

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

C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

***In re* W.B., A.B.-1, L.B.-1, E.B., L.B.-2, and A.B.-2**

No. 24-768 (Mineral County CC-29-2022-JA-31, CC-29-2022-JA-32, CC-29-2022-JA-33, CC-29-2022-JA-34, CC-29-2022-JA-35, and CC-29-2022-JA-36)

MEMORANDUM DECISION

Petitioner Father L.B.-3¹ appeals the Circuit Court of Mineral County’s December 21, 2024, order terminating his parental rights to the children, arguing that the circuit court erred in permitting the DHS to amend the petition and in reopening his adjudication.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 DHS filed its initial petition in August 2022, alleging that the petitioner failed to protect the children. Specifically, the DHS alleged that the petitioner had permitted his girlfriend’s brother, M.D., to live in the home despite knowing that M.D. had been convicted of child abuse resulting in death. The petitioner allowed M.D. to take L.B.-2 out alone and M.D. raped the then-eleven-year-old child. The child subsequently disclosed in a forensic interview that the petitioner had digitally penetrated her on many occasions. Thus, the DHS filed its first amended petition in October 2022 alleging that the petitioner had sexually abused L.B.-2. The petitioner was subsequently charged and indicted on multiple counts of incest, sexual abuse by a parent, and first-degree sexual assault.

After several continuances, the court held a contested adjudicatory hearing in January 2023. A Child Protective Services (“CPS”) worker testified that she had warned the petitioner in 2021 that M.D. should not be left alone with the children due to his prior conviction. She also testified regarding L.B.-2’s disclosures that M.D. had raped her and that the petitioner had touched her inappropriately. The West Virginia State Trooper who investigated the allegations testified that the forensic nurse who conducted L.B.-2’s sexual assault examination reported that the child’s hymen resembled that of “a thirty-year-old woman who had been sexually active her entire life.” When the trooper interrogated M.D., he deflected questions regarding the rape by indicating that

¹ The petitioner appears by counsel Jeremy B. Cooper. The Department of Human Services (“DHS”) appears by counsel Attorney General John B. McCuskey and Assistant Attorney General Lee Niezgoda. Counsel Heather M. Weese appears as the children’s guardian ad litem.

² We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e). Additionally, because two of the children and the petitioner share the same initials, we use numbers to differentiate them.

there was other abuse going on in the home. The court continued the adjudicatory hearing to March 2023, at which time it heard from the forensic nurse who examined L.B.-2. The nurse, who testified as an expert witness, described observing an acute genital injury consistent with assault. The forensic interviewer then testified that L.B.-2 initially disclosed being raped by M.D. and, in a second interview, disclosed digital penetration by the petitioner. The child reported that this occurred “almost every day” for about two years beginning when she was seven years old. Lastly, the petitioner’s girlfriend testified that she did not believe L.B.-2’s allegations, as the petitioner did not have the opportunity to molest the child during the time frame the child had specified.

Based on this evidence, in a March 2023 order, the circuit court made findings related to M.D.’s sexual assault and adjudicated L.B.-2 as a neglected child due to the petitioner’s failure to protect her, especially since M.D.’s prior conviction had “illustrated [his] violent propensity toward children.” The court found that the remaining children were neglected “by proxy” as they resided in the home when the rape occurred. Regarding the allegations that the petitioner had sexually abused L.B.-2, the court indicated on the record that it was “not going to rule on the sexual stuff” as that “w[ould] be for other people to decide.” Sometime before September 2023, the case was reassigned to a different judge. In December 2023, the petitioner voluntarily relinquished his parental rights to L.B.-2 and the court granted him a post-adjudicatory improvement period as to the other children. At a review hearing in April 2024, the DHS sought leave to amend the petition (and/or file a new petition) based on recent disclosures M.D. had made to the police. These included that the petitioner had engaged in additional sexual acts with L.B.-2 and that the petitioner had offered the child to other adult men. The petitioner opposed the DHS’s motion, arguing that M.D.’s statements supported the same allegations of abuse for which he had already been adjudicated, and that the court previously made no findings regarding those allegations.

At a hearing in May 2024, the court stated that it reviewed the recording of the petitioner’s prior adjudication hearing and found that the previous judge, in the March 2023 order, had declined to rule on the allegations of the petitioner’s abuse. The court “wholeheartedly disagree[d]” with this approach and stated in a subsequent written order that the previous judge had “apparently defer[ed] to the criminal proceedings commenced against [the petitioner].” The court noted that this violated Rule 5 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings³ and determined that it must fully adjudicate the allegations contained in the petition and make definitive findings as to whether the DHS met its burden of proof. The court granted the DHS leave to further amend the petition. Thus, in June 2024, the DHS filed a third amended petition, adding M.D.’s statements regarding the petitioner’s sexual abuse of L.B.-2.⁴

The court held an adjudicatory hearing on the third amended petition in August 2024, taking judicial notice of all previous testimony. M.D. testified to witnessing L.B.-2 performing oral sex on the petitioner, though he admitted that his statement was given as part of a plea

³ Rule 5 provides that “[u]nder no circumstance shall a child abuse and neglect proceedings be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including . . . criminal proceedings.”

⁴ The second amended petition concerned allegations relating to another adult respondent.

agreement. The petitioner's girlfriend again testified that she did not believe L.B.-2's allegations because the petitioner had never been alone with L.B.-2. The court continued the hearing to September 2024, at which time L.B.-2's former foster parent testified that the child could be dishonest. Ultimately, the court did not find either M.D. or the girlfriend credible. However, the court found that "the combination of the [forensic] nurse's reporting, [the trooper's] investigation, and [L.B.-2's] disclosures . . . provide[d] clear and convincing evidence that [the petitioner] assaulted [L.B.-2]." In its subsequent written order, the court found that L.B.-2 "sustained significant injuries indicative of sexual abuse, non-accidental in nature" while in the petitioner's custody, and, accordingly, that L.B.-2 was an abused child and that her siblings were also abused under West Virginia Code §49-1-201(1)(A) because they also resided in the home. Given that the petitioner challenges only the petition's amendment and his subsequent adjudication, it is sufficient to note that the court terminated his parental rights following a dispositional hearing in November 2024. The petitioner appeals from the dispositional order.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). Before this Court, the petitioner first asserts that the circuit court erred in permitting the DHS to amend the petition to include allegations obtained from M.D.'s disclosures. We disagree. Rule 19(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings states that "[i]f new allegations arise after the final adjudicatory hearing, the allegations should be included in an amended petition . . . and the final adjudicatory hearing shall be re-opened for the purpose of hearing evidence on the new allegations in the amended petition." This Court has further explained that in order

[t]o facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred . . . which is not encompassed by the allegations contained in the [DHS's] petition, then pursuant to Rule 19 . . . the circuit court has inherent authority to compel the [DHS] to amend its petition to encompass the evidence or allegations.

Syl. Pt. 3, in part, *In re C.L.*, 249 W. Va. 95, 894 S.E.2d 877 (2023) (quoting Syl. Pt. 6, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)). Here, M.D.'s March 2024 statement to the police, subsequently filed with the court in April 2024, made additional allegations of sexual abuse perpetrated by the petitioner that were not encompassed by the first amended petition. Since circuit courts have the authority, if not an obligation, to *compel* the DHS to amend a petition in these circumstances, it was certainly proper for the court to grant the DHS leave to amend. *See In re Lilith H.*, 231 W. Va. at 182, 744 S.E.2d at 292. We also find unpersuasive the petitioner's argument that M.D.'s allegations were not "new," because the DHS could have obtained this

⁵ W.B.'s mother successfully completed a preadjudicatory improvement period, and the child's permanency plan is to remain in her custody. The permanency plan for A.B.-1, L.B.-1, E.B., and A.B.-2 is to remain in the custody of their nonabusing mother. The court terminated L.B.-2's mother's rights, and the permanency plan for the child is eventual placement and adoption in a foster home.

information sooner had it exercised diligence. While the record indicates that M.D. alluded to other abuse in the home during his initial interrogation, he did not make specific disclosures prior to the plea negotiations in his criminal proceedings. Thus, we find that the court did not err in permitting the DHS to amend its petition to include M.D.'s disclosures, nor in reopening adjudication to hear evidence on the new allegations. *See In re C.L.*, 249 W. Va. at 102-3, 894 S.E.2d at 884-85 (stating that “after [the DHS] amends the petition to include additional allegations, the circuit court must reopen adjudication to address them”).

Next, the petitioner argues that the circuit court erred in “re-adjudicating” him at the reopened adjudicatory hearing for the same conduct upon which the circuit court had previously declined to adjudicate him, stating that the petitioner’s initial “non-adjudication”—even if erroneous—had been waived and became the law of the case. Again, we disagree. The petitioner’s reliance on the law of the case doctrine is misplaced, as this generally applies to matters that have been decided on appeal (or fully litigated below and not appealed). *See Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2003) (explaining that the law of the case doctrine prohibits relitigating an issue that has already been decided on appeal in the same case); *see also State v. Elza*, No. 12-1049, 2013 WL 3388258, at *2 (W. Va. July 8, 2013) (memorandum decision) (quoting *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 378, 686 S.E.2d 23, 29 (2009)) (stating that law of the case doctrine is also applicable to issues that have been fully litigated below when no appeal is made). Here, the matter had *not* been fully litigated, as the circuit court initially did not rule on the first amended petition’s allegations that the petitioner had sexually abused L.B.-2, improperly concluding that this was “for other people to decide.” The circuit court later noted and corrected this error by making findings of fact and conclusions of law regarding these allegations at the reopened adjudicatory hearing. *See* W. Va. Code § 49-4-601(i) (“At the conclusion of the adjudicatory hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether the child is abused or neglected and whether the respondent is abusing”); *In re Lilith H.*, 231 W. Va. at 182, 744 S.E.2d at 292 (quoting *In re Randy H.*, 220 W. Va. 122, 127, 640 S.E.2d 185, 190 (2006)) (explaining that courts have a duty to make findings of fact and conclusions of law regarding allegations that arise after an initial petition is filed). As such, the petitioner is not entitled to relief.

For the foregoing reasons, we find no error in the decisions of the circuit court, and its December 21, 2024, order is affirmed.

Affirmed.

ISSUED: November 25, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison