

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re A.A. and K.A.

No. 23-177 (Mercer County CC-28-2023-JA-2 and CC-28-2023-JA-3)

MEMORANDUM DECISION

Petitioner Mother S.J.¹ appeals the Circuit Court of Mercer County’s February 17, 2023, order dismissing the DHS’s child abuse and neglect petition against the father, arguing that dismissal was error.² Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court’s order is appropriate. *See* W. Va. R. App. P. 21.

In January 2023, the DHS filed a petition alleging that the father abused and neglected the children by smacking their backs as punishment, failing to supervise them, and failing to provide them necessary medical care. The petition detailed that in October 2022, the DHS received an overlap referral regarding a civil action. Child Protective Services (“CPS”) investigated, found no evidence of abuse or neglect, and dismissed the referral. However, the guardian assigned to the overlap referral requested an extension to finish her report. The children made concerning disclosures to the guardian, so she scheduled forensic interviews for the children, during which they disclosed that their father punished them by slapping them on the back. K.D. disclosed that the father left her at home alone for periods of time and had previously hit her in the face. The petition requested that the children be placed with the petitioner, but no order regarding placement was entered.

On January 23, 2023, the circuit court held a status hearing at which the petitioner was not present, but her counsel appeared on her behalf. After conferring with the parties, the court converted the status hearing to a preliminary hearing. No objections were made. The court heard

¹ The petitioner appears by counsel Jessica Carter. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Deputy Attorney General Steven R. Compton. Counsel Patricia Beavers appears as the children’s guardian ad litem (“guardian”). Respondent Father H.A. appears by counsel Gerald Hayden.

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

² We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

testimony from the CPS employee who filed the petition. The CPS employee explained that she found no evidence of maltreatment and closed the investigation. Further, upon being questioned by the father's counsel, the CPS employee agreed that none of the alleged conduct from the children's disclosures, such as the father leaving the children at home while he went to the store, constituted abuse or neglect. At the conclusion of the hearing, the DHS and the guardian opined that the matter should be addressed in family court. Based upon the testimony presented, the court found no evidence that the children were in imminent danger.

It appears that the petitioner obtained new counsel after the January 23, 2023, hearing. Then, the petitioner filed an emergency motion to stay and for reconsideration, alleging that the petitioner's prior counsel advised her *not* to appear at the January 23, 2023, hearing. The petitioner's motion alleged that her previous counsel did not adequately explain what a preliminary hearing is, failed to timely inform her that the petition was dismissed, and failed to disclose a possible conflict as a result of having been lead counsel on a civil action against the petitioner that concluded in 2020. In addition, the motion alleged the guardian assigned to the case did not communicate with the children or investigate the allegations. In February 2023, the court heard the petitioner's motion and ultimately maintained its decision to dismiss the petition.³ The court entered its order dismissing the abuse and neglect petition on February 17, 2023, finding no probable cause to believe that the children were in imminent danger. The petitioner appeals this order.⁴

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). Before this Court, the petitioner argues that the circuit court erred by waiving the preliminary hearing without her consent. However, this argument has no basis in the record, as it is clear that the circuit court held a preliminary hearing as required. It is confusing why the petitioner makes this assertion, given that she challenges the outcome of the preliminary hearing on appeal. Further, the petitioner argues that the circuit court failed to make the findings required by Rule 3(g) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. According to that rule,

³ We remind the circuit court and the parties that there is no basis for a motion for reconsideration in abuse and neglect proceedings. As we have explained, when a party filing a motion for reconsideration fails to "indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order" depending on the timing of the motion's filing. Syl. Pt. 2, in part, *Malone v. Potomac Highlands Airport Auth.*, 237 W. Va. 235, 786 S.E.2d 594 (2015) (quoting Syl. Pt. 2, *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996)). Critically, neither of these rules apply to abuse and neglect proceedings. See W. Va. R. Civ. P. 81(a)(7) (providing that Rules 59 and 60 of the West Virginia Rules of Civil Procedure do not apply to abuse and neglect cases).

⁴ The permanency plan for the children is to revert to the custody agreement between the petitioner and the children's father that was decided in family court.

[t]he [preliminary] hearing is held for the purpose of determining (1) whether there is reasonable cause to believe that the child is in imminent danger; (2) whether continuation in the home is contrary to the welfare of the child, setting forth the reasons; (3) whether the Department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home or whether an emergency situation made such efforts unreasonable or impossible; (4) whether efforts should be made by the Department to facilitate the child's return, and if so, what efforts should be made; and (5) whether the child's school placement is in his or her school of origin, and if not, whether the change of school placement is in the child's best interests.

Id. After the court found the children were not in imminent danger, it is clear that the other factors were inapplicable, as they pertain to circumstances that are not present in the facts at hand. The circuit court concluded that there was no imminent danger to the children. Its finding does not constitute waiver of the preliminary hearing or failure to comply with any applicable rule. Accordingly, any argument the petitioner predicates on Rule 22(c) of the Rules of Procedure for Child Abuse and Neglect Proceedings which governs waiver or stipulation of the preliminary hearing does not entitle her to relief.⁵

Further, the petitioner argues that the court failed to timely hold the preliminary hearing. According to West Virginia Code § 49-4-601(c) and Rule 22(a) of the Rules of Procedure for Child Abuse and Neglect Proceedings, in situations in which a court orders a child placed or continued in emergency custody with the DHS or another reasonable person, the preliminary hearing must be held within ten days. The court did not order the children be placed in emergency custody, thus, the ten-day time frame for holding a preliminary hearing is not controlling. Further, there was never a finding by the court that the children were in imminent danger. Because the circuit court was only required to comply with these timelines in certain circumstances, and the petitioner has failed to include citation to the record indicating that these circumstances applied in the instant matter, she is not entitled to relief.

Finally, the petitioner argues that the court violated her right to be heard, testify, and present and cross-examine witnesses because the court should have “call[ed] her to be present over the phone and/or continue[d] the hearing and require[d] that [the petitioner] be present in person.” The petitioner correctly states that she “shall be afforded a meaningful *opportunity* to be heard, including the *opportunity* to testify and to present and cross-examine witnesses.” *See* W. Va. Code § 49-4-601(h) (emphasis added). The petitioner was afforded an opportunity to be heard but chose

⁵ This includes any assertion on appeal that it was error to convert the January 23, 2023, hearing from a status hearing to a preliminary hearing. The petitioner's counsel consented to the holding of the preliminary hearing and raised no objection at the time. Accordingly, this issue is waived. “Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.” *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999).” *Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).

not to appear. The petitioner was represented by counsel who was present. Therefore, we find that the circuit court did not err.⁶

For the foregoing reasons, we find no error in the decision of the circuit court, and its February 17, 2023, order is hereby affirmed.

Affirmed.

ISSUED: May 13, 2024

CONCURRED IN BY:

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

DISSENTING:

Justice John A. Hutchison

⁶ The petitioner also briefly argues that her former counsel had an ethical conflict of interest because he represented a party who sued the petitioner a year prior to the instant case, but the petitioner cites to no relevant authority to support her argument. “The decisions of this Court are quite clear. ‘Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.’ *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996).” *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013). Additionally, the petitioner argues that the guardian’s lack of investigation violated Rule 18a(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings, which requires the guardian to file a report five days prior to disposition. The petitioner’s reliance on the rule is misplaced, as no dispositional hearing was held.