STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: The Adoption of A.P.S.

No. 11-0630 (Raleigh County 07-A-22-H)

FILED
June 8, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David R. appeals the circuit court's final adoption decree terminating the parental rights of the natural mother, terminating his own parental rights as the natural father, and allowing the minor child's maternal grandfather and step-grandmother to adopt her as their own. Petitioner argues inter alia that the circuit court's finding that he abandoned A.P.S. is incorrect when the court knew that his ability to support A.P.S. and to have contact with her was limited because of his incarceration. The instant appeal was timely filed by the pro se petitioner with the entire record being designated on appeal.

The 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 April 26, 2011. 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 record presented, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The minor child involved in the case sub judice, A.P.S., D.O.B. October 14, 2004, is the natural daughter of Christine L. who consented to A.P.S.'s adoption by A.P.S.'s maternal grandfather and step-grandmother. The circuit court found that "[t]he Consent to Adopt was not procured through fraud, duress or any other unconscionable means" and that "[t]he Consent to Adopt was executed knowingly, voluntarily and with the advice of counsel." The circuit court further found that A.P.S. presently lived with Donnie R. and Debra R., her maternal grandfather and step-grandmother, and "has resided with [Donnie R. and Debra R.] continuously for more than six months prior to the filing of the petition for adoption in this action." A home study of Donnie R. and Debra R.'s home, filed with the circuit court on July 12, 2007, indicated that A.P.S. has lived with Donnie R. and Debra R. continuously since she was seven weeks old.[1]

[1] In addition, the Guardian ad litem, for A.P.S. reports in her response to Mr. Rowe's petition for appeal that A.P.S. refers to Donnie R. and Debra R. as her "daddy and mommy."

DNA testing revealed that Christina L.'s then-husband, Anthony S., was not A.P.S.'s father. It was subsequently determined that petitioner was the natural father of A.P.S. Petitioner is an incarcerated individual due to convictions on four counts of sexual abuse by a guardian against his stepdaughter in an unrelated case. In that case, petitioner is currently serving two consecutive sentences of ten to twenty years in prison.[2] Petitioner has been incarcerated since prior to the birth of A.P.S. According to the Division of Corrections, petitioner's projected release date is January 23, 2024.

In the case sub judice, the circuit court found that petitioner abandoned the child A.P.S.:

> . . . The "determined father" is presently incarcerated at Mt. Olive Correctional Facility in Fayette County, West Virginia as a result of a criminal conviction in Mercer County, West Virginia. The "determined father" has abandoned the child, as that term is defined in West Virginia Code §§ 48-22-102 and 48-22-306, in that the "determined father" has demonstrated a settled purpose to forego all duties and relinquish all parental claims to the child, including, but not limited to, failing to support the child within the means of the "determined father" and failing to visit or otherwise communicate with the child when he was physically and financially able to do so and was not prevented from doing so by the petitioners, all for a continuous period that is in excess of six (6) months. The Court further finds that the respondent father's conviction of crimes of sexual assault or abuse against a minor and the fact that his incarceration will continue for a period in excess of ten years from the date of the proceedings in this matter likewise necessitates the termination of the respondent's parental rights. The "determined father" has been represented at all stages of these proceedings by a duly-appointed guardian *ad litem*[3]

On petitioner's behalf, petitioner's Guardian ad litem filed a response to Donnie R. and Debra R.'s amended petition for adoption and then filed proposed findings of fact and conclusions of law suggesting that their amended petition be denied.

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[2] In the unrelated case, the trial court originally sentenced petitioner to four consecutive sentences of ten to twenty years in prison but then suspended two of those sentences in lieu of five years probation.

[3] Petitioner asked for a Guardian ad litem for himself in his pro se motion to intervene filed on July 25, 2007.

In the final adoption decree, the circuit court concluded that adoption is in A.P.S.'s best interests and terminated the parental rights of both petitioner and Christina L. The circuit court allowed the adoption of A.P.S. by Donnie R. and Debra R. and ordered a name change to their surname. The circuit court granted post-adoption visitation to Christina L. Petitioner now appeals the termination of his parental rights and A.P.S.'s adoption by Donnie R. and Debra R.

I. ADEQUACY OF REPRESENTATION BY GUARDIAN AD LITEM

As his first assignment of error, petitioner contends that he should have been appointed legal counsel instead of a Guardian ad litem. Donnie R. and Debra R. argue that the preferred manner of protecting an incarcerated person's legal rights in civil proceedings is through the appointment of a Guardian ad litem. Both they and A.P.S.'s Guardian ad litem argue that petitioner's Guardian ad litem adequately represented him. In the final divorce decree, the circuit court found that petitioner's Guardian ad litem represented him "at all stages of these proceedings." In addition, petitioner's contention that a Guardian ad litem was insufficient to protect his interests is undermined by the fact that petitioner asked for a Guardian ad litem, instead of court-appointed counsel, in his pro se motion to intervene. Therefore, this Court concludes that this issue lacks substantial merit.

II. ENTITLEMENT TO A FREE COPY OF THE TRANSCRIPT

Petitioner contends that as an indigent person, he is entitled to a free copy of the transcript of the adoption proceedings. Donnie R. and Debra R., and A.P.S.'s Guardian ad litem, argue that there is no legal authority holding that a indigent natural father in a paternity action or an adoption action is entitled to a free copy of the transcript. Donnie R. and Debra R. further argue that even if it were error not to provide petitioner with a free transcript of the adoption proceedings, the error was harmless because the record made during the adoption proceedings, including the final adoption decree which contained detailed findings of fact and conclusions of law, provides adequate information to allow this Court to properly review the propriety of the final adoption decree. This assignment of error can be dealt with more easily, however, because according to the court reporter in the case sub judice, she never received a request from petitioner for a copy of the transcript, free or otherwise. Therefore, this Court concludes that this issue lacks substantial merit.

III. ADEQUACY OF THE CIRCUIT COURT'S FINDINGS

Petitioner contends that the circuit court's finding that he abandoned the child A.P.S. was incorrect when the court knew that his ability to support A.P.S. and to have contact with her was limited because of his incarceration. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.,* 198 W.Va. 79, 479 S.E.2d 589 (1996), *see also Michael K.T. v. Tina L.T.,* 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."). Petitioner has been incarcerated since prior to the birth of A.P.S. On the other hand, the adoptive parents, Donnie R. and Debra R., have had A.P.S. since she was seven weeks old according to the home study of their

home. Donnie R. is A.P.S.'s biological maternal grandfather. A.P.S.'s Guardian ad litem reports that A.P.S. calls Donnie R. and Debra R. "daddy and mommy." Petitioner has never had a relationship with A.P.S. The circuit court found that "[petitioner's] incarceration will continue for a period in excess of ten years from the date of the [adoption] proceedings." Petitioner will never have the opportunity to be an active father to A.P.S. Therefore, after considering the best interests of A.P.S., this Court concludes that the circuit court did not err in its decision to terminate the parental rights of A.P.S.'s natural mother and father, and to approve A.P.S.'s adoption by Donnie R. and Debra R.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 8, 2012

CONCURRED IN BY:

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

DISSENTED IN BY:

Justice Brent D. Benjamin