STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.A., S.A. and M.K.:

No. 11-0318
(Lewis County 09-JA-19, 20 and 21)

FILED
June 17, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Paternal Grandmother appeals the circuit court's denial of her request for placement of the infant children in her custody. Petitioner Grandmother filed the instant appeal pro se. 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, B.A., S.A., and M.K. 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.

> 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).

The petition in this matter was filed in December 2009 due to ongoing domestic violence between mother and stepfather (M.K.'s parents). DHHR placed B.A. and S.A. with

their father and stepmother, as there were no allegations of abuse against father. The case plan was directed toward reunification with mother, until there was another domestic violence altercation between mother and stepfather in August 2010. B.A. and S.A.'s father, who was on parole for a prior drug conviction, was meanwhile arrested for delivery of a controlled substance (morphine), and pled guilty in August 2010, at which time he was incarcerated. He was sentenced to concurrent prison terms of one to five years and one to fifteen years. The circuit court terminated father, mother and stepfather's parental rights. After hearing testimony from the children's psychologist, the court determined that it is in the best interests of the children to remain as a united sibling group. The circuit court granted Petitioner Grandmother intervenor status, but denied her request for custody of the children, finding that she had not proven her ability to keep the children safe. Petitioner Grandmother remains in regular contact with terminated stepfather, who has been found to be abusive to the children, prone to violence, and prone to the usage of firearms against others. Further, Petitioner Grandmother is only somewhat acquainted with B.A. and S.A., and it appears from the testimony at the dispositional hearing that Petitioner Grandmother is only truly interested in seeking custody of M.K., her biological grandson, but will reluctantly take all three children as the court has ordered that they stay together. The children are currently together in a pre-adoptive foster care placement.

Petitioner Grandmother appeals the circuit court's failure to grant of the children to her, arguing that the children, particularly M.K., should be in a family 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: The Matter of Ronald Lee 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 instance, the circuit court found that Petitioner Grandmother's home was not the proper placement for these children. B.A. and S.A. feared their stepfather's presence, and the circuit court found that Petitioner Grandmother had not shown that she could protect them from him, as she refused to sever ties with him, even after his rights were terminated. Further, the evidence, as well as Petitioner Grandmother's petition to this Court, showed that

her primary focus was her grandchild M.K., and that she was only willing to accept B.A. and S.A. so that she could gain custody of M.K. Both DHHR and the guardian ad litem argue against placement of these children with Petitioner Grandmother. This Court finds that the circuit court did not err in placing the children with non-family members under the facts of this case.

For the foregoing reasons, we find no error in the decision of the circuit court and placement of the children is hereby affirmed.

Affirmed.

ISSUED: June 17, 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