

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

In Re: the Matter of J.B. and J.B.

No. 11-0724 (Clay County 11-FIG-2)

FILED

February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Norma J. appeals the circuit court order refusing her appeal of a family court order denying her Petition for Appointment of Guardian over the subject children. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. J.B. and J.B.'s father, James B., has filed a *pro se* response. J.B. and J.B.'s mother, Janet O., has also filed a *pro se* response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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.

This case involves a Petition for Appointment of Infant Guardian. Norma J. moved for guardianship of the two children, ages seventeen and fourteen. The parents of the children, respondents in this matter, opposed the petition. Petitioner is the aunt of the subject children, and at times has allowed them to live with her. Child Protective Services became involved after the children each missed almost thirty days of school. The children's mother Janet O. claims that the children missed school while staying with the petitioner, and the petitioner contends that the mother had custody at the time. The family court found that petitioner failed to prove a *prima facie* case for appointment of infant guardianship and that granting the petition is not in the best interest of the infant children. Although the records from the family court are scant, it appears that along with denying the petition, an order was entered preventing contact between petitioner and the children. Father James B. was granted custody of the children. Petitioner now appeals the circuit court's refusal of her appeal. Father James B. responds in favor of the circuit court order, and Mother Janet O. argues that she should be given custody of the children.

This Court has stated that:

“In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.” Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

Syl. Pt. 1, *Allen v. Allen*, 226 W.Va. 384, 701 S.E.2d 106 (2009).

Petitioner argues that the circuit judge erred in failing to interview the children to determine where they wished to reside. However, petitioner ignores the relevant code provision regarding appointment of a guardian. West Virginia Code § 44-10-3(a) states:

The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the State, the county in which the minor has an estate, may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.

In the present case, the children are placed with their father, who properly received priority as per the statute. Further, petitioner was found not to be a suitable placement, presumably because the children missed significant amounts of school at the time they resided in her home. The family court found petitioner so unsuitable that it entered an order preventing contact between petitioner and the children. Thus, an interview with the children was unnecessary because petitioner was never deemed a suitable guardian. This Court finds no error in the failure to interview the children.

Petitioner also argues that the petition should have been transferred to the circuit court due to petitioner's allegations that father James B. has abused and/or neglected the children. However, petitioner gives no specific allegations of abuse and neglect, and no allegations of abuse or neglect appear in the appendix presented to this Court by petitioner. Respondent Father James B. alleges that a Child Protective Services case was opened against petitioner and Mother Janet O. due to the children's educational neglect, but that no allegations of neglect were lodged against him, and he asserts that the case was closed once he was granted custody of the children.

This Court has stated that:

“Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va.Code § 44–10–3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va.Code § 49–1–3, then the family court is required to remove the petition to circuit court for a hearing thereon. Furthermore, ‘[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence.’ West Virginia Rules of Practice and Procedure for Family Court 48a(a).” Syl. Pt. 7, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008).

Syl. Pt. 3, *In re Richard P.*, 227 W.Va. 285, 708 S.E.2d 479 (2010). However, in the present case, the petition does not allege child abuse or neglect. The petition alleges that the “children are both attending school in Clay Co., both wanting to stay with Norma J[.], both have [serious] issues with other placements [sic].” Likewise, no specific abuse or neglect allegations appear in the appendix provided to this Court by the petitioner. Thus, this Court finds no error in the family court’s failure to transfer the case to the circuit court.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 13, 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