

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re C.G. and M.G.-1

No. 23-22 (Nicholas County CC-34-2022-JA-66 and CC-34-2022-JA-67)

MEMORANDUM DECISION

Petitioner Mother M.G.-2¹ appeals the Circuit Court of Nicholas County’s December 13 2022, order dismissing the abuse and neglect petition that alleged the children, C.G. and M.G.-1 had been neglected by their father.² Petitioner argues that the circuit court applied the wrong standard by concluding the children had suffered no injury, and that the circuit court erroneously dismissed the petition without conducting a full and fair evidentiary hearing. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision vacating and remanding the circuit court’s order is appropriate, in accordance with the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

In October 2022, the DHS filed a petition alleging that the father of the children medically neglected the children by injecting Noromectin³ in the back of their throats with a syringe, as

¹Petitioner appears by counsel Michael T. Clifford. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Heather L. Olcott. Counsel Taylor Graham appears as the children’s guardian ad litem (“guardian”).

Additionally, pursuant to West Virginia Code § 5F-1-2, the agency formerly known as the West Virginia Department of Health and Human Resources was terminated, effective January 1, 2024, and is now three separate agencies—the Department of Health Facilities, the Department of Health, and the Department of Human Services. For purposes of abuse and neglect appeals, the agency is now the Department of Human Services (“DHS”).

²We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e). Additionally, because one of the children and petitioner share the same initials, we will refer to them as M.G.-1 and M.G.-2, respectively.

³Noromectin is a brand of ivermectin for animals. Ivermectin is used to treat worm infections and safety has not been established for children. Mayo Clinic, <https://www.mayoclinic.org/drugs-supplements/ivermectin-oral-route/description/drg-20064397> (last visited November 30, 2023).

disclosed by the children in a forensic interview. When a Child Protective Services (“CPS”) worker and a West Virginia State Trooper went to the father’s home to inquire of the use of medicine, the father initially stated he didn’t know what Noromectin was. The bottle was found in a location previously described by the children, but the father said he used it for his dogs. When asked why the children disclosed that he gave it to them, he said he tricks the children and tells them he is giving it to them to administer their fiber medicine. The trooper then asked to see the fiber medicine. The father responded that he was giving the children Miralax but that he recently threw it away and the trash had already been collected. The CPS worker then spoke to the children’s pediatrician who said she did suggest that M.G.-1 take Miralax several months ago, but that it wouldn’t have been administered with a syringe and that she did not recommend C.G. take Miralax. The petition contained no allegations against petitioner and the children remained in her care throughout the proceedings.

At the adjudicatory hearing held in December 2021, the DHS indicated it would present testimony of the children’s pediatric nurse practitioner, the CPS worker, and the trooper. The DHS further stated its intention to submit the forensic interviews of the children into evidence. However, the only evidence presented was the testimony of the pediatric nurse practitioner. The nurse stated that petitioner called and said the children were receiving ivermectin. Petitioner asked why that medicine was prescribed, to which the nurse responded that she had not prescribed it. The nurse explained that ivermectin is a treatment for parasites and it comes in the form of lotion, cream, and tablets for humans. It is sold in liquid or paste form for treatment of farm animals. The nurse further testified that the children came into her office in August 2022 with nausea, diarrhea, and abdominal pain. Although she testified that those are potential side effects of ivermectin, she admitted that there was no known ingestion of it mentioned at the appointment and she was unable to determine the cause of the children’s symptoms. Immediately following the nurse’s testimony, the court stated, “it doesn’t appear to me that there’s any evidence that the children were harmed . . . I’m going to dismiss the case.” The court did not hear any further testimony or otherwise consider any other evidence. By final order, the court dismissed the petition.⁴ It is from the final dismissal order that petitioner appeals.⁵

On appeal from a final order in an abuse and neglect proceeding, this Court reviews the circuit court’s findings of fact for clear error and its conclusions of law de novo. Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011). Further, we have held,

⁴According to the record, the parents previously followed a shared custody schedule pursuant to a family court order; however, the guardian recommended the court revisit the issue of custody based on this proceeding. According to appellate briefs, the children currently reside together with the parents in adherence to the shared custody arrangement set forth by the family court.

⁵The circuit court’s final order references a pending domestic violence proceeding, which was also set to be addressed at the hearing on the issue of custody. Upon review of the record, the domestic violence petition was filed by petitioner and was based upon the same circumstances as those alleged by the DHS’s abuse and neglect petition.

“[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).

First, petitioner argues that the court erred by relying upon the lack of injury to the children as the basis for dismissal of the petition. We agree. West Virginia Code § 49-1-201 defines “abused child” to include “[a] child whose health or welfare is being harmed *or threatened by* . . . [a] parent . . . who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, personal injury.” (Emphasis added). Similarly, that same statute defines “neglected child” 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 . . . medical care.” *Id.* (Emphasis added). Here, the court misapplied the governing standard for finding abuse or neglect as it simply found no evidence of harm to the children. The court’s finding ignores our interpretation of Chapter 49. *See In re S.C.*, 248 W. Va. 628, --, 889 S.E.2d 710, 716 (2023) (finding that the “statute does not require . . . that the child suffer injury; it requires that a parent’s conduct threatens his child’s well-being.”) (citation omitted). Accordingly, we must vacate the court’s order on these grounds and remand the matter in order for the court to apply the appropriate standard.

Second, petitioner argues that the court erred in dismissing the petition without holding a full and fair evidentiary hearing. Upon our review of the record, it is clear that the court failed to conduct the adjudicatory hearing in accordance with West Virginia Code § 49-4-601.⁶ The parties to an abuse and neglect proceeding must be given a meaningful opportunity to introduce substantive evidence in support of their respective positions. *See In re George Glen B., Jr.*, 205 W. Va. 435, 443-44, 518 S.E.2d 863, 871-72 (1999). Here, the only evidence submitted was the testimony of the pediatric nurse practitioner even though the DHS intended to also submit the children’s forensic interviews and testimony of the CPS worker and trooper. The court dismissed the petition without allowing the opportunity for introduction of any other evidence which may have informed its decision. We, therefore, must vacate and remand for compliance with the required procedure under the rules and statutes set forth herein.

For the foregoing reasons, we vacate the circuit court’s December 13, 2022, order dismissing the abuse and neglect petition and remand for further proceedings consistent with this decision. The Clerk is directed to issue the mandate contemporaneously herewith.

⁶West Virginia Code § 49-4-601(h) states that, “[i]n 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.”

Vacated and remanded, with directions.

ISSUED: February 7, 2024

CONCURRED IN BY:

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