STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: N.P., Jr. and A.P.

No. 11-0324 (Mercer County 09-JA-127-DS & 128-DS)

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 Mercer County, wherein the Petitioner Paternal Grandparents were denied custody of the children at issue, N.P., Jr., and A.P., following the termination of the biological parents' parental rights. The appeal was timely perfected by counsel, with the entire record from the circuit court accompanying the petition. The guardian ad litem has filed his response on behalf of the children. Respondent Maternal Grandmother has also filed a response, as have the respondent foster parents who were granted custody of the children below. Subsequently, the petitioners filed a reply brief.

This Court has considered the parties' briefs and the record on appeal. 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 February 23, 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.

"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). Petitioners herein challenge the circuit court's order granting custody of the children to a foster family, arguing

that this decision is erroneous because it violates both the grandparent preference found in West Virginia Code § 49-3-1(a)(3) and the Indian Child Welfare Act found in 25 U.S.C.A. § 1901, et seq.

The Indian Child Welfare Act (hereinafter referred to as "the Act") is applicable to state court child abuse and neglect proceedings involving Native American children, and was enacted because "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C.A. § 1901(4). The federal government has recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and . . . the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C.A. § 1901(3).

Because the children at issue are members of the Leech Lake Band of Ojibwe, Section 1915(a) of the Act is applicable. That section states that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." Petitioners argue that there was no good cause to allow the circuit court to deviate from this code section, and that they were entitled to custody of the children pursuant to both the Act and the grandparent preference found in West Virginia Code § 49-3-1(a)(3). Specifically, petitioners argue that placement with them was appropriate because they passed their home study as required by West Virginia law, and they passed their court-ordered psychological evaluation. They further argue that Petitioner Grandfather passed his court-ordered drug screen, and that the past domestic issues with their adult children do not preclude placement with them. However, the circuit court's reasons for denying placement with the petitioners serve as both the good cause required to deviate from the requirements of the Act, and illustrate why placement with the petitioners is not in the children's best interests.

In its order, the circuit court stated that the petitioners' "age and chronic health conditions present real possibility of the long term stability of the home being disrupted given that the children are 2 and 1 years of age." Further, the circuit court pointed out that the children have had no personal contact with petitioners since the eldest child was a newborn. The circuit court went on to address issues related to the petitioners' home environment, noting that "there is a history of domestic violence in the extended family of the [petitioners'] living near [them]." The circuit court also addressed issues related to the petitioner's ability to raise their own children. As noted above, the biological parents had their parental rights terminated in this action following their convictions of first degree murder. The circuit court

cited this fact, as well as the continuing intervention of the police due to domestic issues involving the petitioner's other two adult daughters, in finding that petitioners had difficulty raising children. Lastly, the circuit court noted that while petitioners are Ojibwe Native Americans, they "have no practical means of exposing their children to the Tribe which is centered in Minnesota" because they reside in Idaho.

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 interests 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).

In reaching its decision, the circuit court found that placement with the petitioners is not in the children's best interests for the reasons stated above, and as such it was not required to grant them a custodial preference. Further, it is clear from the circuit court's order that it properly considered the applicable sections of the Indian Child Welfare Act, and found that good cause did exist to deviate from the preference found in 25 U.S.C.A. § 1915(a). In its order, the circuit court found that "outside of [petitioners'] home, there is no possible suitable Native American placement despite a diligent search." Because the petitioners were not suitable custodians for the children, and because no other possible Native American placements were available, good cause existed to deviate from the preference dictated in the Act. As such, 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 Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin