# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

***In re* K.H.**

**No. 18-0282** (Raleigh County 15-JA-120)

**FILED**
**November 16, 2018**
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

## MEMORANDUM DECISION

W.P. (hereinafter "the petitioner" or "the father") appeals the February 26, 2018, order of the Circuit Court of Raleigh County terminating his parental rights to his son, K.H., in an abuse and neglect case.[1] The respondents herein—the West Virginia Department of Health and Human Resources ("DHHR"), the child's guardian ad litem G. Todd Houck, Esquire, and the child's foster parents T.P. and K.C. who have been permitted to intervene—ask this Court to affirm the circuit court's termination decision.[2] The petitioner raises four assignments of error, including that the circuit court erroneously terminated his parental rights after expressly refusing to adjudicate him as an abusive or neglectful parent.

After considering the parties' written and oral arguments, we are compelled to conclude that the petitioner's procedural rights were violated; that the portion of the circuit court's order terminating his parental rights must be vacated; and that this case must be remanded to the circuit court for further proceedings. Because this case does not present any new issues of law, it is appropriate for disposition in a memorandum decision pursuant to Rule 21 of the Rules of Appellate Procedure.

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[1] Because this case involves a child and sensitive matters, we follow our practice of using initials to refer to the child and the parties. *See e.g.*, W.Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

[2] The father is represented by lawyer Daniel J. Burns; the DHHR is represented on appeal by Assistant Attorney General Brandolyn N. Felton-Ernest; and the intervenors T.P. and K.C. are represented by lawyers Kyle G. Lusk, Matthew A. Bradford, and Brandon L. Gray.

## I. Facts and Procedural History

The child, K.H., was born in 2013 to the mother W.H. (hereinafter "the mother"). The child's birth certificate did not list a father. On July 13, 2015, the DHHR filed an abuse and neglect petition alleging that on April 14, 2015, the mother, while intoxicated, left K.H. with another intoxicated person who did not know how to care for a young child.[3] The abuse and neglect petition identified another man, J.L., as K.H.'s father. However, during a preliminary hearing, the circuit court learned that paternity was uncertain. Accordingly, the court ordered paternity testing for J.L. and for another potential father, D.H., and ordered that publication be made for any unknown father. As a result of the filing of the petition, the child was placed in the care of foster parents.

The mother was discharged from a homeless shelter and tested positive for illegal drugs. On October 6, 2015, the mother stipulated to the allegations in the petition and was adjudicated as an abusing parent. She was granted a post-adjudicatory improvement period. At a hearing held in January of 2016, the court received test results indicating that neither J.L. nor D.H. was K.H.'s father. However, the petitioner was suggested as a potential father, and the court ordered that he be tested for paternity.

On March 17, 2016, the DHHR filed an amended abuse and neglect petition naming the petitioner as a party, alleging that the petitioner is the biological father of K.H., and alleging that the petitioner is a registered sex offender who was convicted of second degree sexual assault in the State of Wisconsin.[4] In August of 2016, paternity testing established that the petitioner is the biological father of K.H.

The circuit court held the petitioner's adjudicatory hearing on August 15, 2017. The DHHR's allegations against the petitioner were limited to the issue of abandonment;

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[3] The abuse and neglect petition also referred to the mother's other children, as well as to the fathers and putative fathers of her children. However, it is undisputed that the petitioner is not the father of the other children, and those children are not the subject of this appeal.

[4] The petitioner has testified that his Wisconsin conviction, which occurred in 2005, was based upon his having sexual intercourse with a fifteen-year-old female when he was eighteen years old. Additionally, the petitioner was subsequently convicted and incarcerated in West Virginia for failing to register, or properly register, as a sex offender as a result of that conviction. Although the petitioner was incarcerated in West Virginia during a large portion of these proceedings, the DHHR did not further amend the abuse and neglect petition to include any other allegations.

specifically, the DHHR asserted that the petitioner had failed to have any contact with, and failed to financially support, K.H. for the child's entire life. The petitioner testified that he had not sought contact or provided support because K.H.'s mother had expressly denied that he was the father. The mother testified that although she and the petitioner were in a relationship and lived together for several months, they separated early in her pregnancy with K.H., and she could not recall whether she ever told the petitioner she was pregnant. She testified that she knew K.H. could belong to either the petitioner or her ex-husband D.H.; that K.H. resembles an older child she has with D.H.; and that she told D.H. that he was K.H.'s father. In her sworn testimony, the mother admitted that she had expressly told the petitioner he was *not* K.H.'s father. The petitioner testified that after his paternity was established by DNA testing in August 2016, he sent several letters to K.H. at the foster parents' address but was unable to visit the child because he was incarcerated for his conviction of failing to register as a sex offender.[5]

After hearing the evidence presented during the adjudicatory hearing, the circuit court found that the mother had misled the petitioner about K.H.'s paternity and that the evidence presented did not support a conclusion that he had had abandoned the child. As such, the court declined to adjudicate the petitioner father as an abusive or neglectful parent. This ruling was confirmed in a written order entered on August 25, 2017:

> The Court then proceeded to take up the adjudication of [W.P.] [the father] as to the infant [K.H.]. Following completion of testimony and the taking of evidence, the Court was of the opinion that [W.P.] did not abandon the infant [K.H.] and, accordingly does not adjudicate him to have neglected or abused the infant, all for the reasons set forth at length on the record which are incorporated herein by referral, the Court noting the exception and objection of the Department and the Guardian ad litem.

However, the child remained in the DHHR's legal custody, with physical custody in the foster parents/intervenors, due to the petitioner's incarceration and the mother's ongoing improvement period.

Thereafter, the court held a November 14, 2017, status hearing which was confirmed by a November 20, 2017, order. Although the appendix record on appeal does not contain a transcript of this hearing, the written order reflects that the following issue was raised:

> The Court was then advised that [W.P.], father of [K.H.], who had been incarcerated for this entire case but is DNA father but Court denied a finding of abandonment, will complete his sentence on December 28, 2017 and depending on whether or not [the mother] is terminated at next hearing

[5] *See supra*, note 4.

> the possible placement of [K.H.] with him or disposition of his paternal rights as child has been in custody for 28 months and must have permanency.

This order concluded by scheduling a "Final Improvement Period Review and/or Dispositional of Mother and an [sic] Dispositional Hearing on [the petitioner father]" on February 13, 2018.

During the February 13, 2018, disposition hearing, the petitioner asked to be permitted to develop a parent-child relationship with K.H. However, the DHHR and, particularly, counsel for the intervenors/foster parents presented additional evidence regarding the petitioner's prior knowledge that he might be K.H.'s father and his failure to take any steps to investigate paternity even before he was incarcerated in West Virginia. This additional evidence included the petitioner's admission that he had obtained photographs of the child, and that the mother had suggested he was the father when she asked him for money to support her drug habit. There was also new evidence presented about other instances of criminal conduct and convictions, and evidence that the petitioner had decided to discharge his sentence for failing to register as opposed to seeking parole so he could have a relationship with his child. Noting that the child had lived with the foster parents for several years, the DHHR and the guardian ad litem asked the circuit court to terminate the petitioner's parental rights.

The circuit court found that the evidence presented during the disposition hearing went "much further" than that presented during the adjudication hearing, and that this evidence "very firmly support[ed] a finding of abandonment." Concluding that termination was in K.H.'s best interests, the court terminated the petitioner's parental rights. The termination ruling was reflected in the court's written order entered on February 26, 2018:

> Following a full evidentiary hearing, the Department moved the Court to TERMINATE the parental rights of [the father] to the infant [K.H.]. Deeming all matters submitted, the Court announced its rulings after argument. The Court noted that although it declined to find abandonment at the adjudicatory phase, the evidence adduced at the dispositional hearing firmly supports a finding of abandonment in terms of disposition; that [the father] had reason to believe he was the father of [K.H.], but did not enquire, although he should have; that the evidence produced at the adjudicatory hearing should be considered in terms of disposition; that the interest of the parents must be balanced with the interests of the child; and that the best interest of [K.H.] requires the termination of the parental rights of [the father].

Because the mother's parental rights were also terminated, the permanency plan for K.H. is adoption by the foster parents. The petitioner now appeals the February 26, 2018, termination order.

## II. Standard of Review

The standards of review applied in abuse and neglect appeals are well established. First, "conclusions of law reached by a circuit court are subject to *de novo* review[.]" Syl. Pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996); *accord* Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). Second, with respect to a circuit court's findings of fact and determination of abuse or neglect, we apply a clearly erroneous standard:

> [W]hen 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.

*Tiffany Marie S.*, 196 W.Va. at 225-26, 470 S.E.2d at 179-180, syl. pt. 1, in part.

## III. Discussion

We turn directly to the petitioner's second assignment of error, which we conclude is dispositive of this appeal. He contends that the circuit court erroneously terminated his parental rights at a disposition hearing after *previously declining to adjudicate him as an abusive or neglectful parent on the same grounds*. The DHHR contends that despite initially declining to adjudicate the petitioner, the court did not err in subsequently terminating his parental rights because the purpose of the dispositional hearing was to determine the appropriate permanency plan for the child. The DHHR explains that based upon the evidence presented during the disposition hearing, termination was clearly in K.H.'s best interests. Adding to the DHHR's argument, the guardian ad litem asserts that the petitioner failed to object to the circuit court's procedures. The intervenors stress that at the time of the disposition hearing, K.H. had been in their foster care for a lengthy twenty-eight months.

Our examination of this issue begins with the controlling statutes. West Virginia Code §§ 49-4-601 and -602 (2015) direct the initial steps to be taken in all abuse and neglect cases, including the requirement for the adjudication of a parent as an "abusing" or "neglecting" parent:

> [a]t 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, neglecting,* or, if applicable, a battered parent, all of which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

W.Va. Code § 49-4-601(i) (emphasis added). West Virginia Code § 49-4-604 (2016) specifies the steps to be taken "[f]ollowing a determination" of abuse or neglect. Section 604 provides that after the development of a case plan and possible attempts at remedial action, the court shall then proceed to disposition. *Id.* This two-stage process is well-recognized in our case law. For example, in *In Re Beth Ann B.*, 204 W.Va. 424, 427, 513 S.E.3d 472, 475 (1998), we explained that

> [t]he statutory scheme applicable in child abuse and neglect proceedings provides for an essentially two phase process. The first phase culminates in an adjudication of abuse and/or neglect. *See* W.Va. Code § 49-6-2(c) (1996) [now § 49-4-601]. The second phase is a dispositional one, undertaken to achieve the appropriate permanent placement of a child adjudged to be abused and/or neglected. *See* W.Va. Code § 49-6-5 (1996) [now § 49-4-604].

Critical to the petitioner's appeal, we have long held that adjudication is a *prerequisite* for continuing to the disposition stage:

> In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W.Va. Code, 49-6-5 [now § 49-4-604], it must hold a hearing under W.Va. Code, 49-6-2 [now § 49-4-601], and determine "whether such child is abused or neglected." *Such a finding is a prerequisite to further continuation of the case*.

Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983) (emphasis added). Stated another way, "the state's right to intervene is predicated upon its initial showing that there has been child abuse or neglect, which constitutes unfitness on the part of the

parents to continue, either temporarily or permanently, in their custodial role." *Id.* at 51, 303 S.E.2d at 690.

The Court in *T.C.* explained that the "primary purpose of making an initial finding of abuse or neglect is to protect the interest of all parties and *to justify the continued jurisdiction*" of the court. *Id.* at 50, 303 S.E.2d at 688 (emphasis added). The two-stage process supports the "constitutional protections afforded to parents in permanent child removal cases"—constitutional rights guaranteed by the Due Process Clause of the Fourteenth Amendment. *Id.* at 51, 303 S.E.2d at 689. Indeed, with regard to minor children, "no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, in part, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

In this case, the circuit court held an adjudicatory hearing where the DHHR alleged abandonment. After considering the evidence presented during that hearing, the court found that the petitioner had *not* abandoned his child and therefore was *not* an abusive or neglectful parent. In light of this ruling, it is clear that the circuit court lacked "the continued jurisdiction" to subsequently terminate the petitioner's parental rights. *See T.C.*, 172 W.Va. at 50, 303 S.E.2d at 688.

We reject the notion that the petitioner somehow consented to these procedures and to the violation of his procedural rights. Although the circuit court's November 20, 2017, order advised the petitioner that "disposition of his paternal rights" would be addressed at the February 13, 2018, hearing, such an order cannot imbue a court with the sudden authority to terminate the constitutionally-protected rights of a person who was declared to be a non-offending parent. The November 20, 2017, order also would not have put the petitioner on notice that he would be required to once again defend himself against an abandonment charge. Moreover, inasmuch as the court had previously ruled that the petitioner had not committed abuse or neglect, the November 20, 2017, order could have been interpreted to mean that the disposition would be for the petitioner to begin having a relationship with his child. During the February 13, 2018, hearing, the petitioner's attorney argued that due to the lack of a prior adjudication, the court's obligation was to allow the petitioner to begin a father-son relationship with K.H.

We certainly understand and commend the circuit court's reluctance to delay permanency for K.H. when new and additional evidence was developed adverse to the

petitioner in the course of the mother's ongoing abuse and neglect proceedings. However, the proper procedure would have been for the DHHR to amend its abuse and neglect petition and for the circuit court to hold another adjudicatory hearing. Rule 19(b) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings directs 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." The circuit court has "the inherent authority to compel" the DHHR to file an amended petition in such circumstances. *See* Syl. Pt. 10, *In re T.W.*, 230 W.Va. 172, 737 S.E.2d 69 (2012). By terminating the parental rights of a person who was never adjudicated as abusive or neglectful, the circuit court ignored well-settled law and violated the petitioner's procedural rights. The circuit court's decision essentially announces that rules designed to protect important constitutional rights are irrelevant so long as the end justifies the means and the court believes the outcome is warranted.

When the child abuse and neglect rules are "'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.'" Syl. Pt. 3, in part, *In re Emily G.*, 224 W.Va. 390, 686 S.E.2d 41 (2009) (quoting Syl. Pt. 5, in part, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001)). A remand for corrective action was the remedy ordered by this Court in *T.C.* when the adjudicatory step was skipped.[6] To ensure that the petitioner is afforded the statutorily-mandated procedures designed to protect his rights as a parent, we are obligated to vacate the termination ruling and remand this matter back to the circuit court.

Accordingly, we hereby vacate the portion of the circuit court's February 26, 2018, order terminating the petitioner father's parental rights. We remand the case to the

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[6] The *T.C.* Court ordered as follows:

> Because there was no initial finding of abuse in this case, we must remand this case with directions that the lower court promptly hold a hearing under W.Va. Code, 49-6-2 [the adjudication statute], in order to determine if the child was abused. At such hearing, the court may consider the evidentiary transcript of the July 23, 1980, hearing since all parties were present and had an opportunity to cross-examine. After holding the hearing and making findings of fact of whether the child was abused, the lower court should then proceed to make an appropriate disposition under W.Va. Code, 49-6-5 [the disposition statute].

*T.C.*, 172 W.Va. at 52-53, 303 S.E.2d at 691.

circuit court with instructions for it to require the DHHR to immediately file an amended abuse and neglect petition alleging any and all claims that it may have against the petitioner. The amended petition may assert abandonment and may address the additional evidence developed during the February 2018 hearing, and it may include any other evidence of alleged abuse and neglect.[7] The circuit court shall expeditiously hold an adjudicatory hearing on the newly amended petition and, if the father is adjudicated as abusive or neglectful based upon abandonment or other grounds, shall expeditiously hold a disposition hearing.[8] Unless the circuit court finds reasons indicating that a change in custody is appropriate, K.H. should remain in the intervenors' care pending the outcome of the case.

Finally, in light of our ruling on the petitioner's second assignment of error, it is unnecessary to address his three remaining issues.[9]

Vacated and remanded with directions.

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[7] During this appeal, the parties indicated that the petitioner has been charged with additional criminal conduct.

[8] We emphasize that our decision should not be seen as somehow forecasting the outcome of the case.

[9] The petitioner's first assignment of error alleges that the March 17, 2016, amended abuse and neglect petition failed to adequately notify him that he was being accused of abandoning K.H. Even if the petitioner is correct in this regard, this alleged shortcoming will be remedied on remand with the filing of another amended petition. The petitioner's third assignment of error asserts that the circuit court improperly weighed the evidence when deciding that he abandoned K.H., and his fourth assignment of error contends that the court failed to consider less restrictive alternatives than termination. Because of the remand for further proceedings, these issues are not ripe for appeal.

**ISSUED:** November 16, 2018

**CONCURRED IN BY:**

Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice Paul T. Farrell, sitting by temporary assignment

**DISSENTING AND WRITING SEPARATELY:**

Chief Justice Margaret L. Workman
Justice Tim Armstead

**WORKMAN, C. J., dissenting:**

This case revolves around K.H., a five-year-old little boy who has never known his biological father. In fact, other than a brief period of time with his biological mother which resulted in termination of her parental rights due to abuse and neglect, the foster family is the only family K.H. has ever known. The petitioner was in prison for failing to register as a sexual offender from the time K.H. was two-years-old. When he had the opportunity to seek parole and actually be a father to this little boy, he decided that he would prefer to serve his entire sentence in order to avoid parole supervision.

The majority would hasten to say that this case is about the rule of law and the petitioner's rights thereunder, not a little boy's life. It is about the law, for sure. Unfortunately, however, the majority opinion decides the case strictly in the context of the rights of the petitioner, ignoring the fine balance between the rights of the child and the rights of the parent that a large body of our caselaw mandates. The majority is wrong on a human level and it is wrong on a legal level.

Petitioner was afforded ample—and procedurally adequate—due process; he was well-aware of the allegations of abandonment against him and completely failed to rebut those allegations, while demonstrating himself not even a minimally acceptable parent. As such, I dissent to both the majority's rationale and conclusion and to reiterate that "*[u]njustified* procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) (emphasis added).

In this case, an amended abuse and neglect petition filed against petitioner plainly alleged abandonment as clearly stated within the petition. The opening paragraph of the amended petition asserted abandonment along with abuse and/or neglect;

paragraph seventeen specifically alleged that K. H. had been "abused and/or neglected and/or abandoned . . . ." Petitioner had neither supported nor contacted K. H. since his birth, despite having lived continually with K. H.'s mother at the time of his conception, obtaining photographs of the child, K. H.'s mothers' not-infrequent representations that K. H. was indeed petitioner's child, and his parentage being an admitted "curiosity" to petitioner. Before he was even incarcerated—for the first two years of K. H.'s life—petitioner took no steps to determine paternity in the face of overwhelming evidence that he was K. H.'s father. He took no steps to show any other interest in having a relationship with the child, contributing any support to the child, or seeking to protect the child from the abuse and neglect of the mother even though he characterized her as a drug-abuser.

Only after court-ordered paternity testing did petitioner begin to make half-hearted, obstructive efforts to assert his parental rights in the course of this proceeding. Incarcerated for much of K. H.'s life,[1] petitioner took absolutely no steps to position himself to parent his child even after his release from incarceration. In fact, *petitioner voluntarily chose to discharge his full sentence rather than seeking parole* which would have enabled him to attempt to establish a relationship with K. H. After release, petitioner submitted no information to the DHHR regarding his employment and established residence with his own mother, who likewise has multiple felonies. In addition to his sex offender status and incarceration for failure to register as such, petitioner admitted to a litany of other offenses[2]; most recently, he was arrested for manufacture of a controlled substance. There can be little doubt that not only did petitioner abandon K. H. and was therefore properly adjudicated abusive and neglectful, but also that termination of his parental rights was critically necessary for the protection of K. H.

Despite these facts, most of which were provided by the petitioner himself, the majority bemoans the departure from rote procedure below, railing about "lack of jurisdiction" and the anomalous adjudicatory and dispositional hearing which were consolidated in time due to the factual peculiarities of this case. The majority inexplicably demands "amendment" of the abuse and neglect petition despite the fact that the grounds upon which petitioner was adjudicated were not "new." Even taking the

[1] Petitioner was incarcerated for second degree assault of a child in Wisconsin and subsequently for failing to register as a sex offender.

[2] At the dispositional hearing, petitioner admitted to additional violations of law including 1) using "illegal drugs" with K. H.'s mother; 2) theft of a firearm; 3) fleeing from the police after engaging in a fight; 4) falsifying a check; and 5) DUI.

petitioner's very best legal argument, this case should have been remanded for a new dispositional hearing, rather than a "do-over" from the beginning. This veneration of rote procedure over substantive compliance with the import of our procedural rules is short-sighted and imperils children who have been twice victimized—first by the underlying abuse and/or neglect, then by procedural delays which merely prolong the inevitable. The majority's directive that the whole thing start over again is ill-advised, wrong on both a human and legal level, and will result in at least another year or possibly years until K. H. receives permanency in his life.

This Court has cautioned that "vacation of dispositions and remand for compliance serves only to compound any pre-existing delay." *In re J. G.*, 240 W. Va. 194, __, 809 S.E.2d 453, 464 (2018). And, although *necessary where lack of procedural compliance has resulted in the abuse and neglect process being "substantially disregarded or frustrated,"* vacation of disposition where the same result will indisputably obtain is irrational and absurd. Syl. Pt. 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001). More importantly, meaningless remand is insensitive to and completely undermines a child's entitlement to permanency: "[C]hildren have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 257, 470 S.E.2d 205, 211 (1996).[3]

Without question, our procedural rules are critically important and serve to ensure that due process is afforded all parties to an abuse and neglect proceeding. And, certainly, where departure from procedure results in an error which deprives a party of *substantial* rights, reversal is warranted and necessary. That fundamental principle is tempered, however, by our oft-quoted admonition that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and

[3] As noted in my separate opinion in *Lawyer Disciplinary Bd. v. Thompson*, "the longer a child spends bonding with one family before unceremoniously being removed and placed with an entirely different family, the greater the short-term and long-term emotional harm to that child." 798 S.E.2d 871, 897 (W. Va. 2017) (Workman, J., concurring in part and dissenting in part). Moreover, this delay in attaining permanency wreaks emotional havoc on adoptive parents who, much like the intervenor foster parents in this case, are frequently the only family an abused or neglected child has ever known. Like the lawyer incompetence addressed in *Thompson*, the majority's opinion is alarmingly callous toward the "real people and real lives affected daily by these proceedings" and demonstrates "a lack of understanding of the very values our abuse and neglect system seeks to preserve." *Id*. at 897.

neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

What occurred procedurally in the underlying matter is quite simple and understandable. The circuit court held an adjudicatory hearing where limited and conflicting evidence was presented that it felt did not substantiate abandonment; the circuit court ruled accordingly. The majority's protestations to the contrary, the circuit court quite obviously continued to maintain jurisdiction over the matter by virtue of K. H.'s mother's ongoing improvement period, completion of which precluded final disposition of the matter and petitioner's continued incarceration, which made him unavailable for placement. Petitioner himself, as K. H.'s unadjudicated biological father who was incarcerated, continued to be a proper respondent to the matter, obviously, pending permanent placement and disposition as to the biological mother. The circuit court properly noted that disposition as to K. H. remained properly before the Court.[4]

[4] In that regard, the case cited by the majority is patently distinguishable. In *State v. T. C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983), a mother and stepfather accused of physical abuse were subject of multiple petitions making the same allegations, but no adjudication *ever* occurred. Rather, the case continued into perpetuity with the circuit court ultimately concluding the case by entering an order purportedly authorizing a "rehabilitation plan" between the parents and the Department. *Id*. at 48-49, 303 S.E.2d at 687. Accordingly, the circuit court in that case insinuated itself into the care and custody of a child absent *any* finding of abuse and neglect whatsoever against *either* parent or caregiver. Obviously, under those circumstances, the court was wholly without authority to intervene in the legal and physical custody of the child because, as even the majority admits, "the adjudicatory step was skipped." In this case, there was not only the mother's finding of abuse and neglect, but the circuit court did in fact ultimately find that petitioner abused and neglected K. H. before proceeding to disposition. No step was "skipped"; it was merely consolidated due to reconsideration of the adjudication.

The majority relies on statutory authority and caselaw reflecting merely that disposition must "follow[]" adjudication and that the case may not "continue" absent abuse and neglect. *See* W. Va. Code § 49-4-604; Syl. Pt. 1, *T. C.* As to the former, clearly adjudication did in fact precede the circuit court's ultimate disposition, albeit briefly. As to the latter, Syllabus Point 1 of *T. C.* is applicable only when there is no finding whatsoever of abuse and/or neglect. As previously indicated, this case must necessarily have continued given the allegations against K. H.'s mother and petitioner's unavailability for placement due to incarceration.

Upon dispositional hearing, however, additional facts which were germane not only to disposition, *i.e.* placement of K. H., but also as to the original allegations as to petitioner, were adduced. *Most of this additional evidence came from petitioner himself.* Critically, the intervenor foster parents expressly raised the specter of reconsideration of petitioner's adjudication. In that regard and in view of the additional evidence, the circuit court plainly revisited the adjudication based on evidence that went equally to adjudication and to disposition, *e.g.*, petitioner's untenable living situation, criminal record, lack of financial support, K. H.'s relationship with the intervenor foster parents, etc. *Petitioner made no objection at the time the circuit court proceeded to take evidence germane to reconsideration.*[5] *See In re B.A.*, No. 14-0460, 2014 WL 5470498, at *3 (W. Va. Oct. 27, 2014) (Workman, J., dissenting) ("Petitioner did not argue below that he was prejudiced by the circuit court's decision to move forward to disposition. In this case, the evidence relevant as to adjudication and the denial of an improvement period is the same evidence that is relevant to disposition. The only effect a remand will have is that the circuit court will be required to hear the same evidence twice."). Certainly petitioner's continued lack of any authentic interest in the child and meaningful effort to position himself to properly parent him speaks to both the alleged abandonment and proper disposition.

The consideration of post-petition activity is fully contemplated by our Rules and caselaw. This does *not* require amendment of the petition unless "new" allegations are asserted, despite the majority's assertion to the contrary. *See* W. Va. R. of Proc. for Child Abuse and Neglect 19(b) (providing for final adjudicatory hearing to be "re-opened" for purposes of hearing additional evidence); *see also In re Brandon Lee B.*, 211 W. Va. 587, 590, 567 S.E.2d 597, 600 (2001) ("[F]acts developed after the filing of the petition, or amended petition, may be considered in evaluating the conditions which existed at the time of the filing of the petition or amended petition."); *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997) (holding that post-petition performance by parent must be considered in evaluating allegations). Petitioner was fully on notice that

[5] The circuit court specifically invited petitioner to object to revisitation of adjudication at that time and indicated its intention to decide both issues given the confluence of evidence:

> Now, if any party believes it is procedurally necessary to revisit the question of abandonment as an adjudication, procedurally that can be done. If today's evidence is unrefuted, and, since a lot of it came from [Petitioner], it'd be hard to refute it, but if today's evidence is unrefuted, then abandonment is supported. But, if we don't do that and if we look at disposition, the evidence that would have supported the finding of abandonment speaks also to the question of disposition.

abandonment was being asserted; the evidence adduced upon reconsideration of the adjudication merely went "much further," as stated by the circuit court. It was not in any way a "new" allegation of abuse and/or neglect. It was, therefore, proper for the circuit court to revisit adjudication in view of the more fully developed, incontrovertible evidence demonstrating unmistakable abandonment by petitioner. Moreover, the majority's instruction that the amended petition on remand "may assert abandonment" is completely nonsensical; the amended petition has *always* exclusively alleged abandonment as against petitioner.

It is therefore of no moment that the hearing was initially captioned a "dispositional" hearing; petitioner was on notice of the hearing, aware that disposition as to his rights would be considered, represented by counsel at the hearing, and presented on his own behalf the evidence which augmented the proof in support of a finding of abandonment.[6] *See In re I.P.*, No. 12-0110, 2012 WL 4069521 *4 (W.Va. Sept. 7, 2012) (finding no error where court held adjudication and disposition in one hearing and petitioner had "sufficient notice" two matters would be considered, testified on his own behalf, and presented no evidence which would have altered outcome). Thus, under these circumstances, the procedural consolidation of rehearing on adjudication and the dispositional hearing were proper. The evidence adduced and the considerations made were equally relevant to both issues: it is the totality of the circumstances in this case—both before the petition and after—that equally demonstrate that petitioner 1) abandoned K. H. and was therefore abusive and neglectful and 2) should have his parental rights terminated. That there was a confluence of these procedures is an anomaly occasioned by the reconsideration of adjudication—an occurrence relatively peculiar to this case. In absence of any demonstrated prejudice to petitioner, this confluence did not deprive him of any substantial rights.

Perhaps the most compelling legal reason that the majority is wrong in remanding for duplication of the already-conducted dispositional hearing is that no alternative result may legally occur. Although petitioner asserts in his brief that

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[6] The majority's contention that petitioner was somehow not "on notice" that his parental rights continued to be in jeopardy is belied by the circuit court's order. The order plainly stated that the "dispositional" hearing would be held to consider "possible placement of [K. H.] with him *or disposition of his paternal rights as child has been in custody for 28 months and must have permanency*." (emphasis added). The circuit court could not have been clearer that petitioner's parental rights were in danger of being terminated in view of the length of time K. H. had been in foster care and his entitlement to permanency.

alternative dispositions including an improvement period should be considered upon remand, the finding of abandonment precludes any such alternatives. "Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period." Syl. pt. 2, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991); *see also* W. Va. Code § 49-4-604(c)(4) (providing that "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" exists where abandonment has been found). The court below, after finding abandonment, had no obligation—and will not have on remand—to consider less restrictive alternatives. *See* Syl. Pt. 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980) ("Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49–6–5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49–6–5(b) [1977] that conditions of neglect or abuse can be substantially corrected.").[7] Thus, the only option available to the lower court under these circumstances is to place the child into the custody of the petitioner and his environment of criminal activity and drug use.

A minor and insubstantial deviation from procedure in view of the absolute necessity of establishing permanency for children embroiled in abuse and neglect proceedings is an insufficient basis upon which to base remand when the ultimate outcome is abundantly clear. At the time of petitioner's adjudication and disposition, K. H. had been in foster care *twenty-eight* months. The intervenor foster parents are the only parents K. H. has ever known—a fact entirely of petitioner's own making. Petitioner was afforded more than ample due process and certainly remand for insubstantial, unnecessary procedural niceties will not provide petitioner with relief from the inevitable outcome of his own actions. Rather, it will serve only to exacerbate the unfortunate delay K. H. has already endured in obtaining the permanency to which he is entitled. Accordingly, I dissent to the majority's reversal of the circuit court's termination of

[7] Moreover, given that K. H.'s mother's improvement periods had resulted in K. H. being in foster care for seventeen of the most recent twenty-two months as of the dispositional hearing, no additional improvement periods may be had pursuant to West Virginia Code § 49-4-610(9):

> [N]o combination of any improvement periods or extensions thereto may cause a child to be in foster care more than fifteen months of the most recent twenty-two months, unless the court finds compelling circumstances by clear and convincing evidence that it is in the child's best interests to extend the time limits . . . ."

petitioner's parental rights. Upon remand, the circuit court should expedite all procedures necessary to complete this process and to bring stability to this little boy's life.

**ARMSTEAD, J., dissenting:**

The definitions set forth in Rule 3 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings distinguish the "adjudicatory hearing," at which the determination is made whether the child has been abused and/or neglected, from the "disposition hearing," which occurs after abuse and/or neglect has been found. That distinction forms the basis of the Majority opinion, and, under ordinary circumstances, I would join the Majority in remanding this case for further proceedings. The distinction between the adjudicatory hearing and the disposition hearing is also recognized in *W.Va. Code*, 49-4-601(I) [2015] (Whether abuse or neglect has occurred shall be determined at the conclusion of the adjudicatory hearing.), and in syllabus point 1 of *State v. T. C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983) (Whether abuse or neglect has occurred shall be determined prior to a consideration of dispositional alternatives.).

Nevertheless, the Majority's application of that distinction in this case constitutes a denial of other considerations meant to afford the degree of flexibility necessary to determine the best interests of the child. For example, Rule 35(b)(2) of the Rules of Procedure for Child Abuse and Neglect Proceedings states in part: "*Except as to the establishment of grounds for termination* and the establishment of other necessary facts, dispositional hearings are not intended to be confrontational hearings; rather such are concerned with the best interests of the abused or neglected children involved." (emphasis added)

I am of the opinion that the case now before us, which has been pending in Raleigh County since 2015, does not warrant a remand for essentially the presentation of evidence already heard. Although the father, W. P., never objected to the revisiting of the abandonment issue during the dispositional hearing, two "objections," in effect, were made on his behalf, yet ignored.

After the adjudicatory hearing, an order was entered on November 20, 2017, and served on W. P.'s attorney which stated that, at the upcoming dispositional hearing, placement of K. H. with W. P. would be considered "or disposition of his parental rights." There was no objection to the order. During the February 13, 2018, dispositional hearing, W. P. objected to intervention by K. H.'s foster parents, but did not object to the dispositional hearing itself. Significantly, during that hearing, the interveners stated that they would be willing to make a "formal motion" to reconsider the abandonment issue. Moreover, the Circuit Court stated: "Now, if any party believes it is procedurally necessary to revisit the question of abandonment as an adjudication, procedurally it can

be done." No response to those offers was made, and the Circuit Court proceeded to consider the merits of the testimony. The final order, reflecting the dispositional hearing sets forth W. P.'s general objection to the Circuit Court's rulings but does not reveal any objection to the dispositional hearing itself.

Worth noting is *In Re: H. J.*, No. 16-0727, 2017 WL 2230005, (W.Va. - May 22, 2017) (Memorandum Decision), in which the mother admitted that her untreated mental health and substance abuse issues resulted in child neglect. After the children were adjudicated neglected, the mother filed a "Motion to Set Aside Waiver of Adjudicatory Hearing." The motion was denied, and this Court upheld the termination of the mother's parental rights.

The Majority is correctly respectful of due process protections afforded a natural parent with regard to the custody of his or her child. However, in reviewing the full record, in particular the foster parents' offer to move to reconsider the issue of adjudication, and the circuit court's explicit invitation to "revisit" the issue as an "adjudication," which invitation was not accepted, it is evident that W. P.'s rights were, in fact, protected in the proceedings. I dissent from the Majority not because I believe the due process concerns raised by the petitioner, W. P., are invalid, which I do not, but because I believe they were adequately addressed during the dispositional hearing. I therefore respectfully dissent.