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MEMORANDUM DECISION OF THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA (FEBRUARY 1, 2022)

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

IN RE R.W.

No. 21-0626

(Braxton County 21-JA-9)

Before: John A. HUTCHISON, Chief Justice, Elizabeth D. WALKER, Tim ARMSTEAD, Evan H. JENKINS, William R. WOOTON, Justices.

Petitioner Mother D.H., by counsel Daniel K. Armstrong, appeals the Circuit Court of Braxton County's July 6, 2021, order terminating her parental rights to R.W.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Patrick Morrisey and Lee Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem, Julia R. Callaghan, filed a response on behalf of

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[1] 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).

the child in support of the circuit court's order and a supplemental appendix. On appeal, petitioner argues that the circuit court erred in terminating her parental rights.

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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

As petitioner previously appealed her adjudication as an abusing parent, she alleges error in regard to a narrow issue in the current appeal. As such, it is unnecessary to undertake an extended recitation of the facts in this matter. Instead, given that petitioner only challenges the ultimate termination of her parental rights, it is sufficient to set forth the following: After the DHHR filed multiple abuse and neglect petitions alleging that petitioner engaged in domestic violence in the child's presence and failed to protect her other child, three-year-old K.H., who died in his father's home, petitioner was adjudicated of abusing and neglecting R.W. in May of 2021. Petitioner's adjudication was based on her history of extensive domestic violence in the child's presence and her failure to acknowledge any wrongdoing or abuse and neglect, especially in regard to the death of K.H., which occurred at a time that then one-year-old R.W. was also in the home. Relevant to the current issue on appeal, the evidence below established that petitioner

was aware of the father's violent nature, including toward the deceased child, as petitioner even reported the issue to law enforcement prior to the child's death. Further, petitioner admitted in her testimony to taking inadequate steps to protect the children from the father or otherwise remove the children from the dangerous conditions presented. A medical professional testified that several of K.H.'s injuries could have been fatal in and of themselves, and opined that the injuries to the child were a result of severe child abuse. Testimony also established that petitioner permitted R.W.'s grandfather to exercise custody of the child, despite the fact that his parental rights to his own children—including petitioner—had been terminated. It is also important to note that the circuit court found petitioner's credibility following adjudication to be entirely lacking.

The circuit court held a dispositional hearing in June of 2021, during which a psychologist who performed petitioner's psychological evaluation testified. The psychologist explained that petitioner failed to accept any responsibility during the proceedings. The psychologist stated that she assigned petitioner the worst possible prognosis for improved parenting, extremely poor to nonexistent. The psychologist testified that her prognosis was new since she released the psychological evaluation report. She explained that at the time of petitioner's initial evaluation, she had given a guarded prognosis for improved parenting. However, the psychologist explained that after petitioner attempted to defend the father at the adjudicatory hearing and failed to accept responsibility for her actions, the psychologist updated the prognosis to extremely poor to nonexistent. The psychologist further

noted that petitioner should never have access to any children in the future.

Next, a CPS worker testified that although petitioner was participating in services, she had failed to admit to any wrongdoing and did not maintain fit and suitable housing. The worker also explained that petitioner's poor decision making was a danger to R.W. The worker noted that there were no services that could be offered to petitioner to overcome the circumstances that led to the petition given that she failed to take responsibility during the proceedings.

Petitioner presented a service provider who testified that petitioner had positive interactions during her visits with R.W. However, under questioning, the provider acknowledged that petitioner missed at least two visits because petitioner allegedly slept through her alarm. Finally, petitioner testified and acknowledged that she had missed two visits with the child after sleeping through alarms. Petitioner also admitted that she received a call at 5:30 a.m. on February 2, 2021—the day of K.H.'s death—from the father who made a disturbing, violent statement about an imaginary individual. Petitioner acknowledged that she was working at the time of the call and never left work to check on the children. Petitioner continued to deny wrongdoing and maintained that her "poor judgment" was the only thing that she "may have done wrong" in the case.

After hearing the evidence, the circuit court found that petitioner failed to demonstrate she would fully participate in an improvement period, if granted one, and that there were no services that could be provided to her to overcome the conditions that led to the filing of the petition.

Accordingly, the circuit court terminated petitioner's parental rights to the child.[2] It is from the July 6, 2021, dispositional order that petitioner appeals.

The Court has previously established the following standard of review:

> "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 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).

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[2] The father's parental rights were also terminated below. The permanency plan for the child is adoption by his current foster parents.

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

On appeal, petitioner first argues that the circuit court erred in terminating her parental rights based on her decision to allow the children's grandfather to supervise the children.[3] Petitioner argues that the DHHR failed to call a single witness who testified that petitioner was ever informed that she could not allow the grandfather to supervise the children. She contends that no one explained any terms or conditions related to the grandfather's prior termination of parental rights to his own children and that there was no evidence that she had any knowledge that his prior termination of parental rights should have impacted his fitness to supervise the children.

Having reviewed the record, we find that sufficient evidence existed to terminate petitioner's parental rights. While petitioner claims that she did not know that the grandfather could not supervise the children, she does not dispute having knowledge that his parental rights were previously terminated. Further, her testimony reflects that she understood that the grandfather had been found by a circuit court to be unsafe to parent his children—including her. Nevertheless, petitioner chose to allow the grandfather to serve as a caregiver for her children on a regular basis, based upon a personal assessment that he had changed. Although there is no evidence that the grandfather perpetrated acts of abuse or neglect against petitioner's

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[3] Petitioner also argues that it was error to adjudicate her as an abusing parent. However, because petitioner previously raised this argument in her prior appeal, it is unnecessary to address this issue herein.

children, petitioner's choice to place the children in her father's care, despite his history of abuse and neglect, threatened the children's safety and wellbeing. Further, the DHHR demonstrated, by clear and convincing evidence, that petitioner knew or should have known that the grandfather was an inappropriate caregiver for the children and that his prior termination of parental rights placed the children at risk for abuse and neglect.

Next, petitioner argues that the circuit court erred in terminating her parental rights based upon exposure of the children to domestic violence. This argument, however, is not appropriate for review, as it, in actuality, is yet another attack on her adjudication. Although couched in terms of termination of her rights, the ultimate point of this argument is that petitioner alleges that she was not exposing R.W. to domestic violence when the instant petition was filed in February of 2021. Because we previously found petitioner's adjudication to be appropriate, including upon the evidence that she exposed the children to domestic violence, she is not entitled to raise this issue on appeal yet again. This Court has previously recognized that "'[a] court on notice that it has previously decided an issue may dismiss the action *sua sponte*, consistent with the *res judicata* policy of avoiding judicial waste[.]' *Bezanson v. Bayside Enterprises, Inc.*, 922 F.2d 895, 904 (1st Cir. 1990)." *Gulas v. Infocision Mgmt. Corp.*, 215 W. Va. 225, 229 n.4, 599 S.E.2d 648, 652 n.4 (2004).

Next, petitioner argues that the circuit court erred in terminating her parental rights based on her failure to admit any wrongdoing or culpability. Petitioner notes that the DHHR has the burden of proof,

under West Virginia Code § 49-4-601(i), to prove conditions of abuse and neglect by clear and convincing evidence. Petitioner contends that the circuit court shifted the burden of proof onto her by finding that she failed to take any responsibility for the death of K.H. as to the finding of abuse for R.W. We find petitioner's arguments unavailing.

Here, while recognizing that "[t]he burden of proof in a child neglect or abuse case does not shift from the State Department of [Health and Human Resources] to the parent, guardian or custodian of the child," we nonetheless find that such shifting did not occur below. Syl. Pt. 4, in part, *In re K.L.*, 233 W. Va. 547, 759 S.E.2d 778 (2014) (citation omitted). As set forth above, the DHHR presented overwhelming evidence that petitioner knew or should have known that the father was not a safe caregiver for the children. Petitioner testified that the father committed several acts of domestic violence in the presence of the children, had anger management issues, and had violent tendencies. Further, petitioner admitted that on at least one occasion, the father smacked K.H., in her own words, "too hard." Petitioner further testified that mere loud noises, including from the children, caused the father to become angry and violent. Petitioner also documented that the father failed to take responsibility for domestic violence in their relationship, blaming many incidents on an apparition which he named "Fire Face." Petitioner also allowed the children's grandfather, whose parental rights were previously terminated, to supervise the children and minimized her actions by claiming that she did not know that he should not be around the children. Thus, while the circuit court did find that petitioner

"denied any wrongdoing" during the proceedings, there is no evidence that the court used petitioner's lack of admission to abuse and neglect as a basis for her terminating her parental rights.

Finally, petitioner argues that the forensic psychologist improperly "downgraded her prognosis" for achieving minimally adequate parenting based on the mistaken belief that petitioner had defended the father when she contends that she testified otherwise. Petitioner asserts that the forensic psychologist changed her prognosis after reading the circuit court's findings in its adjudicatory hearing order "and not an actual examination of the testimony provided at the hearing via a transcript or first-hand knowledge of what was said." Petitioner argues that the circuit court, in turn, erred in terminating her parental rights based, in part, on the change in the forensic psychologist's prognosis. We find petitioner's argument without merit.

On appeal, petitioner presents no evidence that her parental fitness evaluation failed to provide the circuit court with accurate information regarding her ability to parent or whether she addressed the allegations of the father's physical abuse. Petitioner's downgraded prognosis was based upon a finding by the circuit court that petitioner was not a credible witness and that she minimized the father's violent nature during her adjudicatory hearing testimony. While petitioner argues that she did not defend the father in her testimony throughout the proceedings, she ignores the fact that the circuit court resolved this credibility determination against her. We decline to disturb this finding on appeal. *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) ("A reviewing court cannot assess witness credibility

through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations."). The psychologist's consideration of the circuit court's assessment of petitioner's testimony alongside other information—including her own interview of petitioner and the records provided to her—was appropriate. The fact that such additional information caused the psychologist to downgrade petitioner's prognosis for achieving minimally adequate parenting is not erroneous or prejudicial to petitioner when it accurately reflected her testimony. Accordingly, the circuit court did not err in considering the psychologist's revised recommendation when it terminated petitioner's parental rights.

Moreover, this evidence supports findings that there was no reasonable likelihood petitioner could substantially correct the conditions of abuse and neglect in the near future and that termination of parental rights was necessary for the welfare of the child. West Virginia Code § 49-4-604(c)(6) provides that circuit courts are to terminate parental rights upon these findings. Clearly, petitioner presented a danger to the child if in her custody. Additionally, "we find that adoption, with its corresponding rights and duties, is the permanent out-of-home placement option which is most consistent with the child's best interests." *State v. Michael M.*, 202 W. Va. 350, 358, 504 S.E.2d 177, 185 (1998). The circuit court's termination of petitioner's parental rights to R.W. was necessary to facilitate adoption for the child. As such, it is clear that termination of petitioner's parental rights was necessary to provide permanency for the child and, therefore,

necessary for his welfare. Further, we have long held that

> "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] . . . that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). Accordingly, we find no error in the circuit court's order terminating petitioner's parental rights without the imposition of a lesser-restrictive alternative.

For the foregoing reasons, we find no error in the decision of the circuit court, and its July 6, 2021, order is hereby affirmed.

Affirmed.

ISSUED: February 1, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton

ORDER OF THE CIRCUIT COURT OF BRAXTON COUNTY OF WEST VIRGINIA (JULY 6, 2021)

IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

IN THE INTEREST OF: R.W.

D.H.

S.T.W.

Adult Respondent(s).

Case No. CC-04-2021-JA-9

Before: Richard A. FACEMIRE, Chief Judge.

Note: West Virginia court rules require that the names of parents and children in abuse and neglect matters are presented solely by initials. These initials are used in this matter:

R.W.	is the child
D.H.	is the biological mother
S.T.W.	is the biological father
K.H.	was the son of D.H. and the step-son of S.T.W.

On the 23rd day of June, 2021, a disposition hearing was held before this Court regarding the

adult respondents, S.T.W.and D.H. The Court heard the testimony from Barbara Nelson of Saar Psychological Group, Robin Meadows, CPS worker, Kathryn MacDonald, service provider, and the adult respondent mother, D.H., and took the matter under advisement and ordered the parties to submit to the Court proposed findings of fact and conclusions of law.

1. S.T.W.is the biological father of R.W. and was the step-father of K.H.

2. D.H. is the biological mother of both children.

3. Following the May 7, 2021, adjudicatory hearing, this Court made an adverse inference against the father and found that his silence was affirmative evidence of his culpability in the case. This Court further found the State met its burden of proving, by clear and convincing evidence, that the adult respondents were abusive and neglectful parents for the following reasons:

a. The parents committed a minimum of ten (10) to twelve (12) acts of domestic violence in the presence of the children.

b. The father, S.T.W., on the night of February 1, 2021, into the early morning hours of February 2, 2021, left the children, ages three (3) and one (1), alone on numerous occasions, in his residence located at [redacted], West Virginia 26601.

c. The father, S.T.W., was the only other person at the residence besides his children on the night the child, K.H., died and the only expert to testify in this matter, Dr. Given, opined that the child died as a result

of severe physical child abuse. The injuries to the child were so severe the doctor could not open the child's mouth or his left eye. The child had been deceased for approximately three (3) to five (5) hours before the child arrived at the hospital and no one but the father had access to the children during that time.

d. The father, S.T.W., failed to testify in the matter and has not admitted to any wrong-doing or culpability in the case, except through his silence.

e. The mother, D.H., testified in the matter that she had done nothing wrong, that she did not allow any abuse or neglect to occur to her children, and that she did not know that her father, who had his parental rights previously involuntarily terminated to his own children, one being herself, was not permitted to independently care for children after a termination. The Court found the mother's testimony was not credible.

f. The mother, D.H., failed to admit any wrong-doing or any culpability in this case.

g. The Court concluded that the child, K.H., died at the hands of his step-father, the adult respondent father, S.T.W., and that the child, R.W., was present and witnessed the child's death.

h. The Court concluded, based on the conditions present at the time of the filing of the petition and at the adjudicatory hearing, that clear and convincing evidence existed which

demonstrated that the infant respondents were abused and neglected as defined by West Virginia Code § 49-1-201.

4. A contested disposition hearing was held on June 23, 2021.

5. All parties to this action and persons entitled to notice of the disposition hearing were given notice of the proceeding in accordance with Rule 31 of the Rules of Procedure for Child Abuse and Neglect Proceedings.

6. The Department of Health and Human Resources prepared and filed a Family Case Plan with the Court, including the permanency plan, and copies were provided to all parties, their counsel and all persons entitled to notice at least five (5) judicial days prior to the hearing. The Family Case Plan recommended termination of both the adult respondents' parental and custodial rights.

7. The Guardian ad Litem timely filed her report which also recommended termination of both the adult respondents' parental and custodial rights.

8. The State presented the testimony of Barbara Nelson, licensed psychologist with Saar Psychological Group, who performed the psychological evaluations of the adult respondents, and she was subject to cross-examination by all parties. Ms. Nelson was qualified as an expert and testified as to each of the evaluations that she performed regarding the parents. Ms. Nelson noted that there was a complete lack of acceptance of responsibility on the part of both parents. She also gave the parents the worst possible prognosis for improved parenting within a reasonable degree of psychological certainty and that prognosis was extremely poor to

nonexistent. Ms. Nelson testified that the father, S.T.W., in his evaluation showed a high probability of future abuse to children and opined that he should never have access to any children in the future.

Ms. Nelson testified regarding the mother, D.H., and stated her opinion and prognosis had changed since the drafting of her report, which was prior to the adjudicatory hearing held herein. She testified the change in her prognosis was due to the Court's adjudicatory hearing Order. At the time of the mother's evaluation, she had given a prognosis of improved parenting within a reasonable degree of psychological certainty as guarded. However, since the mother attempted to defend the father at the adjudicatory hearing and accepted no responsibility whatsoever, her prognosis for improved parenting within a reasonable degree of psychological certainty changed from guarded to extremely poor to non-existent. Ms. Nelson further testified the mother, D.H., should also never have access to any children in the future. Ms. Nelson testified that there were no services that could be offered to the parents to overcome their extremely poor to non-existent prognosis.

9. The State further presented the testimony of Robin Meadows, CPS worker, and she was subject to cross-examination by all parties. Ms. Meadows testified the Department's recommendation for both parents was termination of their parental and custodial rights. The reasons for the recommendation for the father were due to his incarceration and no services could be provided to him while incarcerated and, therefore, he would be unable to participate in services. Further, Ms. Meadows testified that there were no services the Department could offer to the father to overcome the

fact that the father caused the injuries that led to the child's, K.H.'s, death in the presence of the child, R.W.

Ms. Meadows further testified regarding the mother. She testified that although the mother was participating in services, the mother had admitted to no wrongdoing and the mother had not yet found independent, fit, apt and suitable housing. Ms. Meadows testified the mother's poor decision making is a danger to her son, R.W. Ms. Meadows testified there were also no services that could be offered to the mother to overcome the circumstances that led to the filing of the petition due to her lack of responsibility in the case and due to her poor decision making being a danger to her son. Thereafter, the State rested.

10. The mother, D.H., presented the testimony of Kathryn MacDonald, service provider, and testified on her own behalf and both were subject to cross-examination by all parties. Again, the Court finds D.H.'s testimony less than credible.

11. Kathryn MacDonald, service provider, testified regarding the mother missing visits including at least two (2) visits that were missed because she overslept. Ms. MacDonald testified the mother did interact well with her son, R.W., during the visits.

12. The mother, D.H., testified again at the disposition hearing. She testified she was attempting to obtain independent housing but had not yet done so. She admitted that she had slept through her alarm on two (2) occasions and missed visits with her son. Further, she testified that she received a call at 5:30 a.m. on February 2, 2021, from the adult respondent father, S.T.W., who said that "Fire Face" was going to kill them all. She further testified that she took no

action to attempt to ensure the safety of her children after the telephone call. She never left work to check on her children. The mother continued to deny any wrongdoing and testified that her poor judgment was the only thing that she had done wrong in the case, absolutely nothing else.

13. Neither the father, S.T.W., nor the Guardian ad Litem presented any evidence.

14. The father, S.T.W., inflicted the injuries which ultimately caused the death of the child, K.H., in the presence of the child, R.W.

15. The father, S.T.W., remains in jail awaiting indictment and trial on criminal charges stemming from the death of the infant, K.H. At this point the State did not present the criminal matter to the June Term and is awaiting presentation to the Grand Jury.

16. The father, S.T.W., does not have safe and suitable housing, has no verifiable employment, has not visited with his child and has not participated in parenting or adult life skills. He is currently unable to participate in an improvement period and has not demonstrated by clear and convincing evidence that he would fully participate in an improvement period if he were granted one.

17. West Virginia Code § 49-4-605, requires the Department of Health and Human Resources to seek termination of the father's, S.T.W.'s, parental and custodial rights to the child, R.W.

18. The Department of Health and Human Resources is not required to make reasonable efforts to preserve the family with regard to the father, S.T.W.

19. Although the mother, D.H., has participated in parenting and adult life skills and visitations, she has not taken any responsibility for her actions and has not admitted to any wrongdoing whatsoever.

20. The mother, D.H., has not demonstrated by clear and convincing evidence that she would fully participate in an improvement period if she were granted one.

21. The Court finds that there are no services that can be provided to the adult respondents to overcome the conditions that led to the filing of the petition.

22. The Court further finds that there are no services that can be provided to the father due to the fact that he caused the injuries to the child, K.H., that led to his death and those injuries were inflicted in the presence of his son, R.W.

23. The Court further finds that there are no services that can be provided to the mother to overcome the conditions that led to the filing of the petition due to her complete lack of acceptance of any responsibility in the case.

24. The Court finds that the State has proven by clear and convincing evidence that the adult respondent parents have failed to take any responsibility for the acts of abuse and neglect that led to the filing of the petition.

25. Based upon the foregoing, the Court finds that there is no less restrictive alternative than to permanently terminate the legal, parental and custodial rights of the mother, D.H., and the father, S.T.W., to the child, R.W.

26. The Court finds that such a disposition is in the best interest of the child as there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future and the child needs continuity of care and caretakers, and a significant amount of time is required to be integrated into a stable and permanent home environment.

27. The Court incorporates all findings from the adjudicatory and all other hearings as if verbatim set out herein.

28. The Court has considered the alternatives set forth in West Virginia Code § 49-4-604 and concludes that there is no alternative to the termination of the legal, parental and custodial rights of the adult respondents, S.T.W.and D.H., to the child, R.W.

29. The legal, parental and custodial rights of the adult respondent, S.T.W., to the infant respondent, R.W., are hereby PERMANENTLY TERMINATED.

30. The legal, parental and custodial rights of the adult respondent, D.H., to the infant respondent, R.W., are hereby PERMANENTLY TERMINATED.

31. Custody of R.W. shall remain with the West Virginia Department of Health and Human Resources.

32. NO CONTACT: It is ordered that S.T.W. and D.H. shall have no contact, direct or indirect, with the infant respondent and no party, foster parent, foster placement, custodian, adoptive parent, or adoptive placement shall permit such contact.

33. The adult respondents, S.T.W.and D.H., are hereby advised that:

a. You have the right to appeal this case.

b. A Notice of Intent to Appeal must be filed within thirty (30) days of the entry of the final order in this case.

c. The appeal must be perfected within sixty (60) days of the entry of the final order.

d. If you cannot afford an attorney to perfect the appeal, the Court will appoint you an attorney.

34. The WV DHHR shall file their permanent placement report setting out the plan for permanent placement including adoption, legal guardianship and/or long-term foster care. DHHR is ordered to achieve permanent placement within twelve (12) months.

35. The WV DHHR shall file a progress report in sixty (60) days.

36. A Permanent Placement Review Hearing shall be held on the 13th day of September 2021, at 9:00 a.m.

37. The Court notes and preserves all parties' objections and exceptions to the Court's ruling and order.

It is accordingly so ordered.

/s/ Richard A. Facemire
Chief Judge
Circuit Court Judge
14th Judicial Circuit

ENTER: July 6, 2021

STATUTORY PROVISION
W. VA. CODE 49-4-604

CHAPTER 49. CHILD WELFARE.
ARTICLE 4. COURT ACTIONS.

§49-4-604. Disposition of Neglected or Abused Children; Case Plans; Dispositions; Factors to Be Considered; Reunification; Orders; Alternative Dispositions.

(a) **Child and family case plans**.—Following a determination pursuant to § 49-4-602 of this code wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term "case plan" means a written document that includes, where applicable, the requirements of the family case plan as provided in § 49-4-408 of this code and that also includes, at a minimum, the following:

(1) A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child, and foster or kinship parents in order to improve the conditions that made the child unsafe in the care of his or her parent(s), including any reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U. S. C. § 12101 *et seq*., to parents with disabilities in order to allow them meaningful

access to reunification and family preservation services;

(2) A plan to facilitate the return of the child to his or her own home or the concurrent permanent placement of the child; and address the needs of the child while in kinship or foster care, including a discussion of the appropriateness of the services that have been provided to the child.

The term "permanency plan" refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available. The plan must document efforts to ensure that the child is returned home within approximate time lines for reunification as set out in the plan. Reasonable efforts to place a child for adoption or with a legal guardian should be made at the same time, or concurrent with, reasonable efforts to prevent removal or to make it possible for a child to return to the care of his or her parent(s) safely. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative, concurrent permanent placement plans for the child to include approximate time lines for when the placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children. Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard.

(b) **Requirements for a Guardian ad litem**.—

A guardian ad litem appointed pursuant to § 49-4-601(f)(1) of this code, shall, in the performance of his or her duties, adhere to the requirements of the Rules of Procedure for Child Abuse and Neglect Proceedings and the Rules of Professional Conduct and such other rules as the West Virginia Supreme Court of Appeals may promulgate, and any appendices thereto, and must meet all educational requirements for the guardian ad litem. A guardian ad litem may not be paid for his or her services without meeting the certification and educational requirements of the court. The West Virginia Supreme Court of Appeals is requested to provide guidance to the judges of the circuit courts regarding supervision of said guardians ad litem. The West Virginia Supreme Court of Appeals is requested to review the Rules of Procedure for Child Abuse and Neglect Proceedings and the Rules of Professional Conduct specific to guardians ad litem.

(c) **Disposition decisions**.—The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the department;

(4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child

and which are within the ability of any parent or parents or custodian to perform;

(5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why;

(B) Whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent or eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home;

(C) Whether the department has made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(D) What efforts were made or that the emergency situation made those efforts unreasonable or impossible; and

(E) The specific circumstances of the situation which made those efforts unreasonable if

services were not offered by the department. The court order shall also determine under what circumstances the child's commitment to the department are to continue. Considerations pertinent to the determination include whether the child should:

(i) Be considered for legal guardianship;

(ii) Be considered for permanent placement with a fit and willing relative; or

(iii) Be placed in another planned permanent living arrangement, but only in cases where the child has attained 16 years of age and the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options set forth in subparagraphs (i) or (ii) of this paragraph. The court may order services to meet the special needs of the child. Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with § 49-4-801 through § 49-4-803 of this code;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody

of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors:

(A) The child's need for continuity of care and caretakers;

(B) The amount of time required for the child to be integrated into a stable and permanent home environment; and

(C) Other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child 14 years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the court shall consider the efforts made by the department to provide remedial and reunification services to the parent. The court order shall state:

(i) That continuation in the home is not in the best interest of the child and why;

(ii) Why reunification is not in the best interests of the child;

(iii) Whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made those efforts unreasonable or impossible; and

(iv) Whether or not the department made reasonable efforts to preserve and reunify the family, or some portion thereof, including a description of what efforts were made or that those efforts were unreasonable due to specific circumstances.

(7) For purposes of the court's consideration of the disposition custody of a child pursuant to this subsection, the department is not required to make reasonable efforts to preserve the family if the court determines:

(A) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse, and sexual abuse;

(B) The parent has:

(i) Committed murder of the child's other parent, guardian or custodian, another child of the parent, or any other child

residing in the same household or under the temporary or permanent custody of the parent;

(ii) Committed voluntary manslaughter of the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(iii) Attempted or conspired to commit murder or voluntary manslaughter, or been an accessory before or after the fact to either crime;

(iv) Committed a malicious assault that results in serious bodily injury to the child, the child's other parent, guardian, or custodian, to another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(v) Attempted or conspired to commit malicious assault, as outlined in sub-paragraph (iv), or been an accessory before or after the fact to the same;

(vi) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(vii) Attempted or conspired to commit sexual assault or sexual abuse, as outlined in subparagraph (vi), or been an accessory before or after the fact to the same.

(C) The parental rights of the parent to another child have been terminated involuntarily;

(D) A parent has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family.

(d) As used in this section, "No reasonable likelihood that conditions of neglect or abuse can be substantially corrected" means that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Those conditions exist in the following circumstances, which are not exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and the person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan

designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health, or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare, or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems, or assist the abusing parent or parents in fulfilling their responsibilities to the child; and

(6) The battered parent's parenting skills have been seriously impaired and the person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan, or has not adequately responded to or followed through with the recommended and appropriate treatment plan.

(e) The court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six months. During this period the court shall require the parent to rectify the conditions upon

which the determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person, for the temporary care of the child during the period. At the end of the period, the court shall hold a hearing to determine whether the conditions have been adequately improved and at the conclusion of the hearing shall make a further dispositional order in accordance with this section.

(f) The court may not terminate the parental rights of a parent on the sole basis that the parent is participating in a medication-assisted treatment program, as regulated in § 16-5Y-1 *et seq.*, for substance use disorder, as long as the parent is successfully fulfilling his or her treatment obligations in the medication-assisted treatment program.