Notice: On July 18, 2012 the Court granted a petition for rehearing in this matter. This Memorandum Decision is therefore withdrawn and no longer effective.

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.W. and B.W.

No. 11-1669 (Logan County 08-JA-81 & 08-JA-82)

FILED
June 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners' appeal, by counsel Susan J. Van Zant, arises from the Circuit Court of Logan County, wherein their motion for intervenor status was denied by order entered on November 28, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, David A. Wandling, has filed his response on behalf of the children. Respondent Foster Parents M.M. and N.M., by counsel L. Donna Pratt, have also responded.

This Court has considered the parties' briefs and the appendix 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 appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioners are the paternal grandparents of B.W., one of the subject children herein.[1] The child was the subject of abuse and neglect proceedings in the circuit court that were initiated due to her significant withdrawal symptoms because of her mother's drug abuse during pregnancy. B.W. was placed in the home of Respondent Foster Parents in December of 2008, where she has resided since she was approximately three weeks old. During the proceedings below, both of B.W.'s biological parents had their parental rights terminated. On May 4, 2010, Petitioner Grandparents filed a motion to intervene in the abuse and neglect proceedings below, but this motion was denied by

[1]While two children were the subject of the abuse and neglect proceedings below, only B.W. is the subject of this appeal. Petitioners are the paternal grandparents of B.W., but have no biological relationship to her half-sibling, M.W. As such, the petitioners did not seek custody of M.W. below, and do not appeal any rulings related to that child.

order entered on May 24, 2010. However, upon review of the appendix and representations of counsel, it appears that the petitioners were nevertheless allowed to participate in the proceedings below despite this denial, including attending the multidisciplinary team ("MDT") meetings, arguing for custody of B.W. prior to the circuit court's determination of permanency, and participating in visitation with the child. The petitioners again filed a motion to intervene on December 9, 2010, but this motion was held in abeyance pending further hearings as to the paternal rights of the Respondent Father below. Following a hearing regarding permanency on August 18, 2011, the circuit court ultimately granted custody of B.W. to Respondent Foster Parents by order entered on November 28, 2011. It is from this order that petitioners appeal.

On appeal, petitioners allege the following assignments of error: that the circuit court erred in denying their motion to intervene; that the circuit court erred in denying them custody of B.W.; and, that the circuit court erred in entering a permanent placement order with Respondent Foster Parents at the time of an open Child Protective Services ("CPS") investigation. While petitioners list these separate assignments of error in their petition for appeal, in actuality they argue only one assignment of error: that the circuit court erred in denying them custody of B.W. In support of this allegation, petitioners argue that the circuit court should have granted them custody pursuant to the grandparent preference found in West Virginia Code § 49-3-1(a)(3). According to petitioners, this statute contemplates that placement with a grandparent is presumptively in the child's best interest, and further that good cause must be established to overcome this presumption. Simply put, petitioners argue that no good cause to disregard the grandparent preference was established in this matter. They further argue that placement in their home was in the child's best interest based upon their ability to expose the child to extended family. Lastly, petitioners argue that they received a positive home study during the proceedings below, while the foster parents were granted custody at such time as CPS was openly investigating their home. For these reasons, petitioners argue that the circuit court erred in denying them custody of B.W.

The guardian ad litem responds and argues that the circuit court did not commit error below. To begin, he argues that even if petitioners' motion to intervene had been granted, the outcome of the case would not have been substantially different. This is based upon the fact that petitioners were allowed to participate in all aspects of the abuse and neglect proceedings, despite the denial of their first motion to intervene. The guardian further notes that the outcome would not have changed, because it was not in the child's best interests to be placed with petitioners or to be separated from her sister, M.W. The guardian also relies on these two arguments in support of his assertion that the circuit court did not err in denying petitioners custody of B.W. The guardian notes that the grandparent preference is not absolute, and further that the law prefers placement of children with siblings, as was done below. To show that placement with Respondent Foster Parents was in the child's best interest, the guardian notes that the child refers to them as "mom" and "dad," and also that the child has been in this home for over three years beginning when she was less than a month old. Additionally, the guardian notes that B.W. has been in the home that entire time with her sibling, M.W., which has allowed the children to form an extremely close bond. Lastly, the guardian argues that the circuit court was unaware of any alleged open CPS investigation into Respondent Foster Parents, and that petitioners' argument on this issue is therefore moot.

The DHHR also responds and argues that the circuit court's order should be affirmed. The DHHR's argument mirrors that of the guardian, relying predominately on the argument that placing the child in the same foster home as her sibling was in her best interest, while placement with petitioners was not. Addressing the allegations of an open CPS investigation into Respondent Foster Parents, the DHHR argues that it investigated the allegations and found them to be unsubstantiated. As such, the DHHR argues that the allegations against Respondent Foster Parents had no bearing on the circuit court's decision. Further, the DHHR argues that West Virginia Code § 49-2-14(b) appears to override the grandparent preference, in that a child may not be removed from a foster family if it has been there in excess of eighteen months, absent specific delineated circumstances. For these reasons, the DHHR requests that the circuit court's order be affirmed.

Lastly, Respondent Foster Parents respond and argue in support of the circuit court's decision regarding permanency. The foster parents also echo the arguments of the respondents above, arguing that B.W.'s best interests were served by placement in their home. The foster parents argue that the best interests of a child are paramount, and that the preference for placement with grandparents is not absolute. The foster parents argue that in reaching its decision as to permanency, the circuit court relied upon the strong bond they developed with the child while she has been in their care for over twenty-nine months, the bond that the two siblings in the home have developed, and also B.W.'s recognition of the foster parents as her parents. The foster parents also argue that the circuit court noted that B.W. does not have a bond with her half-siblings currently in petitioners' care. In short, the foster parents argue that the stability they have offered the child is a major concern when reaching the custody decision. For these reasons, Respondent Foster Parents argue in support of the circuit court's decision below.

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." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

Upon review of the appendix in this matter, the Court finds no error in the circuit court's

decision to deny petitioners custody of B.W. Petitioners herein seem to rely almost entirely upon the argument that they are entitled to custody of B.W. by virtue of the preference for placement with grandparents found in West Virginia Code § 49-3-1(a)(3). However, we have previously held that "even with regard to this State's statutory preference for considering grandparents for adoption of a child in situations wherein the parental rights have been terminated, this Court has clarified that such a preference is not an absolute directive to place children with their grandparents in all circumstances." *Kristopher O. v. Mazzone,* 227 W.Va. 184, 193, 706 S.E.2d 381, 390 (2011) (citing *In re Elizabeth F.*, 225 W.Va. 780, 786–87, 696 S.E.2d 296, 302–03 (2010)). While it is true that the grandparents argue that placement of the child in their home would be in her best interest, they provide little, if any, facts in support of this assertion beyond the access that B.W. would have to other half-siblings and relatives.

The circuit court, however, appropriately weighed several other factors in determining that placement with Respondent Foster Parents would be in the child's best interest. This includes the fact that the child spent approximately twenty-nine months in the foster parents' care, which was only one month less than her entire life up to the point that the circuit court made its custody determination. The circuit court further found that the foster parents were the psychological parents of the child, as B.W. not only recognized them as her mother and father, but in fact had never known another family. Also important in the circuit court's determination of which placement would serve the child's best interest was the strong emotional bond that B.W. had developed with her sibling M.W. in Respondent Foster Parents' home. Lastly, citing a recent holding from the Court, the circuit court noted that "'stability in a child's life is a major concern when formulating custody arrangements.' *Snyder v. Scheerer*, 190 W.Va. 64, 72–73, 436 S.E.2d 299, 307–08 (1993)." *In re Hunter H.*, 227 W.Va. 699, 705, 715 S.E.2d 397, 403 (2011). For these reasons, it is clear that the circuit court did not err in making its decision regarding custody, and that the child's best interests were served by placement with Respondent Foster Parents.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within eighteen months of the date of the disposition order.[2] As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect

[2] Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that "[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found." Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard* , 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court, and the circuit court's November 28, 2011, order is hereby affirmed.

Affirmed.

ISSUED: June 25, 2012

CONCURRED IN BY:

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