IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

No. 25-366

In Re A.C.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal from the Circuit Court of Ohio County
The Honorable Michael J. Olejasz, Judge
Case No. CC-35-2023-JA-112

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 8, 2026
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JUSTICE KIRKPATRICK delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "This Court reviews the circuit court's orders in abuse and neglect proceedings using the three following standards: (1) substantive rulings, such as whether the evidence supports a conclusion that a child has been abused or neglected or whether termination of parental rights is appropriate, are reviewed for abuse of discretion; (2) factual findings supporting substantive rulings are reviewed for clear error; and (3) to the extent review of the order implicates an issue of law or requires statutory interpretation, our review is de novo." Syllabus Point 1, *In re K.S.*, 253 W. Va. 154, 930 S.E.2d 400 (2026).

2. "Where 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 adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syllabus Point 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

KIRKPATRICK, Justice:

The petitioner mother, M.D., appeals the May 8, 2025, order of the Circuit Court of Ohio County terminating her parental rights to A.C. On appeal, the petitioner argues that the circuit court erred by terminating her parental rights via a modification proceeding because the Department of Human Services ("DHS") failed to allege or prove that a material change of circumstances had occurred since her prior disposition. The DHS concedes that it did not allege a material change of circumstances in its petition for modification, and instead, it filed its petition to comply with an informal circuit court policy that required parties who have been granted disposition pursuant to West Virginia Code § 49-4-604(c)(5) to return to court one year later for a modification of their initial disposition. The petitioner also argues that termination of her parental rights was not in the best interests of A.C. The guardian ad litem agrees that the circuit court erred by terminating the petitioner's parental rights.

Upon our review of the parties' briefs and oral arguments, the appendix record, and the pertinent legal authority, we accept the DHS's confession of error and conclude that the circuit court erred by terminating the petitioner's parental rights. Accordingly, we reverse the May 8, 2025, order terminating the petitioner's parental rights and remand this case to the circuit court for entry of an amended dispositional order consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

In August 2023, the DHS filed an abuse and neglect petition against the petitioner after she failed to follow through with a safety plan, which had been implemented after she recorded a video threatening to harm herself while she was in the presence of A.C. The petitioner stipulated that her mental health and substance abuse issues impaired her parenting abilities and her judgment, and she was adjudicated as an abusing parent. Thereafter, the petitioner was granted a post-adjudicatory improvement period, consented to by the DHS. Approximately two months later, in February 2024, the petitioner filed a "Disposition 5 Agreement" ("Agreement") in which she indicated that she was "presently unable to provide adequately for the needs of [A.C]" and that entering into the Agreement was in the best interest of A.C. at that time.[1] The disposition referenced in the Agreement is found in West Virginia Code § 49-4-604(c)(5), which permits a circuit court to commit a child whose parent is "presently unwilling or unable to provide adequately for the child's needs" to the temporary "care, custody, and control of the [DHS], a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court." *Id*.

At the dispositional hearing, counsel for the petitioner tendered the Agreement. Thereafter, the circuit court engaged into a colloquy with the petitioner and concluded that she made a "knowing, voluntary and intelligent waiver of her right to a

[1] Although titled as an "Agreement," the petitioner is the only signatory to this document.

[contested] dispositional hearing…." The circuit court granted the petitioner's request for a "Disposition 5" and ordered that although her parental rights remained intact, "full legal, physical and residential custody of [A.C.] shall remain with her" nonabusing father. In the Disposition Hearing Order, the circuit court directed the parties "to return to [the] [c]ourt in one year to address a modification of the [petitioner's] Disposition" and set a hearing on an anticipated motion to modify the petitioner's disposition for February 24, 2025.[2]

On February 13, 2025, the DHS filed a motion to modify the petitioner's initial disposition, asking the court to terminate the petitioner's parental rights. On April 25, 2025, a hearing was held on the motion to modify. At the dispositional hearing, the petitioner and the guardian sought to continue the petitioner's "Disposition 5." The DHS did not agree to a continuation of the petitioner's "Disposition 5" and opted to move forward with its evidence in support of modification of the prior disposition by way of termination. In this regard, the DHS called three witnesses: (1) A.C.'s father; (2) the petitioner; and (3) the child protective service ("CPS") worker. A.C.'s father testified that he had allowed the petitioner to see A.C. in the year preceding the modification hearing and that during the summer of 2024, he found a straw inside the petitioner's purse which he perceived to be drug paraphernalia. He further testified that when he asked the petitioner about the straw, she told him that she had taken the straw from an attendee at a Narcotics

[2] The order on appeal indicates that the parties appeared on February 24, 2025, and at that time, counsel for the petitioner requested a continuance, which was granted. The modification hearing was rescheduled and conducted on April 25, 2025.

Anonymous meeting who she suspected was going to use drugs. In response to this incident, A.C.'s father ended overnight visits between the petitioner and A.C., but he allowed non-overnight visits to resume thereafter. The father also testified that he had never been suspicious that the petitioner was under the influence of drugs when she showed up for a visit with A.C.

The petitioner then offered testimony detailing her treatment or lack thereof for her mental health and substance abuse issues. She acknowledged the straw incident and testified that she took the straw away from an attendee at a Narcotics Anonymous meeting in an effort to help the other person. Further, she denied using any substances during her one-year "Disposition 5" and testified that she had been clean for almost three years. The CPS worker confirmed that the DHS filed the petition to modify the petitioner's disposition to comply with the circuit court's policy to revisit "Disposition 5" cases after one year. Importantly, in response to questions from the petitioner's counsel, the CPS worker confirmed that during the year between the petitioner's disposition and the modification hearing, "nothing ha[d] changed" with the petitioner and that she had "continued to stay the same." At the conclusion of the hearing, the circuit court found that there had been a material change of circumstances based upon, in part, the incident involving the petitioner bringing "methamphetamine and [drug] paraphernalia to a visit with [A.C.], her failure to maintain treatment, and her refusal to produce negative drug screens at the father and DHS' [sic] request . . . . " Ultimately, the circuit court entered an

order modifying the petitioner's prior disposition and terminating her parental rights. It is from the dispositional order that the petitioner appeals.[3]

II. STANDARD OF REVIEW

We recently established the following standard for reviewing circuit court orders in abuse and neglect proceedings:

> [t]his Court reviews the circuit court's orders in abuse and neglect proceedings using the three following standards: (1) substantive rulings, such as whether the evidence supports a conclusion that a child has been abused or neglected or whether termination of parental rights is appropriate, are reviewed for abuse of discretion; (2) factual findings supporting substantive rulings are reviewed for clear error; and (3) to the extent review of the order implicates an issue of law or requires statutory interpretation, our review is de novo.

Syl. Pt. 1, *In re K.S.*, 253 W. Va. 154, 930 S.E.2d 400 (2026). With this standard of review in mind, we turn to the parties' arguments.

III. DISCUSSION

Before this Court the petitioner asserts that the circuit court erred by terminating her parental rights in a modification proceeding when the DHS failed to prove that a material change in circumstances occurred following her prior disposition, as

[3] A.C. remains in the custody of her nonabusing father, and his parental rights remain intact.

required by West Virginia Code § 49-4-606(a). The petitioner also takes issue with the circuit court's "policy" of placing a one-year time limit on its "Disposition 5" orders.

Before delving into the petitioner's substantive arguments, we must appropriately characterize her initial disposition in 2024. On February 21, 2024, the petitioner executed and tendered to the circuit court the Agreement referenced *supra*, and the circuit court granted the petitioner a "Disposition 5" pursuant to West Virginia Code § 49-4-604(c)(5).[4] The circuit court noted that the petitioner's parental rights remained intact, but "full legal, physical and residential custody of [A.C] shall remain with her" nonabusing father. However, disposition pursuant to West Virginia Code § 49-4-604(c)(5) "[s]pecifically does not encompass when a child is with a non-offending parent—only when a child is temporarily placed with a guardian or the DHS." *In re H.B.*, 252 W. Va. 350, 362 n.18, 922 S.E.2d 350, 362 n.18 (2025).[5] Accordingly, as the petitioner acknowledges, West Virginia Code § 49-4-604(c)(5) was not the proper statutory vehicle to accomplish the disposition intended and granted by the circuit court. Rather, because A.C. was placed in the sole custody of her father, the petitioner's initial disposition was an attempt to terminate her custodial rights, which is actually governed by West Virginia Code

[4] According to the dispositional order, all parties agreed upon this disposition.

[5] *See also In re R.G.*, No. 20-0509, 2021 WL 2366886, at *1 n.4 (W. Va. June 9, 2021) (memorandum decision) (explaining that while the parties "label[ed] the child's placement with his father at the conclusion of the mother's proceeding as a section 5 disposition" it appeared that the circuit court had actually terminated the mother's custodial rights pursuant to § 49-4-604(c)(6), considering that the child was not placed in a guardianship but placed in the sole custody of a nonabusing parent).

§ 49-4-604(c)(6), not (c)(5). As such, the initial disposition contemplated below was governed by West Virginia Code § 49-4-604(c)(6).

Having acknowledged the applicable dispositional standard, we now move to the petitioner's substantive arguments. On appeal, the petitioner asserts that the circuit court clearly erred when it found that a material change in circumstances justifying modification occurred between the time of her initial disposition and the hearing on the DHS's motion to modify her disposition. According to the petitioner, the DHS did not argue or prove a material change of circumstances. In addition, the petitioner contends that termination is not in the best interests of A.C. On appeal, the DHS concedes that its motion to modify "did not expressly allege a material change of circumstances . . . . " After reviewing the entirety of the record, the DHS confesses error insofar as it does not believe that the evidence supported a finding that there had been a material change of circumstances, and "no evidence" was presented to show that the modification and subsequent termination of the petitioner's parental rights were in A.C.'s best interest. This confession is not dispositive, nor does it relieve us of our "judicial duty to independently examine the error confessed to determine if the confession of error is meritorious." *Freeland v. Marshall*, 249 W. Va. 151, 160, 895 S.E.2d 6, 15 (2023).

Prior to the modification proceedings the petitioner challenges in this appeal, the DHS alleged in its motion to modify that the petitioner "had failed to remedy the issues which led to the filing" of the abuse and neglect petition in 2023. Specifically, the DHS alleged that the petitioner did not receive consistent treatment for her mental health and

substance abuse issues and that she failed to provide records to show any progress. Because the petitioner had been given "ample time and opportunity" to remedy her issues in the intervening year and had failed to do so, the DHS sought to modify the petitioner's initial disposition and terminate her parental rights. The motion contains one sentence alleging that A.C.'s father reported concerns that the petitioner was using illicit substances.

During the modification hearing, the petitioner and the guardian sought to continue the petitioner's "Disposition 5." Counsel for A.C.'s father indicated that his client was "amenable to continuation of Disposition 5 for another year."[6] Counsel for the DHS, however, indicated that the DHS still sought termination because it "just [could not] see any material change in [the petitioner] since" her prior disposition.[7] Counsel for the petitioner seized upon this representation and argued, to no avail, that the DHS was required to prove that a material change of circumstances had occurred between the granting of the "Disposition 5" and the filing of the motion to modify the petitioner's disposition.

Despite the lack of supporting evidence elicited during the modification hearing, the circuit court found "that there ha[d] been a material change by the testimony

[6] As part of this representation, A.C.'s father requested that the petitioner participate in "substance abuse treatment, mental health treatment and drug testing."

[7] In response to the DHS's motion to modify, the petitioner filed a motion for a post-dispositional improvement plan, but the DHS did not agree to a post-dispositional improvement period, and instead, elected to proceed with an evidentiary hearing on its request to terminate the petitioner's parental rights.

and admissions of [the petitioner] that she was in possession of methamphetamine on a drug paraphernalia device." In addition, the circuit court stated that other circumstantial evidence made it appear that the petitioner was in possession of the straw mentioned in A.C.'s father's testimony "because she very well was still using methamphetamine." The circuit court commented on the petitioner's failure to produce medical records to show that she was not using methamphetamines and that she did not complete drug testing despite her promises to do so. The lack of supporting testimony to that effect belies the circuit court's findings. While A.C.'s father testified that he found a straw in the petitioner's purse almost nine months earlier, he also acknowledged that he was never suspicious that the petitioner was using drugs when she showed up for her regular visits. Further, contrary to the circuit court's finding that the DHS had "proven a significant and deteriorating change in the circumstances of [the petitioner] since her disposition[,]" the CPS worker who had been assigned to this case from its inception testified that the "nothing ha[d] changed" with the petitioner and that she "continued to stay the same." Given that testimony, we find the DHS's confession of error to be meritorious. Accordingly, the circuit court erred in granting the DHS's motion to modify when the DHS failed to meet its burden of proof with respect to the statutory prerequisites to modify an initial disposition. *See* W. Va Code § 49-4-606(a) (permitting a court to "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").

Because the DHS asserts that it filed the motion to modify at issue in this case in "good faith to comply" with an informal policy implemented by the circuit court, we take this opportunity to address the policy. Under the policy, as described in the order challenged on appeal, a Disposition 5 order entered by the circuit court will remain in effect for a "one year" period, after which time the party subject to the order must return to court for potential dispositional modification.[8]

According to the petitioner, the policy limits "parents who have been given a Disposition 5 to a one-year time limit to rectify the issues," that led to the filing of the abuse and neglect petition initiating their case. On appeal, the petitioner argues that there is no statutory authority for this policy and that the implementation of this policy results in disparate treatment among similarly situated respondents. The DHS echoes the petitioner's concerns regarding the circuit court's policy, as it believes the policy was inappropriately implemented and then relied upon to terminate the petitioner's parental rights.

Upon our review, we find no support for the circuit court's policy in statute or our rules. West Virginia Code § 49-4-606, which governs modification of dispositional orders, permits circuit courts to 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

[8] The petitioner's original dispositional order "ORDERED" the petitioner to "return to [the circuit court] in one year to address a modification of [her] Disposition." In addition, the circuit court scheduled a hearing to be held one year later for a "Hearing on a Motion to Modify [the petitioner's] Disposition." The order notes that the future hearing would "address modification so permanency can be achieved."

child's best interests." This statute does not impose a time frame for filing a motion to modify a dispositional order, and it certainly does not require a modification to be filed one year after a circuit court grants disposition pursuant to § 49-4-604(c)(5) or, as intended in the instant case, a termination of custodial rights pursuant to § 49-4-604(c)(6). Further, Rule 46 of the West Virginia Rules of Procedure for Abuse and Neglect Proceedings indicates, with some limited exceptions, that a motion to modify or supplement a dispositional order can be filed "at any time."

Requiring persons who have been granted a so-called "Disposition 5" or termination of custodial rights under § 49-4-604(c)(6) to return to court in one year to prove that they have addressed and rectified the issues that resulted in their adjudication and disposition essentially places those individuals on an unsupervised improvement period for one year. In cases such as this, this policy also impermissibly shifts the burden from the DHS having to prove that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" under § 49-4-604(c)(6) to a burden on the parent to prove that they have remedied whatever circumstances resulted in their "Disposition 5." Scheduling a hearing one year in the future and identifying it as a hearing on a motion to modify disposition presupposes that at least one party will file such a motion, even though there is no guarantee that the requirements for a modification will be present. This case highlights the pitfalls of this policy. The State filed a motion to modify the petitioner's disposition in "good faith to comply" with the circuit court's policy. However, the State concedes that it "did not expressly allege a material change of

circumstances in its motion to modify [the petitioner's] disposition . . . . " This admission demonstrates the problem—this policy may require a party to file a motion to modify even if there has not been a material change of circumstances. As this case further demonstrates, such a policy may, at times, run counter to our statute governing modifications of dispositional orders and frustrate this Court's rules by imposing a rigid filing requirement where one is not contemplated.

We have long held that

> [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 adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

Syl. Pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

For the aforementioned reasons, we conclude that the circuit court's policy substantially disregards and frustrates the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes and, therefore, its dispositional order in this case must be reversed. *Id*.

IV. CONCLUSION

For the foregoing reasons, we reverse the May 8, 2025, order terminating the petitioner's parental rights and remand this matter to the circuit court for entry of an

amended dispositional order that is consistent with the parties' intended disposition of terminating the petitioner's custodial rights pursuant to West Virginia Code § 49-4-604(c)(6).[9]

Reversed and Remanded with Directions.

[9] In the order challenged on appeal, the circuit court did not grant the petitioner specific post-termination visitation, but instead, left visitation between the petitioner and A.C. "in the sole discretion" of A.C.'s father. We remind the circuit court that post-termination visitation "is the right of the child." *In re K.S.*, 246 W. Va. 517, 530, 874 S.E.2d 319, 332 (2022). Further, leaving post-termination visitation in the discretion of a non-offending parent is "not a proper order of post-termination visitation." *Id*. The amended dispositional order should properly delineate post-termination visitation. *Id.* at 530-531, 874 S.E.2d at 332-333.