

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

**FILED**

May 16, 2011

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

**In Re: C.L., H.L., and S.L.**

**No. 11-0145**

(Mercer County Nos. 08-JA-54-DS, 08-JA-55-DS, 08-JA-56-DS)

**MEMORANDUM DECISION**

This appeal arises from the Circuit Court of Mercer County, wherein the petitioners were denied custody of their grandchildren<sup>1</sup> 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 her 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.

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. Initially, abuse and neglect was alleged against the petitioners in addition to the parents, though the DHHR later voluntarily moved to dismiss the allegations against petitioners, and the circuit court granted the same. Following dismissal of the abuse and neglect allegations against them, petitioners sought transfer of the children to their custody but were denied. Subsequently, the parental rights of both biological parents to the children were terminated. In determining the permanent placement for the children at issue, petitioners were denied adoptive placement due to a failed home study. Petitioners challenge the circuit court's order granting custody of their grandchildren to their foster family, arguing that both West Virginia Code § 49-3-1(a)(3) and the best interests of the children dictate placement in their home. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when

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<sup>1</sup> The oldest child, C.L., was dismissed from this action due to reaching the age of majority prior to disposition.

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 allege the following assignments of error in connection with the circuit court's decision below: 1) that the circuit court erred by not adopting the substantive findings of the DHHR's home study, as opposed to relying upon the conclusion that the petitioners failed the home study as a result of a failure to grant an age waiver, before eliminating them as a permanent placement option; 2) that the circuit court erred in failing to place the minor children with petitioners after the abuse and neglect allegations against them were dismissed; and, 3) that the circuit court erred in refusing to place the minor children with the petitioners for adoption as their permanent placement.

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, 786-787, 696 S.E.2d 296, 302-303 (2010). The Court recognized that "an integral part of the implementation of the grandparent preference, as with all decisions concerning minor children, is the best interest of the child." *Id.*, 225 W.Va. at 787, 696 S.E.2d at 303. 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: 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 (citing Syl. Pts. 4 and 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005)).

In this matter, the circuit court found that placement with petitioners would not be in the children's best interest for several reasons. The petitioners could not satisfy the requirement that they pass their home study. W.Va. Code § 49-3-1(a)(3). While petitioners allege it was solely due to their failure to obtain an age waiver, the record shows that several

factors resulted in the failure of the home study. While the petitioners' age and failure to obtain waiver was a factor, so too was their poor health as observed by DHHR employees, and also their refusal to admit that their daughter's behavior necessitated termination of her parental rights or had an impact upon the subject children. These factors, coupled with Petitioner Grandmother's prior admission to a DHHR employee that she and her husband could no longer care for the children properly despite increased DHHR services and that she suffered from dementia, created concerns that the children have issues that could be overwhelming to the petitioners. Further, there were also concerns that the children would have continued contact with their biological mother if placed with petitioners, or even that they could come to be in her custody if petitioners' health failed. Because the petitioners were unable to meet the requirements of West Virginia Code § 49-3-1(a)(3), in that they could not pass a home study, the DHHR was not required to offer the petitioners adoptive placement. Additionally, because placement was not in the children's best interest, the circuit court was not bound to order placement in their home.

The subject minor children have resided with the same foster family for approximately two years during the pendency of the action below. The children were found to have done well in this home with the foster parents providing them consistent and proper care. For these reasons, the circuit court determined that the children's best interests required adoption by the family that had provided them stability for the previous two years. 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:** 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