a desire to live primarily with petitioner, but did not want to be separated from T. M., who wanted to live with respondent. Ultimately, just before the dispositional hearing, both expressed to the guardian ad litem that they wanted to live with respondent. The guardian ad litem indicated the children had a strong bond with both parents and confirmed that they were unable to articulate why they preferred to live with respondent. She nevertheless recommended that respondent be awarded primary custody. As a result of the foregoing testimony, petitioner argued that the children's preference was not "firm and reasonable," as required by West Virginia Code § 48-9-206(a)(2) and/or was based on an insubstantial reason, *i.e.* the desire for cell and internet service.

At the close of the hearing, the circuit court dismissed the petition against respondent and stated that it was retaining jurisdiction over the children pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. In that regard, the circuit court found that the emotional trauma the children endured due to respondent's suicide attempt was "significant," but that throughout the proceedings, petitioner had "place[d] her primary interest above those of her children." The court

discussed petitioner's misrepresentation regarding contact with the prior boyfriend, noted her relinquishment of the family home in the divorce, and criticized her living situation, stating that it had "a substantial risk of being unstable in light of the conduct of the mother, her constant moving[6] and failure to obtain stability." (footnote added). The court then found that the children's best interests would be served by awarding primary custody to respondent, but with a shared parenting schedule with petitioner. The schedule provided for petitioner to have the children three weekends a month during the school year, splitting holidays between the parties, and petitioner having the children during the summer except for every other weekend and two, one-week vacations with respondent. This appeal followed.

II. STANDARD OF REVIEW

As is well-established,

> "[w]hen this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl., *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

Syl. Pt. 1, *In re S. W.*, 236 W. Va. 309, 779 S.E.2d 577 (2015). However, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an

[6] Petitioner's initial move out of the family home appears occasioned by respondent's suicide attempt. She then moved a second time at the suggestion of respondent and/or the circuit court that there was inadequate space in her mother's home. The final move was into her boyfriend's home. *But see* n.5, *supra*.

interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

III. DISCUSSION

On appeal, petitioner asserts that the circuit court erred in granting primary custody to respondent over a non-offending parent on the basis of the children's preferences, which preferences failed to rise to the level of "firm and reasonable" as required in West Virginia Code § 48-9-206(a)(2).[7] We find that this assignment of error as characterized *presumes* the applicability of Chapter 48's child custody statutes and therefore presents the threshold legal issue of whether and under what circumstances those statutory directives are applicable to custodial placement determinations which may arise in the course of abuse and neglect proceedings.[8]

[7] West Virginia Code § 48-9-206(a)(2) provides that an allocation of custodial responsibility should accommodate,

> if the court determines it is in the best interests of the child, the *firm and reasonable* preferences of a child who is 14 years of age or older, and with regard to a child under 14 years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference the weight warranted by the circumstances[.]

(emphasis added).

[8] The Court ordered the parties to provide supplemental briefing on this issue.

More specifically, the Court must determine which standard the circuit court is obligated to apply to make a custodial placement determination where there is a dispositional dismissal of an abuse and neglect petition and reunification with non-cohabitating parents—the broad, "best interests" standard utilized in making placement determinations in abuse and neglect proceedings pursuant to Chapter 49 or the statutory considerations mandated in certain of the "Allocation of Custodial Responsibility and Decision-Making Responsibility of Children" statutes set forth in the domestic relations portion of the Code—West Virginia Code §§ 48-9-206 through 209.

A. Jurisdiction to Determine Custodial Placement at the Close of Abuse and Neglect Proceedings

Before determining the applicability of Chapter 48's custodial allocation provisions, we find it appropriate to first examine the basis of the circuit court's jurisdiction to allocate custodial responsibility upon dismissal of an abuse and neglect petition. West Virginia Code § 49-4-604(b) (2019), in part, provides for the following hierarchy of dispositions for an abuse and neglect petition:

> *Disposition decisions*. -- The court shall give precedence to dispositions in the following sequence:
>
> (1) *Dismiss the petition*;
>
> (2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;
>
> (3) Return the child to his or her own home under supervision of the department;

> (4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;
>
> (5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the care, custody, and control of the state department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court.
>
> ***
>
> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

(emphasis added). In this case, the circuit court availed itself of "Disposition 1," *i.e.* dismissal of the petition given respondent's successful completion of his improvement period. Notably, neither this statute nor the remainder of West Virginia Code § 49-4-601 *et seq*. regarding "Procedures in Cases of Child Neglect or Abuse" provide further guidance regarding custodial allocation in the event of a dispositional dismissal where the child is reunified with one or more adjudicated parents.

In this case, the family court which heard the parties' divorce appropriately deferred jurisdiction of the children to the circuit court where the abuse and neglect action was pending. Rule 48(d) of the Rules of Practice and Procedure for Family Court provides

that the family court loses jurisdiction over children who are or become involved in abuse and neglect proceedings:

> The family court shall retain full jurisdiction of proceedings until an abuse or neglect petition is filed. If an abuse or neglect petition is filed and the family court has entered an order regarding the allocation of custodial and decision-making responsibility between the parents, orders of the circuit court shall supercede and take precedence over any order of the family court regarding the allocation of custodial and decision-making responsibility between the parents. If the family court has not entered an order for the allocation of custodial and decision-making responsibility between the parents, the family court shall stay any further proceedings concerning the allocation of custodial and decision-making responsibility between the parents and defer to the orders of the circuit court.

See also W. Va. Code § 51-2A-2(c) (2018) (removing family court jurisdiction over "allocation of custodial and decision-making responsibility" in event of filing of an abuse and neglect petition). As the family court appropriately concluded, it had no jurisdiction to entertain the allocation of custodial or decision-making responsibilities it would otherwise have been required to determine to finalize the divorce, given the pendency of the abuse and neglect proceedings.

Commensurately, at the close of the abuse and neglect proceedings, the circuit court expressed its intention to retain jurisdiction over the custodial placement of the children pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 6 states, in part:

> Each child abuse and neglect proceeding shall be maintained on the circuit court's docket until *permanent placement* of the child has been achieved. The court retains

> exclusive jurisdiction over placement of the child while the case is pending, as well as over any subsequent requests for modification, including, but not limited to, changes in permanent placement or visitation . . . .

(emphasis added). While the term "permanent placement" typically envisages placement of a child outside of the construct of the parental relationship, by definition, it also includes reunification with a parent, guardian or custodian: "Permanent placement" is defined to include situations where "[t]he petition has been dismissed and the child has been returned to the home . . . with no custodial supervision by the Department[.]" W. Va. R. Proc. for Child Abuse and Neglect Proceedings 3(n)(1).

Therefore, Rule 6 provides that the circuit court retains jurisdiction for purposes of permanent placement, even where a petition is dismissed and the children are reunified with parents, guardians, or custodians. In addition to placement at the conclusion of abuse and neglect proceedings, Rule 6 further provides for continuing jurisdiction over the children for "any *subsequent* requests for modification, including, but not limited to, changes in permanent placement or visitation[.]" (emphasis added).

During oral argument, petitioner's counsel raised the prospect of a return to family court for the determination of custodial allocation where a petition is dismissed and residual custodial issues remain. However, Rule 6 provides only limited circumstances under which the family court may regain jurisdiction over children once an abuse and

neglect proceeding is initiated—and only for purposes of *future* proceedings. This aspect of the Rule provides that:

> . . . if the petition is *dismissed for failure to state a claim* under Chapter 49 of the W. Va. Code, or [] if the petition is dismissed, and the child is thereby ordered placed in the legal and physical custody of both of his/her *cohabitating* parents without any visitation or child support provisions, then any *future* child custody, visitation, and/or child support proceedings between the parents may be brought in family court. However, should allegations of child abuse and/or neglect arise in the family court proceedings, then the matter shall proceed in compliance with Rule 3a.

Id. (emphasis added). Therefore, *only* upon dismissal of a petition for either 1) failure to state a claim[9]; or 2) where legal and physical custody are returned to *cohabitating* parents, may the family court regain jurisdiction for the resolution of "*future* child custody, visitation, and/or child support proceedings[.]" *Id*. (emphasis added).

These narrow exceptions, along with the mandate that the case remain active until permanent placement is attained, leads inescapably to the conclusion that once an abuse and neglect petition is filed, the circuit court retains jurisdiction to oversee the placement of children at the close of the proceedings, irrespective of the particular disposition of the petition and even in the event of reunification with parents, guardians, or custodians, cohabitating or not. Moreover, the circuit court retains jurisdiction for *future*

[9] The term "failure to state a claim" as used in this statute is undefined and rather obtuse. Although inartful, it does appear to equate to dismissal of abuse and neglect allegations when they are dismissed with no finding of abuse and neglect.

custodial, visitation, or support proceedings involving these children unless the underlying petition is dismissed as unfounded or children are returned to cohabitating parents, guardians, or custodians.

We therefore clarify that pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, the circuit court retains jurisdiction to oversee the custodial placement of children subject to abuse and neglect proceedings at the close of those proceedings, irrespective of the disposition of the petition under West Virginia Code § 49-4-604(b), as well as any future custody, visitation, or support proceedings. Only where a petition has been dismissed for failure to state a claim or children are returned to cohabitating parents may the family court regain jurisdiction for any future proceedings involving the children.

This transfer of responsibility for certain traditional family court functions to the circuit court in the context of abuse and neglect proceedings is not without precedent. In *West Virginia Department of Health & Human Resources, Bureau for Child Support Enforcement v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005), this Court addressed which court—the family court or circuit court—is vested with authority and responsibility for the entry of child support orders during the pendency of abuse and neglect proceedings. Based upon the transfer of jurisdiction from family court to circuit court, the *Smith* Court found that despite the jurisdictional statute's silence on whether the family court must defer to the circuit court on issues of support, entry of such orders necessarily falls to the circuit

court for entry after an abuse and neglect proceeding is instituted: "We believe that when an abuse or neglect petition has been filed, the family courts are divested of jurisdiction to establish a support obligation for the child and that the duty to establish a support obligation lies solely with the circuit court." *Id.* at 486, 624 S.E.2d at 923.[10]

Similarly, where, as here, children are returned to parents, guardians, or custodians who are no longer cohabitating at the close of the abuse and neglect proceedings, the obligation to allocate custodial responsibility falls to the circuit court given the divestment of jurisdiction in the family court to do so. We therefore hold that the mandatory deferral of jurisdiction over the children to the circuit court necessarily requires the circuit court to make the custodial and decision-making allocations the family court was foreclosed from making. The question then becomes whether this placement or allocation of custody is governed by the precepts established in our abuse and neglect caselaw or the statutory considerations mandated for the allocation of child custody and decision-making responsibilities. [11]

[10] The requirement of a court to enter a support order where a child is subject to abuse and neglect proceedings was clarified and codified at West Virginia Code § 49-4-801(c) (2015) and Rule 16a of the Rules of Procedure for Child Abuse and Neglect Proceedings subsequent to *Smith*.

[11] The Court recognizes that children may likewise—and frequently do—enter abuse and neglect proceedings under some sort of informal custodial division between non-cohabitating parents. This opinion does not purport to speak to the issue of whether those children and non-cohabitating parents must be compelled to enter a formal custodial and

B. Standards to be Utilized Following Reunification with Non-Cohabitating Parents at the Conclusion of Abuse and Neglect Proceedings

As indicated above, petitioner's reliance on the "firm and reasonable" preference standard contained in West Virginia Code § 48-9-206(a)(2), implicitly suggests she advocates for application of the child custody considerations contained in West Virginia Code § 48-9-206; in her supplemental briefing she expressly argues for the statute's applicability.

Conversely, the DHHR insists that mandatory application of West Virginia Code § 48-9-206 is improper and may serve to undermine the holistic statutory scheme established by Chapter 49's abuse and neglect procedures.[12] It argues that had the Legislature intended the use of these considerations in the course of abuse and neglect proceedings, it would have explicitly said as much. The DHHR therefore urges that

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decision-making allocation under Chapter 48 at the close of abuse and neglect proceedings. We leave for another day the exigencies of such a requirement and limit our holdings and analysis herein to the specific issue of the governance of Chapter 48 custodial provisions where parents have sought judicial allocation of custody through divorce proceedings, but the family court has lost jurisdiction to make those determinations due to the pendency of abuse and neglect proceedings.

[12] Notably, the DHHR did not initially advocate against application of Chapter 48 considerations, acquiescing to petitioner's position that the "firm and reasonable" language was applicable by arguing that the children's expressed preferences satisfied that statutory language. It was only upon being requested by this Court to provide supplemental briefing on the specific question as to whether Chapter 48's child custody statutes were applicable that the DHHR took a contrary position.

custodial allocations necessitated at the close of an abuse and neglect case continue to be singularly governed by a broad "best interests" analysis and without consideration of the specific criteria set forth in Chapter 48.[13] *See In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (1993) ("Although the rights of the natural parents to the custody of their child and the interests of the State as *parens patriae* merit significant consideration by this Court, the best interests of the child are paramount."); *see also* Syl. Pt. 3, *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998) (holding permanent placement options must yield to best interests of child); Syl. Pt. 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005) (holding grandparent placement preference yields to best interests of child); Syl. Pt. 4, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991) (holding best interests guides determination of continued sibling contact); Syl. Pt. 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995) (establishing best interests analysis for post-termination visitation). Respondent argues that the circuit court effectively considered the factors contained in West Virginia Code § 48-9-206 and that, in any event, the outcome is the same irrespective of which standard is used.

The DHHR's argument that these considerations have no place in the abuse and neglect construct compels the Court to assess the qualitative differences between a broad abuse and neglect "best interests" analysis and the more specific considerations

[13] West Virginia Code §§ 48-9-206, 207, and 209 similarly employ a "best interests" analysis in some measure; however, these statutes require the initial consideration of more specific factors, as discussed more fully *infra*.

contained in Chapter 48's statutory scheme, as well as whether the statutory language itself purports to govern this scenario. The DHHR suggests that courts should not be constrained by any such statutory parameters in the wake of abuse and neglect proceedings and that the multi-disciplinary recommendations arising from those proceedings should predominate in any custodial determination.

In traditional domestic relations proceedings, allocation of custodial responsibility for children is governed by West Virginia Code § 48-9-206(a), as follows:[14]

[14] Allocation of decision-making responsibility—which appears not to have been determined by the circuit court at all—is governed by West Virginia Code § 48-9-207 (2001) and guided by the custodial assessment set forth in Section 206:

> (a) Unless otherwise resolved by agreement of the parents under section 9-201, the court shall allocate responsibility for making significant life decisions on behalf of the child, including the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interest, in light of:
>
> (1) The allocation of custodial responsibility under section 9-206 [§48-9-206] of this article;
>
> (2) The level of each parent's participation in past decision-making on behalf of the child;
>
> (3) The wishes of the parents;
>
> (4) The level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child;
>
> (5) Prior agreements of the parties; and

(a) Unless otherwise resolved by agreement of the parents under § 48-9-201 of this code or unless harmful to the child, the court shall allocate custodial responsibility so that, except to the extent required under § 48-9-209 of this code, the custodial time the child spends with each parent may be expected to achieve any of the following objectives:

(1) To permit the child to have a meaningful relationship with each parent who has performed a reasonable share of parenting functions;

(2) To accommodate, if the court determines it is in the best interests of the child, the firm and reasonable preferences of a child who is 14 years of age or older, and with regard to a child under 14 years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference the weight warranted by the circumstances;

(3) To keep siblings together when the court finds that doing so is necessary to their welfare;

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(6) The existence of any limiting factors, as set forth in section 9-209 [§ 48-9-209] of this article.

(b) If each of the child's legal parents has been exercising a reasonable share of parenting functions for the child, the court shall presume that an allocation of decision-making responsibility to both parents jointly is in the child's best interests. The presumption is overcome if there is a history of domestic abuse, or by a showing that joint allocation of decision-making responsibility is not in the child's best interest.

(c) Unless otherwise provided or agreed by the parents, each parent who is exercising custodial responsibility shall be given sole responsibility for day-to-day decisions for the child, while the child is in that parent's care and control, including emergency decisions affecting the health and safety of the child.

(4) To protect the child's welfare when, under an otherwise appropriate allocation, the child would be harmed because of a gross disparity in the quality of the emotional attachments between each parent and the child, or in each parent's demonstrated ability or availability to meet a child's needs;

(5) To take into account any prior agreement of the parents that, under the circumstances as a whole, including the reasonable expectations of the parents in the interest of the child, would be appropriate to consider;

(6) To avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(7) To apply the principles set forth in § 48-9-403(d) of this code if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of custodial responsibility that would otherwise be ordered under this section;

(8) To consider the stage of a child's development; and

(9) To consider which parent will encourage and accept a positive relationship between the child and the other parent, including which parent is more likely to keep the other parent involved in the child's life and activities.

This framework sets forth the essential criteria which, in the collective wisdom of the Legislature, best serve a child's interests. *See* W. Va. Code § 48-9-102(a) (2001) ("The primary objective of this article is to serve the child's best interests . . .").[15]

However, in establishing these criteria, the Legislature did not endeavor to prohibit a court from utilizing its discretion where these particular factors do not best serve a child's interests. Its expression of public policy in West Virginia Code § 48-9-101(b) (2001) states precisely the opposite: "The Legislature finds and declares that is the public policy of this State to assure that the best interest of children is the court's primary concern

[15] In describing its objectives, the Legislature expressed that a child's best interests are served by facilitating:

> (1) Stability of the child;
>
> (2) Parental planning and agreement about the child's custodial arrangements and upbringing;
>
> (3) Continuity of existing parent-child attachments;
>
> (4) Meaningful contact between a child and each parent;
>
> (5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
>
> (6) Security from exposure to physical or emotional harm; and
>
> (7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

W. Va. Code § 48-9-102(a).

in allocating custodial and decision-making responsibilities between parents who do not live together." Moreover, it codified the "best interests" analysis urged by the DHHR and empowered the courts to utilize this standard in fashioning a custodial allocation where inflexible application of these factors would prove harmful to a child. West Virginia Code § 48-9-206(c) expressly provides that:

> *[i]f the court is unable to allocate custodial responsibility under § 48-9-206(a) of this code because the allocation under § 48-9-206(a) of this code would be harmful to the child*, or because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a pattern of caretaking sufficiently dispositive of the issues of the case, *the court shall allocate custodial responsibility based on the child's best interest, taking into account the factors in considerations that are set forth in this section and in § 48-9-209* and § 48-9-403(d) of this code and preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed.

(emphasis added).

Additionally, we need look no further than West Virginia Code § 48-9-209 (2016), entitled "Parenting plan; limiting factors," to conclude that the Legislature specifically contemplated the consideration of abuse and neglect findings in allocating custodial responsibility. Section 209 specifically requires a court to consider findings of abuse and neglect in determining custodial allocations and make appropriate accommodations therefor by imposing express written limitations which seek to protect a child from prospective harm. Section 209 provides:

(a) If either of the parents so requests, or *upon receipt of credible information thereof*, the court *shall* determine whether a parent who would otherwise be allocated responsibility under a parenting plan:

(1) Has *abused, neglected or abandoned a child*, as defined by state law;

* * *

(b) If a parent is found to have engaged in any activity specified by subsection (a) of this section, the court *shall* impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to:

(1) An adjustment of the custodial responsibility of the parents, including but not limited to:

(A) Increased parenting time with the child to make up for any parenting time the other parent lost as a result of the proscribed activity;

(B) An additional allocation of parenting time in order to repair any adverse effect upon the relationship between the child and the other parent resulting from the proscribed activity; or

(C) The allocation of exclusive custodial responsibility to one of them;

(2) Supervision of the custodial time between a parent and the child;

(3) Exchange of the child between parents through an intermediary, or in a protected setting;

(4) Restraints on the parent from communication with or proximity to the other parent or the child;

(5) A requirement that the parent abstain from possession or consumption of alcohol or nonprescribed drugs while

> exercising custodial responsibility and in the twenty-four hour period immediately preceding such exercise;
>
> (6) Denial of overnight custodial responsibility;
>
> (7) Restrictions on the presence of specific persons while the parent is with the child;
>
> (8) A requirement that the parent post a bond to secure return of the child following a period in which the parent is exercising custodial responsibility or to secure other performance required by the court;
>
> (9) A requirement that the parent complete a program of intervention for perpetrators of domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or
>
> (10) Any other constraints or conditions that the court deems necessary to provide for the safety of the child, a child's parent or any person whose safety immediately affects the child's welfare.

(emphasis added).

Section 209's provisions bestow broad discretion on a court making a custodial allocation to ensure that a child is protected from any harm the abuse and neglect findings potentially forecast. Further, the custodial and decision-making responsibility allocation statutes, West Virginia Code §§ 48-9-206 and 207, state that their provisions are expressly limited by any such abuse and neglect findings as directed in Section 209. *See* W. Va. Code § 48-9-206(a) (". . . [T]he court shall allocate custodial responsibility so that, *except to the extent required under § 48-9-209 of this code*, the custodial time the child spends with each parent may be expected to achieve any of the following objectives . . . ."

(emphasis added)); W. Va. Code § 48-9-207(a) and (a)(6) (". . . [T]he court shall allocate responsibility for making significant life decisions on behalf of the child . . . in accordance with the child's best interest, in light of . . . *[t]he existence of any limiting factors, as set forth in section 9-209 [§ 48-9-209] of this article*." (emphasis added)). Section 209 therefore explicitly subordinates the Section 206 and 207 criteria in favor of carefully curated measures designed to protect the child from potentially recurrent abuse or neglect—a paradigm which plainly serves the best interests of the child.

As evidence of its importance, West Virginia Code § 48-9-209 places a mandatory duty upon a court making custodial allocations to make special *written* findings demonstrating that any such allocation includes limitations which will adequately protect the child from potential harm as a result of the abuse and neglect findings of which the court is aware. Subsection (c) provides:

> If a parent is found to have engaged in any activity specified in subsection (a) of this section, the court may not allocate custodial responsibility or decision-making responsibility to that parent without making *special written findings* that the child and other parent can be adequately protected from harm by such limits as it may impose under subsection (b) of this section. The parent found to have engaged in the behavior specified in subsection (a) of this section has the burden of proving that an allocation of custodial responsibility or decision-making responsibility to that parent will not endanger the child or the other parent.

(emphasis added). Section 209 makes no distinction between abuse and neglect findings which may have historically preceded the custodial allocation or those which may have arisen contemporaneous with the custodial dispute.

By way of useful analogy, Chapter 48's mechanisms have been previously utilized in the context of abuse and neglect proceedings. In *Smith*, the Court found that, relative to the circuit court's obligation to enter a child support order when abuse and neglect proceedings ensued, it was bound to utilize the guidelines contained in Chapter 48. Syl. Pt. 5, 218. W. Va. 480, 624 S.E.2d 917. The Court found that the statute requiring use of the Guidelines to calculate support "requires judges—*family court or circuit court*—to use the Guidelines[.]" *Id*. at 486, 624 S.E.2d at 923 (emphasis added). Similarly, West Virginia Code § 48-9-206 makes no distinction between which court is utilizing the criteria for custodial allocation or in what context. It states simply that "*the court shall allocate* custodial responsibility" in a manner which accommodates the enumerated factors (emphasis added). *See also In re Interest of Z. D. and D. D.*, 239 W. Va. 890, 806 S.E.2d 814 (2017) (finding residual custody dispute following abuse and neglect sounds in domestic relations).

In view of the foregoing, we find that Chapter 48's criteria do not create friction with abuse and neglect processes, as urged by the DHHR. Rather, the statutory factors dovetail with the remedial goals of abuse and neglect proceedings by requiring the court to acknowledge and address abuse and neglect findings in formulating a custodial allocation.[16] The factors contained in West Virginia Code §§ 48-9-206, 207, and 209

[16] The DHHR, in urging that Chapter 48's custodial allocation factors would undermine the multi-disciplinary approach when abuse and neglect proceedings are concluded, fails to articulate why a court in allocating custodial responsibility under

largely mirror the considerations typically undertaken by the court in making abuse and neglect placement determinations. Moreover, to fail to require courts to apply these factors would deprive a party seeking judicial allocation of custodial and decision-making responsibility from the protections and considerations afforded under West Virginia Code §§ 48-9-206, 207, and 209.

We therefore hold that a circuit court is obligated to apply the factors and considerations set forth in West Virginia Code §§ 48-9-206 and -207 in allocating custodial and decision-making responsibilities when reunifying children subject to abuse and neglect proceedings with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings. Where findings of abuse and/or neglect have been established, the circuit court must further employ the mandatory considerations and procedures set forth in West Virginia Code § 48-9-209, in order to protect the children from further potential abuse and/or neglect.

Turning now to the specific facts of this case, we find no demonstrable evidence that the circuit court employed the analysis required by West Virginia Code § 48-9-206 in making its custodial allocation and certainly its order made no findings whatsoever regarding decision-making responsibility as required by West Virginia Code § 48-9-207. Admittedly, there was ample testimony regarding the children's schedules,

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Chapter 48 could not make equal use of the recommendations and/or findings of the multi-disciplinary team members in considering these statutory factors.

school enrollment, the parties' work schedules, and living situations. However, given the absence of discussion of the applicability of the factors or reference thereto, we cannot simply presume that the court considered these factors and affirm on that basis. More importantly, however, respondent's adjudication as abusive and neglectful plainly imposed additional statutory considerations upon the circuit court in crafting its permanent custodial allocation pursuant to West Virginia Code § 48-9-209 and mandated special written findings in that regard. We therefore reverse the circuit court's allocation of custodial responsibilities and remand for consideration of the factors set forth in West Virginia Code §§ 48-9-206 and 207, as well as the limitations and procedures mandated by West Virginia Code § 48-9-209.

C. Circuit Court's Consideration of Children's Alleged Preference

Inasmuch as we have determined that Chapter 48's custodial and decision-making allocation statutes are applicable where children subject to abuse and neglect proceedings are reunified with non-cohabitating parents, guardians, or custodians, we turn now to petitioner's primary assignment of error: that the circuit court erred in deferring to the children's purported preference to reside with respondent because their preferences, as expressed by third parties, failed to rise to the level of "firm and reasonable" as required by West Virginia Code § 48-9-206(a)(2). Petitioner points to the CPS representative and guardian ad litem's representations about the children's seeming indecisiveness regarding their preferences throughout the proceedings. The DHHR and guardian ad litem argue that

the children's preferences as expressed just prior to the dispositional hearing were firmly to reside with respondent and note that the arrangement is going well.

With regard to child preference, West Virginia Code § 48-9-206(a)(2) provides that an allocation of custodial allocation must be designed

> [t]o accommodate, if the court determines it is in the best interests of the child, the *firm and reasonable preferences* of a child who is 14 years of age or older, and with regard to a child under 14 years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference the weight warranted by the circumstances[.]

(emphasis added). Certainly insofar as the circuit court's order is concerned, it appeared to consider primarily petitioner's behavior[17] in the course of the abuse and neglect proceedings and the preferences of the children, as conveyed by their CPS representative and the guardian ad litem, in making its custodial allocation.

Child preference has long been recognized as a consideration for a court in both custodial and abuse and neglect matters. *See* Syl. Pt. 7, in part, *Garska v. McCoy*, 167 W. Va. 59, 278 S.E.2d 357 (1981) ("Where there is a child under fourteen years of age, but

[17] There is a rather disconcerting irony that respondent brandished a weapon and threatened to commit suicide in petitioner's presence and the presence of their children and admitted to abuse and neglect. Petitioner, however, had to serve a night in jail for lying to the court about responding to a social media message from an ex-boyfriend (and in fact lost her job as a result), while respondent suffered no criminal consequence for brandishing. Thus, although no abuse and neglect was ever alleged against petitioner, she lost her home, her job, and primary custody of her children.

sufficiently mature that he can intelligently express a voluntary preference for one parent, the trial judge is entitled to give that preference such weight as circumstances warrant[.]"); *In re Frances J.A.S.*, 213 W. Va. 636, 645, 584 S.E.2d 492, 501 (2003) (reversing and remanding for consideration of child's "stated preference" as to placement during post-dispositional improvement period). *Cf.* W. Va. Code § 49-4-604(b)(6)(c) ("Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child 14 years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights."). Although S. M. was fourteen at the time of the dispositional hearing, T. M. was only eleven. There is no indication that the court made any finding regarding the maturity of either child to intelligently express a preference for one parent or the other.

The Court has cautioned that a child's preference is not "binding" on the trial court and that it may be rebutted. *Rose v. Rose*, 176 W. Va. 18, 20 n.3, 340 S.E.2d 176, 179 n.3 (1985). More recently, this Court directly admonished that "rather than blindly accepting a [minor's] wishes carte blanche, those wishes should instead be factored into an analysis of what outcome would be in the minor's best interests." *In re: J. A.*, Nos. 18-1082 and 18-1084, 2019 WL 5302085, at *22 (W. Va. Oct. 18, 2019) (reversing court's failure to terminate parental rights based solely on teenager's wishes).

More specifically, the *Rose* Court provided guidelines for use in examining children's preferences, to ensure they are based on a "good reason." *Id.* at 21 n.4, 340

S.E.2d at 179 n.4.[18] To do so, our precedent plainly permits the court, where appropriate, to examine the children in person: ". . . [W]here appropriate, the trial judge may interview the child *in camera* in order to determine with which parent the child would prefer to live, but a record of the interview should be made." Syl. Pt. 3, *Rose,* 176 W. Va. 18, 340 S.E.2d 176. Accordingly, where third-party representations fail to elucidate the basis of the child's

[18] The *Rose* Court explained:

> As already discussed, an inquiry should be made into the child's intelligence and maturity to see if the child's choice was intelligently made. Equally important, however, is the child's rationale for his decision. In order to be accorded weight, a child's preference for one parent over the other ought to be based on good reason. In making its examination of the child, the trial court should try to explore several aspects of the child's decision. We offer the following guidelines to the trial court as to areas which may have an effect on the weight placed on the child's decision:
>
> 1. The trial court should give greater weight to the wishes of a child which are expressed with strength, clearness, or with great sincerity.
>
> 2. A child's preference should be given less weight where it appears that the preference is based on a desire for less rigid discipline or restraint.
>
> 3. The trial court should investigate whether the statement of preference by the child was induced by the party in whose favor the preference was expressed. If so, said statement of preference should be accorded little, if any, weight.
>
> 4. Where an otherwise intelligent child makes an illogical decision based on unimportant factors, the trial court may disregard the child's statement of preference.

(citations omitted).

preference, an in camera interview should be, at a minimum, considered. In the instant case, both the CPS representative and guardian ad litem indicated that the children provided no real justification upon questioning as to why they wanted to live with respondent. Further, as indicated above, the court conducted no inquiry to determine whether T. M. was of sufficient maturity to intelligently express a preference in the first instance as directed by West Virginia Code § 48-9-206(a)(2) and our caselaw.

We are cognizant that Rule 8(a) of the Rules of Procedure for Child Abuse and Neglect Proceedings provides for a "rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony" in abuse and neglect proceedings. However, there was no discussion on the record about whether the children's testimony was needed, or would be harmful, as pertained to placement. Rule 8(a) specifically states that a child's testimony may be excluded if "equivalent evidence can be procured through other reasonable efforts . . ." In this case, however, the basis for the preference could *not* be procured from equivalent testimony since the CPS representative and guardian ad litem both indicated the children could not explain why they wanted to live with respondent. Certainly, petitioner raises at least the notion that the children's preferences rest upon potentially insubstantial bases, *i.e.* the desire for internet and cell service. *See Rose*, 176 W. Va. at 21 n.4, 340 S.E.2d at 179 n.4 (citing with approval *Metz v. Morley*, 289 N.Y.S.2d 364, 368 (1968) (disregarding child's preference where reason was accessibility of boating, fishing, and swimming facilities on the lake near which the mother's trailer home was located)); *accord In re: J. A.*, 2019 WL 5302085

(questioning child's preference not to terminate where preference may have been based on belief parents would not require child to go to school).

The foregoing notwithstanding, given our remand of this matter for consideration of the appropriate statutory factors and entry of an order compliant with the requirements of West Virginia Code §§ 48-9-206, 207, and 209, we find it unnecessary to determine whether the children's alleged preferences satisfied the statutory requirement of "firm and reasonable" or whether the circuit court committed reversible error in considering same.[19] However, on remand, we encourage the circuit court to ensure that its consideration of the children's preferences complies with the statutory requirements and our ample caselaw in that regard, including but not limited to the required inquiry regarding the preference of a child under fourteen.[20]

[19] To the extent petitioner's assignment of error asserts that the circuit court simply erred in its custodial allocation of primary custody to respondent over petitioner, a non-offending parent, we similarly find that our remand of this matter moots this argument. However, we note that petitioner cites no caselaw or statutory authority which *per se* precludes the circuit court from making a custodial allocation which tips in favor of an adjudicated parent over a non-offending parent. Proper consideration and compliance with the requirements of West Virginia Code § 48-9-209 should serve to address issues occasioned by respondent's adjudication.

[20] We further instruct the circuit court that, on remand, any court-appointed attorneys and the guardian ad litem are to continue their involvement until permanent placement is achieved through the custodial and decision-making allocations required herein. *See* Syl. Pt. 5, *James M. v. Maynard*, 185 W. Va. 648, 649, 408 S.E.2d 400, 401 (1991) ("The guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home."). Permanent placement

IV. CONCLUSION

Therefore, for the reasons set forth herein, we reverse the December 19, 2018, order of the Circuit Court of Webster County and remand for further proceedings consistent with this opinion.

Reversed and remanded with instructions.

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of T. M. and S. M. is required to bring the abuse and neglect proceedings in the instant case to a conclusion and that has not yet occurred. Therefore, any such court appointments continue to be in effect. *But cf. Z. D. and D. D.*, 239 W. Va. 890, 806 S.E.2d 814 (disapproving use of court-appointed counsel and guardian ad litem where parent attempted to utilize abuse and neglect proceedings to modify shared parenting plan).