**FILED**
**June 10, 2024**
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

***In re* K.H.**

**No. 23-434** (Mercer County CC-28-2019-JA-155)

## MEMORANDUM DECISION

Petitioner Father R.H.[1] appeals the Circuit Court of Mercer County's July 20, 2023, order denying his motion to modify disposition, arguing that the court erred by finding it would not be in the best interests of the child, K.H., to restore his custodial rights.[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.

The proceedings were initiated in December 2019 when the DHS filed an abuse and neglect petition alleging that the petitioner committed acts of extreme domestic violence against the mother in the presence of the child, K.H., and her two half-sisters, K.T. and T.H.[3] The DHS later amended the petition in August 2020 to include allegations of substance abuse and set forth the petitioner's criminal activity, which included felony charges for first-degree robbery, kidnapping, and conspiracy, resulting in his incarceration.[4] The petitioner stipulated to substance abuse and

[1] The petitioner appears by counsel E. Raeann Osborne. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrisey and Deputy Attorney General Steven R. Compton. The child's custodian appears by counsel P. Michael Magann. Counsel Andrea P. Powell appears as the child's guardian ad litem.

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).

[3] The petitioner is not the biological father of K.T. or T.H., and these children are not at issue in this appeal.

[4] The child and her siblings were temporarily placed in an emergency guardianship with their maternal great-grandparents in a separate proceeding in family court based on the same conduct by the petitioner. The child remained in the great-grandparents' care throughout the proceedings and the permanency plan is a legal guardianship.

domestic violence at an adjudicatory hearing held in November 2020, and later voluntarily relinquished his custodial rights to the child at a dispositional hearing in January 2022. Accordingly, the circuit court terminated the petitioner's custodial rights to the child following that hearing.[5]

In January 2023, the petitioner filed a motion to modify the dispositional order, asserting a material change in circumstances. The petitioner had been released from incarceration in April 2022 and successfully discharged from parole in June 2022, with no violations. The great-grandparents filed a response, opposing the petitioner's motion. The circuit court held a hearing on the petitioner's motion in July 2023, at which time the DHS and guardian ad litem supported denial of the request for modification. The court heard testimony from the petitioner, a DHS worker, and a family services provider, which revealed that since his release from incarceration, the petitioner began supervised visits with the child, obtained employment, secured housing, and had participated in parenting services. The DHS worker and family services provider expressed no concerns with the petitioner's parenting ability. The DHS worker had visited the home, where the petitioner lived with a new wife, and observed no safety issues. The court also heard testimony of the child's great-grandfather, grandmother, Sunday school teacher, and school social worker, who all testified regarding the "inseparable" bond between the child and her two sisters. The great-grandfather testified that he "pretty much raised" K.H., as the child was eighteen months old when she was first placed in his custody, and she and her sisters had resided with him and his wife since that time. He further testified that it was "not that we don't want [the petitioner] to see his child. I know that she loves him. But if these girls are separated, it's going to devastate them." The grandmother described the siblings' relationship as an "unbreakable" bond, stating,

> [K.T.] did take on the role as a parent with feedings and diaper changes with both the younger ones . . . when they were still living with [the petitioner and the mother] . . . both of them were so messed up on drugs they couldn't function to take care of her . . . to pull [the siblings] apart would be detrimental to all of them.

The school social worker testified that the child's sisters walked with her to her classroom and would "give her hugs and kisses and tell her to have a good day."

The circuit court considered the evidence presented and denied the petitioner's motion for modification. The court found that, while the petitioner did demonstrate a material change in circumstances, granting the petitioner's motion would not be in the child's best interests, and that the child should remain in the care of her great-grandparents. Specifically, the court stated,

> [the child] has lived with [the great-grandparents] since she was eighteen . . . months of age until now at her current age of five . . . years. [The great-grandparents] have been [the child's] primary caretakers for the great majority of her life and she has a close emotional bond with them. Further, [the child] has a strong emotional bond with her sisters, [K.T. and T.H.].

[5] The mother's parental rights were involuntarily terminated.

The court further ordered that a "liberal" visitation schedule be developed and adhered to by the parties. The court then adopted a visitation schedule by an order entered in September 2023. It is from the order denying the motion for modification of the dispositional order that the petitioner appeals.

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). The petitioner argues that the circuit court erred in finding that it would not be in the child's best interests to modify disposition. Upon our review of the record, we disagree. Pursuant to West Virginia Code § 49-4-606(a),

> upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section six hundred four of this article and may modify a dispositional order if the court finds by clear and convincing evidence a material change of circumstances and that the modification is in the child's best interests.

Furthermore, "evidence regarding each of the two elements required by [West Virginia Code § 49-4-606] must be presented." *In re S.W.*, 236 W. Va. 309, 314, 799 S.E.2d 577, 582 (2015). In support of his argument on appeal, the petitioner relies on his various accomplishments upon his release from incarceration, such as maintaining employment, complying with family support services, and securing appropriate housing, among other things. Indeed, the circuit court found that the petitioner proved a material change in circumstances considering these facts. However, the petitioner failed to prove the second element of the statute and demonstrate how modification would be in the child's best interests.

The petitioner cites *Hammack v. Wise* for the proposition that "custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care." Syl. Pt. 3, in part, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975). We find the petitioner's reliance on this holding misplaced here. The circuit court's decision to deny modification of the dispositional order was not based upon the great-grandparents' ability to possibly furnish better care; but rather, the overwhelming amount of testimony regarding the child's "unbreakable" bond with her sisters that she developed through the trauma they experienced together when they lived with the petitioner and the mother. Furthermore, the court properly noted that the child resided in the great-grandparents' home with her siblings for most of her life. As we have stated, "[t]he statutes and rule prohibit a modification of the disposition . . . in the absence of a showing that the child's best interests would be served by altering the status quo." *In re S.W.*, 236 W. Va. at 315, 799 S.E.2d at 583. Therefore, we find no error in the circuit court's decision to deny modification of the dispositional order based on the child's best interests. *See* Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.").

Accordingly, we find no error in the decision of the circuit court, and its July 20, 2023, order is hereby affirmed.

Affirmed.

**ISSUED**: June 10, 2024

**CONCURRED IN BY**:

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