

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

*In re* T.A.

No. 24-194 (Jackson County CC-18-2022-JA-89)

**MEMORANDUM DECISION**

Petitioner Father D.A.<sup>1</sup> appeals the Circuit Court of Jackson County’s March 18, 2024, order terminating his parental rights to T.A., arguing that the court erred in finding that he had abandoned the child by clear and convincing evidence.<sup>2</sup> 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 September 2022, the DHS filed a petition alleging that the petitioner abused and neglected T.A. by abusing substances to the extent that it negatively impacted his ability to parent, engaging in domestic violence in the child’s presence, subjecting the child to physical and emotional abuse, and failing to take medication to treat his mental health issues, which posed an imminent risk to the child’s safety. Following the filing of the petition, the circuit court held a preliminary hearing, for which the petitioner appeared.

At a hearing in November 2022, the petitioner and the child’s mother moved to continue the adjudicatory hearing and for the circuit court to order a multidisciplinary team (“MDT”) meeting. The circuit court continued the hearing and ordered an MDT meeting. The adjudicatory hearing was continued another two times due to the withdrawal of the mother’s counsel and a family emergency involving the mother’s counsel. Notably, the petitioner did not appear at these hearings but was represented by counsel. In April 2023, another adjudicatory hearing was held

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<sup>1</sup> The petitioner appears by counsel Ryan M. Ruth. The West Virginia Department of Human Services appears by counsel Attorney General John B. McCuskey and Assistant Attorney General Lee Niezgoda. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. Counsel Leah Perry Macia appears as the child’s guardian ad litem (“guardian”).

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”).

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

and, again, the petitioner did not appear but was represented by counsel. The circuit court heard from the case worker who testified that she had not had any contact with the petitioner. Following this testimony, the DHS requested leave to file an amended petition, which the court granted, and the parents' adjudication was again continued.

In May 2023, the DHS filed an amended petition adding an allegation that the petitioner abandoned the child based on his absence from the proceedings. Specifically, the amended petition alleged that the petitioner had not appeared for any hearing since the preliminary hearing in September 2022. The next three hearings were also continued. However, unlike the earlier hearings, these continuances each occurred prior to the hearings being held. The adjudicatory hearing resumed in August 2023, where the petitioner appeared in person for the first time since the preliminary hearing. Based on his appearance, the DHS moved to continue the hearing to hold an MDT meeting to determine the petitioner's status. The court granted the motion over the guardian's objection and, on the record and in the petitioner's presence, scheduled the date and times of both the MDT meeting and the next hearing.

The final adjudicatory hearing was held in September 2023, for which the petitioner failed to appear, though he was represented by counsel. The court heard the testimony of the case worker, who testified that, despite the petitioner's presence at the prior hearing, he did not attend the scheduled MDT meeting. She further testified that the abuse and neglect proceedings had been going on for approximately one year and that it was the DHS's position that the petitioner had abandoned the child given his lack of participation in the proceedings. She further testified that the DHS could not provide the petitioner with any additional services that would allow T.A. to be returned to his custody.

Based on the foregoing, the court entered an order finding that there was clear and convincing evidence that the petitioner had abandoned T.A. and adjudicated the petitioner as an abusing and neglecting parent. Given that the petitioner substantively challenges only his adjudication, it is sufficient to note that, following a dispositional hearing, the circuit court terminated the petitioner's parental rights to T.A. by order entered in March 2024.<sup>3</sup> It is from this 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 there was insufficient evidence to support the circuit court's finding of abandonment by clear and convincing evidence. The petitioner asserts that his failure to appear for hearings and attend the MDT meetings is not sufficient proof that he "engag[ed] in conduct demonstrating a settled purpose to forego his duties and parental responsibilities to T.A." We disagree.

West Virginia Code § 49-1-201 defines "abandonment" as "any conduct that demonstrates the settled purpose to forgo the duties and parental responsibilities to the child." Rather than focus on the alleged insufficiency of the evidence in regard to his adjudication for abandonment, the

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<sup>3</sup> The mother's parental rights were also terminated. The permanency plan for T.A. is adoption in the current placement.

petitioner instead argues that the various delays should not be used as evidence of any abandonment and that, without this evidence, the DHS could not satisfy its burden.<sup>4</sup> However, the petitioner is incorrect that his failure to participate in the proceedings could not serve as affirmative evidence of new allegations properly set forth in an amended petition. On the contrary, this Court has been clear that

[i]n making a determination of whether a child is an abused and/or neglected child as defined in [West Virginia Code § 49-1-201], a court must consider evidence of a parent's progress, or lack thereof, during the pre-adjudication improvement period. However, pursuant to [West Virginia Code § 49-4-601(i)], such evidence is proper only if it relates back to conditions that existed at the time of the filing of the abuse and/or neglect petition, and that were alleged in such petition.

Syl. Pt. 2, in part, *State v. Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (1997). While this holding is specific to a parent's participation in a preadjudicatory improvement period, the Court went on to instruct as follows:

Evidence regarding a parent's pre-adjudication improvement period may not be used to informally amend a previously-filed petition. The proper method of presenting new allegations to the circuit court is by requesting permission to file an amended petition pursuant to Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

*Id.* Clearly, this Court has instructed the DHS to file an amended petition in those instances in which a parent's participation, or lack thereof, during ongoing proceedings gives rise to new allegations of abuse and/or neglect.

Accordingly, the only remaining basis upon which the petitioner argues that the evidence was insufficient is his assertion that he appeared at two hearings nearly one year apart. This evidence is not compelling, given the DHS's substantial evidence regarding the petitioner's almost total noncompliance in the proceedings below. This Court has held that

“[West Virginia Code § 49-4-601(i)], requires the [DHS], in a child abuse or neglect case, to prove ‘conditions existing at the time of the filing of the petition

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<sup>4</sup> The record shows that some of these continuances were upon the petitioner's motion and, therefore, cannot constitute a valid basis for relief. See *Maples v. W. Va. Dep't of Com., Div. of Parks & Recreation*, 197 W. Va. 318, 319, 475 S.E.2d 410, 411 (1996) (“A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.”). Further, the petitioner fails to cite to any portion of the record where he objected to any of the continuances, in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure. As we have long held, “[o]ur 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). Accordingly, the petitioner is entitled to no relief in regard to the court's granting of continuances below.

. . . by clear and convincing [evidence].’ The statute, however, does not specify any particular manner or mode of testimony or evidence by which the [DHS] is obligated to meet this burden.” Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. Pt. 1, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (citations omitted). Further, “[c]lear and convincing evidence means that more than a mere scintilla of evidence has been presented to establish the veracity of the allegations of abuse and/or neglect, but it does not impose as exacting an evidentiary burden as criminal proceedings which generally require proof beyond a reasonable doubt.” *In re A.M.*, 243 W. Va. 593, 598, 849 S.E.2d 371, 376 (2020). Here, the record demonstrates that the circuit court was presented with sufficient evidence upon which to find that the petitioner had abandoned T.A. Specifically, the evidence established that, following the petitioner’s initial appearance in September 2022, he failed to appear at any of the scheduled hearings between November 2022 and April 2023 and further failed to keep in contact with the DHS during that time. Further, the court properly considered the petitioner’s conduct after the amended petition was filed because the petitioner’s continued abandonment of the proceedings related back to the conditions at the time the amended petition was filed. *See In re Brandon Lee B.*, 211 W. Va. 587, 590, 567 S.E.2d 597, 600 (2001) (explaining that “facts developed after the filing of the petition, or amended petition, may be considered in evaluating the conditions which existed at the time of the filing of the petition or amended petition.”); *see also* W. Va. Code § 49-4-601(i) (requiring the findings contained in a circuit court’s adjudicatory order to be “based upon conditions existing at the time of the filing of the petition”).<sup>5</sup> Although the petitioner appeared for a hearing shortly before his adjudication, this evidence is not compelling in light of his almost total noncompliance in the proceedings below. As such, it is clear that the petitioner had foregone his parental responsibilities to the child and, therefore, we conclude that the circuit court did not err in adjudicating the petitioner as an abusing and neglecting parent.

For the foregoing reasons, we find no error in the decision of the circuit court, and its March 18, 2024, order is hereby affirmed.

Affirmed.

**ISSUED:** March 19, 2025

**CONCURRED IN BY:**

Chief Justice William R. Wooton

Justice Elizabeth D. Walker

Justice Tim Armstead

Justice C. Haley Bunn

Justice Charles S. Trump IV

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<sup>5</sup> In further support of his argument, the petitioner also states that the circuit court was not presented with any evidence that he had not visited T.A., had not paid child support, or had not offered financial support to the child. However, in doing so, the petitioner appears to rely on the standards used to establish a rebuttable presumption of abandonment under West Virginia Code § 48-22-306(a), rather than the definition used in abuse and neglect proceedings. *See* W. Va. Code § 49-1-201.