STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
September 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: C.H., et al.

No. 11-0906 (Berkeley County No. 09-JA-37 & 38)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Berkeley County, wherein the Petitioner Grandmother's motions for a rule to show cause and an injunction were denied. After Respondent Mother's parental rights to the children[1], C.H.-1 and C.H.-2, were terminated, petitioner sought to reinitiate the home study process in the hopes of gaining custody of the children. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her response on behalf of the children. Intervenors below, S. B. And C. B., have also filed a summary response. Petitioner has also filed a reply brief.

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

[1]The children in this matter have the same initials, so the Court will refer to them throughout as C.H.-1 and C.H.-2.

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). Petitioner challenges the circuit court's denial of her motion seeking a rule to show cause as to why the circuit court did not hold the DHHR in contempt for failing to perform a home study upon her residence. Petitioner also challenges the denial of her motion for an injunction preventing the intervening foster family from adopting the children at issue. She argues that the circuit court's finding that reinitiating the home study process must yield to the children's best interest of permanency is clearly erroneous as a matter of law, is unsupported by the evidence, and constitutes an abuse of discretion. Petitioner relies on the grandparent preference found in West Virginia Code § 49-3-1(a)(3) to argue that the circuit court's decision is erroneous. However, a review of the record shows that the circuit court's denial of petitioner's motions was in the children's best interest, and West Virginia case law dictates that the best interests of the children must be controlling.

To begin, petitioner asserts that the circuit court's finding that reinitiating the home study process would unduly delay permanency for the children at issue is unsupported by the evidence below and that the circuit court improperly took judicial notice of the case file related to the children. Petitioner argues that she was not a party to the action below until after disposition and that, as such, she was not aware of any permanency plan. However, the Court finds no merit in petitioner's argument on this issue. A review of petitioner's motions below illustrates that she had actual knowledge of the circuit court's intention to allow the relative foster family to proceed with adoption. Further, it is clear that the circuit court's decision was based on its overall knowledge of the home study and adoption process generally, which need not be submitted into evidence in order to be considered in ruling on petitioner's motion. The language of the order at issue includes the circuit court's computation of the additional time required to reinitiate the home study process for petitioner; paragraphs forty-three through forty-five illustrate how granting petitioner's request would cause a minimum eight month delay in achieving permanency for two children whose parents had already had their parental rights terminated and who were on the verge of adoption by a paternal relative. As such, the circuit court's decision regarding the delay was supported by the evidence.

Secondly, petitioner argues that the circuit court's decision to deny her motions is clearly erroneous as a matter of law because West Virginia Code § 49-3-1(a)(3) requires a home study be performed on any known grandparent. Petitioner argues that this statute creates a presumption that residing with a grandparent is in the child's best interest and therefore the circuit court's decision is clear error. While it is true that "placement with grandparents is presumptively in the best interest of the child," this Court has also held that "the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child." Syl.

Pt. 4, in part, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005). Clear from this language is the fact that the best interest of the child supercedes the preference for placement with a grandparent. Further, this Court has also 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." *In re Elizabeth F.*, 225 W.Va. 780, 786, 696 S.E.2d 296, 303 (2010). Moreover, we have directed that abuse and neglect "proceedings must be resolved as expeditiously as possible." Syl. Pt. 5, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

It is clear from the circuit court's order that it weighed the positive benefits of expediting permanency against the negative impact of granting the motion of the petitioner, who voluntarily stopped the home study process prior to disposition and then waited approximately three months after termination of her daughter's parental rights to attempt to reinitiate the home study process. This Court has instructed circuit courts to not unnecessarily extend abuse and neglect proceedings when it held that "...courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In Re: R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). While this matter does not concern the termination of any of petitioner's parental rights, this language is directly applicable to the instant case. The children at issue were two years old and less than a year old, respectively, when the third amended petition was filed. As such, they are of the tender age which this Court has recognized as being prone to developmental retardation as a result of multiple placements. Therefore, as the circuit court correctly held below, the best interests of the children are properly served by allowing them to achieve swift permanency through adoption with the relative placement where they have resided for over a year and a half.

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

Affirmed.

ISSUED: September 26, 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