

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

In Re: M.B. and K.V.:

No. 11-0132 (Logan County 08-JA-69-P & 70-P)

FILED

October 25, 2011

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Logan County, wherein the pro se petitioner, who is the children's maternal grandmother, attempted to obtain custody of M.B. and K.V. but was ultimately denied. The appeal was timely perfected, with the complete record from the circuit court accompanying the petition. The guardian ad litem has filed his response on behalf of the children. Father C. B. has also filed a response, and the petitioner has filed a reply brief. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on January 20, 2011. Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioner in this matter is the maternal grandmother of the children at issue. The biological mother and her husband, who is also the biological father of K.V., have a past history of Department of Health and Human Resources ("DHHR") involvement for domestic violence, and their parental rights to the children were terminated in this matter for severe drug addiction and failure to comply with the terms of their respective improvement periods. Additionally, M.B.'s biological father voluntarily relinquished his parental rights, as he is currently incarcerated outside West Virginia. As the maternal grandmother, petitioner then attempted to gain custody of the children at issue. Petitioner challenges the circuit court's order granting a foster family custody of her grandchildren, arguing that both West Virginia Code § 49-3-1(a)(3) and the best interests of the children dictate placement in her home in Alabama. She argues that the circuit court erred in applying the best interest standard and in finding her to be an unsuitable custodian.

“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 the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

While it is true that the West Virginia Code creates a preference for abused and neglected children to be placed with grandparents, this Court has clarified that the preference is not absolute and does not require lower courts to place children with their grandparents in all circumstances. *In re Elizabeth F.*, 225 W.Va. 780, 786-87, 696 S.E.2d 296, 302-03 (2010). Providing further explanation, we have held that “an integral part of the implementation of the grandparent preference, as with all decisions concerning minor children, is the best interest of the child.” *Id.* In fact, once a lower court has properly determined that a child has been abused or neglected and that the natural parents are unfit, “the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody.” Syl. Pt. 8, in part, *In Re: The Matter Of Ronald Lee Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). Based upon this guidance, “adoption by a child’s grandparents is permitted only if such adoptive placement serves the child’s best interests. If, upon a thorough review of the entire record, the circuit court believes that a grandparental adoption is not in the subject child’s best interests, it is not obligated to prefer the grandparents over another, alternative placement that does serve the child’s best interests.” *In re Elizabeth F.*, 225 W.Va. at 787, 696 S.E.2d at 303 (2010) (citing Syl. Pts. 4 and 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005)).

In this matter, the circuit court found that placement with petitioner would not be in the children’s best interest for several reasons. To begin, petitioner testified that the parents at issue in this matter had resided with her at some time following the revocation of their respective improvement periods. Further, at the time of petitioner’s testimony, the parents were undergoing treatment in a rehabilitation facility located approximately thirty miles from petitioner’s residence. The parents’ proximity to petitioner’s home creates concerns of continued contact with the parents, whose parental rights were terminated. Review of the complete record also indicates that two of petitioner’s three children have been incarcerated, with one currently serving a life sentence; her third child, the mother at issue in this matter, suffers from severe drug addiction.

Further, the subject minor children herein resided with the same foster family for approximately two years during the pendency of the action below. The children were found to have done well in this home with the foster parents providing them consistent and proper care, in contrast to the significant emotional trauma inflicted upon them by their natural parents' drug abuse and prior acts of domestic violence. For these reasons, the circuit court determined that the children's best interests required adoption by the family that had provided them stability for the previous two years. Additionally, the children have other relatives in the area where the foster family resides, and the circuit court ordered that the children be permitted continued contact with these family members as well as the petitioner. Based on the foregoing, the Court concludes that there was no error in relation to the decision to grant custody of the children to the foster family.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court's order is hereby affirmed.

Affirmed.

ISSUED: October 25, 2011

CONCURRED IN BY:

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