STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS

In Re: C.B.1, C.B.2, and B.B.

No. 11-1349 (Marion County 09-JA-87, 88 & 89)

FILED
October 25, 2012
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner herein and respondent below, T.B.[1] (hereinafter "mother"), appeals from an order entered September 20, 2011, by the Circuit Court of Marion County. By that order, the circuit court determined "[t]hat physical custody of the B[.] children should be placed with their grandparents, with the respondent mother being free to petition the court for modification of this placement if circumstances change as the children become older." The appeal was timely perfected by counsel, with the appendix record accompanying the petition. The West Virginia Department of Health and Human Resources (hereinafter "the DHHR") filed its response, and the guardian ad litem filed a response on behalf of the children. Based upon the parties' written submissions and oral arguments, the portions of the record designated for our consideration, and the pertinent authorities, we find that the circuit court's decision to place physical custody of the three minor children with the maternal grandparents should be affirmed. This Court further finds that this case presents no new or significant questions of law. Therefore, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

The current issue for review focuses on the proper custodial placement of three minor children: C.B.1, whose date of birth is May 20, 2000; C.B.2, born July 25, 2001; and B.B., who was born on May 17, 2003.[2] An abuse and neglect petition was filed on December 7,

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.,* 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

[2]The three children at issue herein have the same biological father; however, his parental rights were terminated and are not at issue in this appeal. A fourth child, D.W., was born on March 17, 2006, but is not subject to this appeal. D.W. was returned to his mother's custody in December 2010 and has resided with her since that time. References in this memorandum decision to the "children" pertain only to the three older children.

2009.[3] The basis of this petition was a call received by Child Protective Services (hereinafter "CPS") on October 31, 2009, regarding an occurrence that resulted in the mother's arrest and a charge of child neglect creating a substantial risk of injury. The children were placed with the maternal grandparents. At the preliminary hearing on December 17, 2009, legal custody of the children continued to be with the DHHR, physical custody remained with the maternal grandparents, and the mother was granted visitation. On February 9, 2010, the children were adjudicated as abused and neglected children.

During the underlying proceedings, a DHHR report dated September 14, 2010, indicated that the DHHR is "currently pursuing reunification of the children with their biological mother based on her ability to seek and successfully utilize assistance as offered by the DHHR." Following, on December 7, 2010, the circuit court granted a ninety-day extension to the mother's post-dispositional improvement period, and continued the children's physical custody with their maternal grandparents during the week and with their mother on the weekends. While a status report indicated that the mother successfully completed appropriate services and continued to participate in counseling, the report also indicated that "the MDT discussed possible barriers to reunification. C.1 and C.2 have both stated while they love their mother and would like to continue to see her [], they feel unsafe in her care." Subsequently, on May 17, 2011, it was noted that the DHHR had become concerned with the plan to reunite the children and the mother due to the treating psychologist's opinion that the children's psychological well-being could be in danger if forced to live with their mother before they were ready. The children's treating psychologist testified to the circuit court that she does not believe it is in the children's best interests to reunify with their mother.

An order was entered on September 20, 2011, in which the circuit court granted legal custody of the subject children to the DHHR, physical custody to the maternal grandparents, and visitation to the mother. The circuit court reasoned that this is the second abuse and neglect proceeding that resulted in the children's removal from the mother's custody; that the children have expressed that they do not trust their mother as to her decisions with men; and that the children are afraid that their mother will not care for them properly. The lower court directed that the mother shall be allowed to "petition the court for the return of physical and legal custody at such time as she believes the trust/safety issues have been remedied."

On appeal to this Court, the mother asserts that the circuit court erred when it placed the children with the maternal grandparents. Rather, she argues, the children should have

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[3]These children also were involved in a previous abuse and neglect petition against the mother in 2006 when "excessive bruising [was] found on child [B.]'s back, buttocks, and legs." It was uncontested that the injuries were inflicted by G.W., the mother's then-current boyfriend, and the biological father of mother's fourth child, D.W.

been placed with her and the case dismissed. Conversely, the guardian ad litem and the DHHR support the decisions made by the circuit court. The core issue, they assert, is that the mother has failed to put the safety and needs of the children ahead of her desire to be in a romantic relationship, and that such relationships have generally been unstable and abusive. They argue that the current placement with the maternal grandparents is in the best interests of the children because the mother has not rebuilt an atmosphere of trust.

Generally, "'[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.' Syl. Pt. 4, *Burgess v. Porterfield,* 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syl. pt. 1, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). Specifically, in considering the proper placement for the children, we are reminded that "[q]uestions relating to . . . custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syl., in part, *Nichols v. Nichols,* 160 W. Va. 514, 236 S.E.2d 36 (1977). Further, "[i]n . . . custody matters, we have traditionally held paramount the best interests of the child." Syl. pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

It is conceded that the mother has completed every service requested of her. While we applaud the mother's commitment to correct the situations that precipitated the removal of her children from her care, our review is not limited to the mother's success or failure with respect to the offered services. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and 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). Moreover, this Court has instructed that,

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and *whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child*.

Syl. pt. 6, *In the Interest of Carlita B.,* 185 W. Va. 613, 408 S.E.2d 365 (1991) (emphasis added).

The trial court found "[t]hat the State of West Virginia has proven by clear and convincing evidence that the adult respondent has not remedied the lack of trust and safety concerns expressed by her children, such concerns being a direct result of her poor choices in regard to her relationships with men." The lower court based this determination on the fact that this is the second time that the children have been removed from their mother's care. Significantly, during their counseling sessions, the "children have expressed concerns that their mother does not tell the truth, and that they do not trust her to make good decisions as

to relationships with men and who she brings into their family." Further, the children also articulated fear that their mother could not properly care for them, which was based on their previous experiences when the mother left them unattended at home. The record also contains medical evidence that one of the children has experienced panic attack symptoms when contemplating a visit with the mother. The treating counselor testified that, "in [her] opinion, it is not in the B[.] children's best interest to be returned to their mother at this time."

Based on all of the evidence, the lower court ordered that "physical custody of the B[.] children should be placed with their grandparents, with the respondent mother being free to petition the court for modification of this placement if circumstances change as the children become older." This disposition recognizes our mandate that the court determines whether the "conditions of the improvement period have been satisfied" as well as whether "sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. pt. 6, in part, *Carlita B.,* 185 W. Va. 613, 408 S.E.2d 365. Given the children's stated fears regarding reunification with their mother, it was within the lower court's discretion to find that the best interests of the children were protected by remaining in the physical custody of their grandparents. For the foregoing reasons, we find no reversible error in the circuit court's decision. Therefore, the September 20, 2011, order is affirmed, and visitation with the mother is continued.

Affirmed.

ISSUED: October 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh