STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.M. and M.M.

No. 11-1769 (Mercer County 11-JA-08-DS & 11-JA-09-DS)

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

MEMORANDUM DECISION

Petitioners' appeal, by counsel John Earl Williams Jr., arises from the Circuit Court of Mercer County, wherein the circuit court found that the petitioners would not be a suitable placement for the children by order entered on December 6, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Julie M. Lynch, has filed her response on behalf of the children.

This Court has considered the parties' briefs and the appendix 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 appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioners are the paternal grandparents of the children herein. The children were the subject of abuse and neglect proceedings initiated in the circuit court in January of 2011, based upon medical neglect, deplorable living conditions, and physical abuse of the children. Initially, the children's mother and maternal grandfather, as custodian, were named in the petition. The father was not initially named as an abusing parent. In June of 2011, Respondent Mother's parental rights were terminated due to her failure to comply with services offered. Shortly thereafter, an amended petition was filed in September of 2011 to include Respondent Father as an abusing parent because his incarceration left him unable to provide for the children's basic needs. At disposition, Petitioner Paternal Grandparents sought placement of the children with them, but the circuit court found they would be an unfit placement. The circuit court made this finding in its dispositional order terminating Respondent Father's parental rights, and it is from this order that the petitioners appeal.

On appeal, petitioners allege that the evidence presented to the circuit court was insufficient to support the finding that they are unfit for placement of the children. In support, petitioners argue that their rights and privileges as grandparents have not been observed. According to the petitioners, the home study is nothing more than an opinion from an administrative agency that a circuit court can choose to reject. Furthermore, petitioners argue that the DHHR's policy allows for waiver of deficiencies by the main office. In citing to the home study in this matter, petitioners argue that it does not specifically mention the reasons that caused the denial. Petitioners note that their two misdemeanor drug charges cited in the denial occurred in 1995, well beyond the ten-year period that

the DHHR considers such drug offenses. Further, petitioners argue that the Child Protective Services ("CPS") involvement in their home stemmed from an out of control teenager who was later charged as a juvenile for his actions. Lastly, petitioners argue that the past felony charge against Petitioner Grandfather was dismissed. As such, petitioners argue that they are not an unfit placement for the children, and that they should be entitled to custody of the children pursuant to the grandparent preference found in West Virginia Code § 49-3-1(a)(3).

The guardian ad litem responds and argues that the circuit court did not commit error below. To begin, she argues that West Virginia Code § 49-3-1(a)(3) requires grandparents to be suitable in order to benefit from the preference for placement in their homes. According to the guardian, mere willingness to adopt a grandchild is insufficient for purposes of this code section. Further, the guardian argues that this code section requires a home study to be conducted so that the DHHR can evaluate the suitability of the proposed grandparents to serve as appropriate and fit adoptive parents. In this specific case, the guardian argues that petitioners were denied as relative caregivers for the children due to past CPS involvement and criminal histories for drug related crimes. The CPS matter involved Petitioner Grandfather discharging a firearm inside the home in order to terrify his teenage son, according to the guardian. The guardian cites both petitioners' testimony on the incident to establish that petitioners believed this action was necessary given their son's failure to follow the rules. Not only did neither petitioner appreciate the danger of this situation, neither identified a more appropriate method of handling an unruly teenager, according to the guardian. The guardian further cites to the petitioners' testimony regarding their own children, and the criminal problems that they have had, in supporting the circuit court's finding. Lastly, the guardian notes that the grandparent preference is not absolute, and argues that the evidence in this matter established that petitioners were unfit to be considered as a placement for the children. The DHHR responds and fully joins in and concurs with the guardian's response.

The Court has previously recognized:

> "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." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

Upon review of the appendix in this matter, the Court finds no error in the circuit court's finding that the petitioners were an unfit placement for the children. The petitioners herein rely upon the argument that they are entitled to custody of the children by virtue of the preference for placement with grandparents found in West Virginia Code § 49-3-1(a)(3). However, we have previously held that "even with regard to this State's statutory preference for considering grandparents for adoption of a child in situations wherein the parental rights have been terminated, this Court has clarified that such a preference is not an absolute directive to place children with their grandparents in all circumstances." *Kristopher O. v. Mazzone*, 227 W.Va. 184, 193, 706 S.E.2d 381, 390 (2011) (citing *In re Elizabeth F.*, 225 W.Va. 780, 786–87, 696 S.E.2d 296, 302–03 (2010)). Petitioners assert that the circuit court should have disregarded their failed home study by arguing that certain factors should not have been held against them. However, these factors were clearly applicable in determining petitioners' suitability as adoptive parents.

The circuit court was presented with evidence that Petitioner Grandfather discharged a firearm in his home in order to frighten his teenage son, who he claims was attacking him with a stick in order to obtain money from him. While petitioners attempt to legitimize this action by noting that subsequent wanton endangerment charges against Petitioner Grandfather were dismissed, the fact that petitioner was not punished criminally has little or no bearing on his suitability as a caregiver for the children at issue. Further, petitioners argue that their prior misdemeanor convictions for drug possession are so remote in time as to have no bearing on their suitability to raise the children. However, the guardian notes that the circuit court required both petitioners to submit to drug screens in order to attend visitation with the children. According to the guardian, Petitioner Grandmother provided two screens that were positive for substances not prescribed to her, and Petitioner Grandfather refused to participate in the drug screening process. Based upon the evidence presented, it is clear that the circuit court did not err in finding that petitioners are not a suitable placement for the children at issue.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within eighteen months of the date of the disposition order.[1] As this Court has stated, "[t]he eighteen-month

[1] Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that "[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found." Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard* , 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the circuit court's finding, and the circuit court's December 6, 2011, order is hereby affirmed.

Affirmed.

ISSUED: June 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