

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

*In re* T.B. and H.B.

No. 20-0369 (Kanawha County 19-JA-593 and 19-JA-594)

**FILED**  
**November 4, 2020**  
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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Grandfather and Custodian D.M., by counsel Christopher C. McClung, appeals the Circuit Court of Kanawha County’s February 20, 2020, order removing T.B. and H.B. from his physical custody and dismissing him from the proceedings.<sup>1</sup> The West Virginia Department of Health and Human Resources (“DHHR”), by counsel S.L. Evans, filed a response in support of the circuit court’s order and a supplemental appendix. The guardian ad litem, Sharon Childers, filed a response on behalf of the children in support of the circuit court’s order. On appeal, petitioner argues that the circuit court erred in dismissing him as a party for a lack of standing.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that the circuit court erred in dismissing petitioner as a party on the ground that he lacked standing. This case satisfies the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure, and a memorandum decision is appropriate to vacate and remand the matter.

In April of 2019, the DHHR began investigating allegations of the parents’ drug use after child T.B. went missing from his maternal grandmother’s home. Ultimately, the investigation led the DHHR to the home of the paternal grandfather, petitioner herein. Petitioner initially refused access to his home but informed the worker that he was caring for T.B., as well as his older grandchild, H.B. Petitioner requested that the CPS worker return two hours later to see the home and speak with the children. When the CPS worker returned, she observed the inside of petitioner’s home, and found it to be “very cluttered and dirty.” The CPS worker interviewed H.B. who

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<sup>1</sup>Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). In addition, counsel for petitioner withdrew from representation on October 21, 2020.

disclosed that “he lives with [petitioner].” The child further stated that he “sees his mom when she comes to [petitioner’s home] and he does go to her house sometimes.” Petitioner told the CPS worker that he had cared for H.B. “on and off for a couple of years,” but did not have “official” custody of the child. Additionally, the CPS worker interviewed petitioner’s wife, who disclosed that she was subject to a prior child abuse and neglect petition due to a failure to provide a sanitary home and due to the sexual abuse of her child by an older sibling. The DHHR included petitioner as a respondent to the abuse and neglect petition, and petitioner was appointed counsel. Following the filing of the petition, the children remained in petitioner’s care.

The circuit court held a preliminary hearing in October of 2019 and sustained the petition against the parents. Additionally, the circuit court noted concerns with the children’s placement in petitioner’s home and ordered petitioner to participate in services to rectify the conditions in the home. Later in October of 2019, the DHHR filed an amended petition alleging that petitioner refused to participate in the court-ordered services. The DHHR alleged that petitioner’s refusal to participate in services subjected the children “to all the issues that [petitioner], his home and associates present.” However, the children remained in petitioner’s home pending the preliminary hearing on the amended petition.

The circuit court held the preliminary hearing on the amended petition in December of 2019. The circuit court heard testimony from a service provider that petitioner refused to participate in services and refused the provider access to portions of his home, such as his bedroom which was kept locked. The DHHR also expressed concerns over situations that occurred at or around petitioner’s home, including an altercation during which unidentified third parties fired a gun in the vicinity of the home and an incident where a service provider witnessed an unidentified man appear at the home to purchase Lortabs, a controlled substance. Petitioner denied that he refused to participate in services or that he refused to allow services providers full access into his home. Ultimately, the circuit court granted the guardian’s motion to remove the children from petitioner’s home. Thereafter, the DHHR moved the circuit court to dismiss petitioner from the proceedings, arguing that, without physical custody of the children, petitioner did not have standing to be a party. The circuit court granted the DHHR’s motion and dismissed petitioner for a lack of standing. Petitioner now appeals the circuit court’s February 20, 2020, order, which dismissed him from the proceedings.<sup>2</sup>

The Court has previously held:

“Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left

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<sup>2</sup>According to the parties, the parents’ parental rights were terminated in July of 2020. The permanency plan for the children is adoption in their current foster placement.

with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

On appeal, petitioner argues that the circuit court erred in concluding that he lacked standing to be a party and dismissing him from the proceedings. Petitioner asserts that he should have been considered a psychological parent of the children, which, according to petitioner, would have provided him additional due process protections. While we decline to rule on petitioner’s assertion that he qualifies as a psychological parent, we nonetheless agree with petitioner that the circuit court erred in concluding that he did not have standing to be a party to the proceedings.<sup>3</sup>

West Virginia Code § 49-4-601(h) provides as follows:

Right to be heard. – In any proceeding pursuant to this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. Foster parents, pre-adoptive parents, and relative caregivers shall also have a meaningful opportunity to be heard.

As this Court has previously discussed, West Virginia Code § 49-4-601(h) establishes a “two-tiered framework.” *State ex rel. H.S. v. Beane*, 240 W. Va. 643, 647, 814 S.E.2d 660, 664 (2018). “[F]or purposes of this statute, the term ‘custodial’ refers to a person who became a child’s custodian ‘prior to the initiation of the abuse and neglect proceedings[.]’” *Beane*, 240 W. Va. at 647, 814 S.E.2d at 664 (quoting *In re Jonathan G.*, 198 W. Va. 716, 727, 482 S.E.2d 893, 904 (1996)) (emphasis in original). West Virginia Code § 49-1-204 defines a “custodian” as a “person who has or shares actual physical possession or care and custody of a child, regardless of whether that person has been granted custody of the child by any contract or agreement.” Further, we have explained that “[a] person ‘who obtains physical custody *after* the initiation of abuse and neglect proceedings – such as a foster parent – does not enjoy the same statutory right of participation as is extended to parents and *pre-petition custodians.*’” *Beane*, 240 W. Va. at 648, 814 S.E.2d at 665 (quoting *State ex rel. R.H. v. Bloom*, No. 17-0002, 2017 WL 1788946 at \*3 (W. Va. May 5, 2017)(memorandum decision)) (emphasis added). Here, the DHHR alleged sufficient facts to establish that petitioner was a lawful custodian of H.B. prior to the filing of the petition. According to the DHHR’s petition, H.B. confirmed petitioner’s statements that he lived in petitioner’s home and only stayed with his mother “sometimes.” The parties below and on appeal emphasize that

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<sup>3</sup>Although we agree with petitioner’s ultimate conclusion that the circuit court erred in dismissing him from the proceedings, we note that petitioner did not raise the issue of whether he was a psychological parent below. “‘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).

petitioner did not pursue legal guardianship of the child and did not have “legal” custody. However, the record below contains uncontroverted evidence that petitioner shared “actual physical possession or care and custody of [H.B.]” with the child’s mother prior to the filing of the petition. Thus, petitioner was a pre-petition custodian with custodial rights to H.B.<sup>4</sup> At a minimum, the circuit court’s dismissal of petitioner as a party denied him his statutory right to a meaningful opportunity to be heard, including the opportunity to testify and cross-examine witnesses.

The circuit court’s order was, in actuality, a termination of petitioner’s custodial rights without due process. West Virginia Code § 49-4-601 anticipates the filing of child abuse and neglect petitions against “pre-petition custodians.”<sup>5</sup> Indeed, the term “abusing parent” includes “a parent, guardian, or *other custodian* . . . whose conduct has been adjudicated by the court to constitute child abuse or neglect.” W. Va. Code § 49-1-201 (emphasis added). Further, West Virginia Code § 49-4-604(c) permits a circuit court to “terminate the parental, *custodial*, and guardianship rights and responsibilities of an abusing parent.” (Emphasis added.) However,

“[i]n a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under [West Virginia Code § 49-4-604(c)], it must hold a hearing under [West Virginia Code § 49-4-601(i)], and determine ‘whether such child is abused or neglected.’ Such a finding is a prerequisite to further continuation of the case.” Syllabus Point 1, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983).

Syl. Pt. 3, *In re A.P.-I*, 241 W. Va. 688, 827 S.E.2d 830 (2019). In this case, the circuit court failed to determine if petitioner had abused or neglected the children and issued a final order that, essentially, imposed the most restrictive dispositional alternative available in West Virginia Code

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<sup>4</sup>Whether petitioner has custodial rights to T.B. is less clear from the record. On remand, the circuit court should inquire as to the factors surrounding petitioner’s “actual physical possession or care and custody” of that child and determine whether petitioner was T.B.’s lawful custodian at the time the petition was filed. *See State ex rel. R.H. v. Bloom*, No. 17-0002, 2017 WL 1788946 at \*3 (W. Va. May 5, 2017)(memorandum decision) (noting that a grandfather caring for his grandchildren “for a three-week period before the abuse and neglect petition was filed” did not establish the existence of a pre-petition custodianship).

<sup>5</sup>Although not in effect at the time of the circuit court’s order, the West Virginia Legislature recently amended West Virginia Code §49-4-601(b) to require that

[e]ach petition shall name as a party each parent, guardian, custodian, other person standing *in loco parentis* of or to the child allegedly neglected or abused and state with specificity whether each parent, guardian, custodian, or person standing *in loco parentis* is alleged to have abused or neglected the child.

This amendment further clarifies the Legislature’s intention to require that custodians participate in abuse and neglect proceedings if those rights are in jeopardy due to allegations of abuse and neglect.

§ 49-4-604, termination of petitioner’s custodial rights. The circuit court’s reasoning that petitioner had no standing to participate in the proceeding once divested of physical custody of the children is flawed and, notably, the order on appeal cites no authority in support of such a conclusion.<sup>6</sup> We have 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 [alleged] to be abused or neglected has been substantially disregarded or frustrated, the resulting order . . . will be vacated and the case remanded for compliance with that process and entry of an appropriate . . . order.” Syllabus point 5, in part, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Syl. Pt. 3, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009). As the process for child abuse and neglect proceedings was substantially disregarded by the circuit court’s failure to abide by the above-mentioned procedure, its February 20, 2020, order dismissing petitioner as a party must be vacated and the matter remanded. The circuit court must hold an adjudicatory hearing to determine if T.B. and H.B. were abused or neglected in petitioner’s care, and, if applicable, a dispositional hearing to determine the appropriate disposition for the children.

For the foregoing reasons, we vacate the circuit court’s February 20, 2020, order dismissing petitioner as a party for a lack of standing and remand this matter for further proceedings consistent with the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and Chapter 49 of the West Virginia Code. The circuit court is hereby ordered to hold the appropriate hearings and issue a final order in this case within sixty days. The Clerk is hereby directed to issue the mandate contemporaneously herewith.

Vacated and remanded.

**ISSUED:** November 4, 2020

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<sup>6</sup>The Court notes that the circuit court’s removal of the children from petitioner’s home was proper under West Virginia Code § 49-4-602(b), which provides that a circuit court “may order that the child[ren] be delivered into the temporary care, custody, and control of the department” “if the facts alleged in the petition demonstrate to the court that there exists imminent danger to the child[ren]” and “[i]f the court finds at the preliminary hearing that there are no alternatives less drastic than removal of the child[ren].” Here, the DHHR presented evidence that petitioner’s home was unsafe for the children and that petitioner refused to participate in services to rectify those conditions. This evidence clearly established probable cause that the children were in imminent danger in petitioner’s care. To the extent that petitioner argues that the DHHR presented evidence that was not alleged in the petition, specifically his wife’s CPS history and prior removal of her biological children, we find no error. The initial petition included these allegations, and the circuit court provided this evidence an appropriate weight.

**CONCURRED IN BY:**

Chief Justice Tim Armstead  
Justice Margaret L. Workman  
Justice Elizabeth D. Walker  
Justice Evan H. Jenkins  
Justice John A. Hutchison