

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

In Re: D.C., Z.M., and A.M., III

No. 11-0080

(Mingo County Nos. 10-JA-6, 10-JA-7, 10-JA-8)

FILED

May 16, 2011

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mingo County, wherein the petitioners, maternal grandparents of the children at issue and intervenors below, were denied custody of the children following the circuit court's decision terminating the parental rights of the biological parents. The appeal was timely perfected by counsel, with the complete record 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 his response on behalf of the children. 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 petitioners in this matter are the maternal grandparents of the children at issue. Following the filing of the initial petition for abuse and neglect below, the children were taken into DHHR custody and placed with the paternal grandmother, where they remained throughout the pendency of this action. Subsequently, the parental rights of both biological parents to the children were terminated. In determining the permanent placement for the children, the circuit court found that the best interests of the children dictated remaining in the paternal grandmother's care, and denied petitioners custody. Petitioners challenge the circuit court's order granting custody of their grandchildren to the paternal grandmother, arguing that the circuit court did so in violation of West Virginia Code § 49-3-1(a)(3) and § 49-6-6, and that the circuit court's decision violated their federal and state due process rights. "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 first allege that the circuit court erred in its decision to grant the paternal grandmother custody because West Virginia Code § 49-3-1(a)(3) requires that they be offered placement over the paternal grandmother. During the proceedings below, home studies were ordered on the homes of both the petitioners and the paternal grandmother. Due to her remote conviction for manslaughter, the paternal grandmother failed her home study. Initially, the petitioners also failed their home study due to a prior finding of abuse and neglect against Petitioner Grandmother and other issues related to the condition of their home. These conditions were corrected, and the petitioners appealed the prior abuse and neglect finding, having the same overturned administratively; this ultimately resulted in petitioners passing their home study. Petitioners argue that, per the language of West Virginia Code § 49-3-1(a)(3), the paternal grandmother should have been precluded from having custody due to her failed home study, and that they alone should have been considered for placement. However, this Court has held that "a crucial component of the grandparent preference is that the adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's grandparents is not proper." *In re Elizabeth F.*, 225 W.Va. 780, 786, 669 S.E.2d 296, 302 (2010). In this matter, the circuit court ruled that the paternal grandmother's prior conviction was so remote as to not affect her ability to care for the children, and further that significant bonding and attachment patterns had developed between her and the children in the eight months they resided in her care. For these reasons, the circuit court ruled that it was in the children's best interests to remain with the paternal grandmother for purposes of permanency and caretaker continuity.

Petitioners next argue that the circuit court's decision to place the children with the paternal grandmother was a violation of their state and federal due process rights, in that they were deprived of substantial liberty interests that this Court has deemed implicit in abuse and neglect proceedings. However, as addressed above, the circuit court was not required to order the subject children be placed in petitioners' custody per West Virginia § 49-3-1(a)(3), and was granted discretion to make its decisions in the best interests of the children. "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948). For this reason, the circuit court's decision does not

constitute a violation of petitioners' state or federal due process rights.

Lastly, petitioners argue that it was a violation of West Virginia Code § 49-6-6 for the circuit court to enter its second supplemental dispositional order sua sponte and without proper motion or notice. That section, however, deals only with allegations of "a change in circumstances requiring a different disposition." W.Va. Code § 49-6-6. In this matter, the circuit court issued a second supplemental dispositional order solely to correct a mistake concerning an incorrect appearance of counsel. As such, the manner in which this order was issued does not constitute a violation of this code section nor amount to any actionable error.

For the foregoing reasons, we find no error in the decision of the circuit court to grant custody of the children to the paternal grandmother and the circuit court's order is hereby affirmed.

Affirmed.

ISSUED: May 16, 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