STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* J.C., C.P., and E.P.**

No. 18-1059 (Calhoun County 17-JA-28, 17-JA-29, and 17-JA-30)

FILED
June 12, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner maternal grandmother C.E., by counsel Joseph Munoz, appeals the Circuit Court of Calhoun County's October 26, 2018, order denying her motion to intervene and motion for custody of the children.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem ("guardian"), Tony Morgan, filed a response on behalf of the children in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in denying her a meaningful opportunity to be heard and in failing to rule on her request for visitation with the children.

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.

In July of 2017, the DHHR filed an abuse and neglect petition against the parents. The children were removed from the parents' home and placed in a foster home. The DHHR conducted a home study on petitioner's home and the home study was approved in February of 2018. However, following the conclusion of the initial home study, the DHHR learned that petitioner had prior substantiations of child neglect in Ohio. As a result, the DHHR rescinded its prior approval of petitioner's home study. In May of 2018, petitioner filed a motion to intervene in the abuse and neglect proceeding and a motion for custody of the children. On July 12, 2018, the circuit court held a hearing to address petitioner's motion and granted her the right to intervene on a preliminary basis. On July 24, 2018, the parents voluntarily relinquished their parental rights to

[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 children and the circuit court heard further evidence regarding petitioner's motion. According to the record, petitioner presented evidence during the July 12, 2018, hearing and concluded her portion of the case.[2] At a July 24, 2018, evidentiary hearing, the following exchange occurred:

> [Petitioner's counsel: Petitioner's] going to be testifying to all of my grounds for custody. She was cross-examined, at the first hearing, by the State. I can put her back up there to, essentially, say the same things, Judge. I mean I have put on evidence, I have carried my burden, and I think, initially, to show that my client was a custodian or guardian of these grandchildren for a large part of their life. I think I have carried the burden; we wouldn't be sitting in this room right now talking about moving forward after relinquishment. Do you see where I'm coming from?
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> . . .
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> [Guardian]: Well, I guess then they're standing on the evidence, so they rested their case, and now the Department can put on theirs.
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> [Petitioner's counsel]: I think that's a fair assessment, yes.

Also during that hearing, the DHHR presented the testimony of two DHHR employees regarding petitioner's home study and the reasons for its subsequent denial. The first DHHR employee, Sarah Bleigh, testified that petitioner had two prior child neglect substantiations in 1989 and 1990 in Ohio. Ms. Bleigh further testified that those substantiations were based upon "basic neglect of childcare needs, medical needs, and some alcohol use that resulted in improper care of the children." Ms. Bleigh explained that the DHHR was unable to approve petitioner's home study due to the substantiations. She also expressed concern that petitioner had physical custody of her grandchildren, the children at issue in the instant matter, for periods of time before the abuse and neglect petition was filed but failed to seek proper medical care for the children's various medical issues, including a bowel condition, dental problems, and a cleft palate. The DHHR's second witness corroborated Ms. Bleigh's testimony, and the hearing was continued due to time restrictions.

On July 27, 2018, petitioner filed a grievance with the DHHR Board of Review regarding the denial of her home study. On September 27, 2018, the Board of Review held a hearing on petitioner's grievance. During the hearing, petitioner was represented by the same attorney who represented her in the abuse and neglect proceedings and was afforded the opportunity to present evidence and cross-examine the DHHR's witnesses. On October 10, 2018, the Board of Review upheld the DHHR's denial of petitioner's home study, finding that the DHHR was required to deny petitioner's home study upon learning of her substantiated child neglect history, despite the prior approval of her home study. On October 11, 2018, the circuit court reconvened its hearing regarding petitioner's motion to intervene and motion for custody of the children. The circuit court advised the parties that it received the Board of Review's administrative decision and order upholding the DHHR's denial of petitioner's home study. The circuit court declined to hear further

[2]A transcript from the July 12, 2018, hearing was not included in the appendix.

evidence in the matter and denied petitioner's motion to intervene and motion for custody of the children finding that petitioner "does not meet the criteria to have the children placed with her." Petitioner appeals from the circuit court's October 26, 2018, order.[3]

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).

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011). Upon our review, this Court finds no error in the proceedings below.

First, petitioner argues that she was denied a meaningful opportunity to be heard on her motion to intervene and motion for custody of the children pursuant to West Virginia Code § 49-4-601(h), which provides that

> [i]n any proceeding pursuant to this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. Foster parents, preadoptive parents, and relative caregivers shall also have a meaningful opportunity to be heard.

Petitioner's argument is not supported by the record.[4] Contrary to her argument, the record shows that the circuit court held multiple hearings on her motion, and petitioner had notice of the hearings,

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[3]According to respondents, the permanency plan for the children is adoption in their current foster home.

[4]Petitioner offers several arguments in support of this assignment of error. However, petitioner fails to make a single citation to the record in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, which provides as follows:

> The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

was represented by counsel, testified on her own behalf, and had the opportunity to cross-examine the DHHR's witnesses. Petitioner even admits that the circuit court granted her intervenor status on a preliminary basis and that she "testified extensively at the July 12, 2018, hearing." The record further shows that during the July 24, 2018, hearing, petitioner rested her case. After petitioner rested, the DHHR presented its witnesses and petitioner cross-examined them. Therefore, it is clear that the circuit court did not deny petitioner a meaningful opportunity to be heard.

While petitioner also asserts that the circuit court erred in relying on the DHHR's assessment process, we have held that

> [b]y specifying in [West Virginia Code§ 49-4-114(a)(3)] that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case.

Syl. Pt. 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). The record shows that petitioner was considered for placement of the children and a home study was conducted and initially approved. However, the DHHR learned of petitioner's prior substantiations of child neglect in Ohio and was required to rescind its approval of the home study. The DHHR presented testimony that the prior substantiations were based on petitioner's failure to provide her own children with basic needs and medical care in 1989 and 1990. This was particularly concerning to the DHHR because petitioner's grandchildren, the children at issue on appeal in this matter, have numerous medical issues. The DHHR presented testimony that petitioner had physical custody of the children for periods of time before the instant abuse and neglect petition was filed but neglected their medical needs. Based on this evidence, and upon receiving the administrative decision of the DHHR Board of Review, the circuit court concluded that petitioner "does not meet the criteria to have the children placed with her" and denied petitioner's motion to intervene and motion for custody of the children. We find no error in the circuit court's denial of petitioner's motions.

Next, petitioner argues that the circuit court erred in failing to rule on her request for visitation with the children.[5] Petitioner asserts that Rule 15 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings does not place limitations on who can request visitation or when that request may be made. However, Rule 15 also states that the circuit court "shall consider whether or not the granting of visitation would interfere with the child's case plan and the overall effect granting or denying visitation will have on the child's best interests." Although the circuit court did not specifically rule on petitioner's request for visitation, it is clear that visitation with petitioner would interfere with the children's permanency plan of adoption and would have been contrary to the children's best interests. As discussed above, petitioner had prior substantiations of child neglect in Ohio and her home study was denied. She also neglected the

[5]In support of this assignment of error, petitioner refers to testimony that was not included in the appendix record in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, which states that the "argument must contain appropriate and specific citations to the record on appeal." Therefore, that testimony will not be considered on appeal.

children's medical needs prior to the filing of the instant abuse and neglect petition. Moreover, we have held that

> [p]ursuant to *W.Va.Code* § 48–10–902 [2001], the Grandparent Visitation Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

Syl. Pt. 3, *In re Hunter H.*, 231 W. Va. 118, 744 S.E.2d 228 (2013). Because the permanency plan for the children is adoption by a nonrelative, the circuit court did not err in declining to award visitation to petitioner.

For the foregoing reasons, we find no error in the decision of the circuit court, and its October 26, 2018, order is hereby affirmed.

Affirmed.

ISSUED: June 12, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison