STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: M.M. Jr.

No. 12-0112 (Mercer County 11-JA-69-WS)

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

MEMORANDUM DECISION

Petitioner Paternal Grandmother's appeal, by counsel Joseph T. Harvey, arises from the Circuit Court of Mercer County, wherein the circuit court denied petitioner contact with the child, M.M. Jr., and ordered that petitioner have no contact with the child's custodian, B.P., by order entered on December 19, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Andrea Paige Powell, has filed her response on behalf of the child. Respondent Maternal Grandmother B.P. has also filed a response, by counsel William O. Huffman.

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 instant matter was initiated based upon a lengthy history of domestic violence between the child's parents. Based upon these ongoing issues, the initial abuse and neglect petition was filed on May 4, 2011. Six days after the preliminary hearing, on May 19, 2011, the mother was shot and killed. Eventually, Respondent Father was arrested for this act. Thereafter, the State filed an amended petition alleging aggravated circumstances against Respondent Father based on homicide. At adjudication, the circuit court found that aggravated circumstances did exist per West Virginia Code § 49-6-5(a)(7)(B), and that the DHHR was therefore relieved of its duty to make reasonable efforts to achieve reunification. In its adjudicatory order, the circuit court denied visitation between petitioner and the child based upon the child's best interests. Because of the specific facts of the underlying proceedings, the circuit court found that "visitation with [petitioner] is not in the best interest of this infant child" because contact with petitioner would "place the infant child in the middle of the conflict between" the child's maternal and paternal families. At the dispositional hearing, the circuit court terminated Respondent Father's parental, custodial, and guardianship rights to the child, and further ordered that petitioner was to have no contact with the child's custodian, Respondent Maternal Grandmother.

On appeal, petitioner argues that the circuit court abused its discretion by denying her visitation with the child and in forbidding contact between her and the child's custodian, maternal

grandmother B.P. Petitioner argues that visitation in this instance would be in the child's best interest, as evidenced by testimony from multiple individuals establishing that petitioner loves the child. Petitioner argues that there is nothing in the record to demonstrate that she was ever uncooperative with the DHHR or the circuit court, and she only has the child's best interests at heart in seeking to continue to develop the relationship between them. According to petitioner, the sole reason that the circuit court denied her contact with the child was because she is the mother of Respondent Father. Petitioner argues that this constitutes an abuse of discretion because denial of contact will be detrimental to the child.

The guardian ad litem responds and argues that the circuit court did not err in denying petitioner visitation with the child. To begin, the guardian argues that grandparent visitation is a mechanism by which continued contact might be allowed with individuals who have become important figures within a child's life. She further asserts that post-termination visitation is a right of the child, not of the party seeking visitation. The guardian addresses the factors to be considered in making a determination concerning grandparent visitation, as enumerated in West Virginia Code § 48-10-502, noting that the majority of the factors weigh in favor of denying visitation with petitioner. The guardian bases this assessment on the child's age, the lack of a relationship between the child and petitioner, and also the circumstances under which the child's mother was killed, among other factors.

Further, the guardian argues that petitioner has provided no evidence that visitation would be in the child's best interest, arguing that petitioner simply made this assertion during her testimony and based the same solely on her feelings for the child. The guardian argues that this evidences only a self-serving desire to remain in the child's life, which does not constitute a valid basis for visitation. Lastly, the guardian argues that petitioner has mischaracterized the circuit court's findings by arguing that her status as the mother of Respondent Father is the sole reason she was denied visitation. According to the guardian, the circuit court made clear findings that visitation was denied because of the imminent conflicts that would naturally occur between the parties based on the underlying circumstances. In short, the guardian argues that denying visitation with petitioner was in the child's best interest and that the decision should be affirmed. Further, both the DHHR and Respondent Maternal Grandmother also respond and fully join in, and concur with, the guardian's response.

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).

Simply put, the Court finds no merit in petitioner's lone assignment of error. Contrary to petitioner's assertion that the circuit court denied her visitation with the child solely because she is the mother of M.M., the child's father, a review of the record clearly shows that the circuit court specifically found that visitation would not be in the child's best interest. This is in keeping with our prior holdings, in which we have stated that "'[i]n 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.' Syllabus point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995)." Syl. Pt. 4, *In re Samantha S.*, 222 W.Va 517, 667 S.E.2d 573 (2008) (internal citations omitted). As the guardian correctly argues, West Virginia Code § 48-10-502 sets forth the factors to consider in making a determination as to grandparent visitation. Based upon a review of the record, the Court concludes that analysis of those factors under the specific circumstances of this matter weigh in favor of denying petitioner visitation. Most importantly, the record illustrates that the subject child was only ten months old at the time of disposition, and that the child had not yet established a significant bond with petitioner. As such, the circuit court correctly focused on the child's best interests in making its determination.

Based upon the specific, and tragic, circumstances of the instant matter, the Court finds that it was not clearly erroneous for the circuit court to deny petitioner visitation with the child. As noted in the dispositional order, the child at issue will likely not remember what has happened in his life, including the manner in which his mother died, due to his young age. Denying visitation to petitioner serves the child's best interests due to the traumatic manner in which the child's mother died, and will further protect the child from any disputes between the surviving families. For these reasons, we find no error in the circuit court's decision to deny petitioner visitation with the child, or in the circuit court's order prohibiting petitioner from contacting Respondent Maternal Grandmother.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 child within eighteen

months of the date of the disposition order.[1] 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 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 circuit court's order, and the denial of visitation and/or contact for petitioner 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

[1] 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.