STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In Re*: A.C.**

No. 12-0726 (Greenbrier County 11-JA-11)

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners' appeal, by counsel Paul S. Detch, arises from the Circuit Court of Greenbrier County, wherein their motion to intervene in the underlying abuse and neglect proceedings was denied by order entered on May 14, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, S. Mason Preston, has filed a response on behalf of the child. The child's adoptive parents, C.B. III and J.B., have also filed an amicus curiae brief, by counsel Clyde A. Smith Jr.

This Court has considered the parties' briefs and the 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 record 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.

Petitioners K.M. and C.M. sought custody of the subject infant after the child's father voluntarily relinquished his parental rights and the mother had her parental rights terminated during the abuse and neglect proceedings below. K.M. is the child's maternal great-aunt. Upon the newborn infant's removal from his parents, he was placed with C.B. III and J.B., his current adoptive parents, and spent the first eighteen months of his life in their care. Petitioners came forward as a potential placement for the child after the abuse and neglect proceedings had been ongoing for approximately seven months, and on February 1, 2012, they were approved as a placement option for the child by a Relative Home Evaluation performed by the State of Kentucky. However, during a multidisciplinary treatment ("MDT") team meeting in March of 2012, the DHHR noted several concerns related to placement with petitioners, who were not present at the meeting. On April 25, 2012, petitioners filed a motion to intervene, though that motion was denied in the same order in which the circuit court found that adoption with C.B. III and J.B. was in the child's best interest.

On appeal, petitioners list three assignments of error, though their argument is more properly stated as an allegation that the circuit court erred in denying their motion to intervene below. In support of the alleged error, petitioners argue that the circuit court violated their due process rights by failing to let their counsel develop a record in support of their motion by establishing a procedural and factual history or cross-examine the parties. Petitioners also allege that the circuit court failed to provide them notice of A.C.'s permanent adoption, despite the fact

they passed a home study, and also that the DHHR places too much importance on the intended placement of children with foster parents over natural blood relatives at the beginning of abuse and neglect proceedings.

The DHHR argues in favor of the circuit court's denial of petitioners' motion, citing our prior holdings wherein the Court directed that the best interests of the child are controlling in abuse and neglect proceedings. The DHHR also argues that permanency, security, stability, and continuity are the key elements to determining a child's best interests, and that placement with the current adoptive parents serves A.C.'s best interests better than would placement with petitioners. In support, the DHHR notes that petitioners have never even met the child, while the adoptive parents have raised the child his entire life. The DHHR also notes that there were concerns about the appropriateness of the child's placement with petitioners.

The guardian ad litem also argues in support of the circuit court's denial of petitioners' motion, and notes that petitioners were allowed to fully participate as a possible adoptive home. The home study assessed petitioners as a "fair" placement option, and the adoption committee allowed petitioners to state their case during an interview process before it made a recommendation as to permanency. Lastly, the guardian notes that petitioners did not come forward as a potential placement until seven months into the abuse and neglect proceedings, and that the DHHR does not have a duty to locate relatives as remote as a great-aunt that were not recommended by the parents or grandparents.

In their amicus curiae brief, C.B. III and J.B. also argue in support of the circuit court's denial of petitioner's motion. According to the adoptive parents, the only statutory preferences regarding the adoption of a child are for grandparents or the reunification of siblings, which are not applicable herein. They further argue that the DHHR did not place too much importance on the intended placement of the child with them over blood relatives because no family members came forward to take the child at that time. For these reasons, the adoptive parents argue that petitioners do not have any superior standing or statutory preference to have the child placed with them. Therefore, they conclude that their adoption of the child is in his best interest because he has lived with them for his entire life.

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." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.* 228 W.Va. 89, 717 S.E.2d 873 (2011). Upon review of the record, we find no error in the circuit court's denial of petitioners' motion to intervene. To begin, we decline to address petitioners' allegations as to the DHHR's policy of placing children with foster families in emergency situations. Further, we find no error in the circuit court's refusal to allow petitioners to develop a record below. The record in this matter is scant, but upon the representation of the parties, petitioners were permitted to participate in the adoption process once they came forward as a potential placement. Their participation included a home study and an interview with the adoption committee to present their case for placement. We have previously held that

> in any case involving child custody, "[t]he controlling principle . . . is the welfare of the child and . . . 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." *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 405, 168 S.E.2d 798, 799 (1969).

In re Antonio R.A., 228 W.Va. 380, 388, 719 S.E.2d 850, 858 (2011). The circuit court noted several concerns from the MDT in regard to the child's placement with petitioners, including the child's lack of a bond with petitioners, instability of the home due to the number of petitioners' marriages, the short duration of their marriage, and prior domestic violence allegations against Petitioner C.M. Based upon the recommendation of the adoption committee, the circuit court found it in the child's best interest to deny petitioners' motion to intervene and that adoption with C.B. III and J.B. was in the child's best interest. Lastly, we find no merit in petitioner's allegations that the circuit court or DHHR failed to comply with the notice requirements found in Rules 36A, 39, or 40 of the Rules of Procedure for Child Abuse and Neglect Proceedings. For these reasons, the circuit court did not err in denying petitioners' motion to intervene.

For the foregoing reasons, we find no error in the decision of the circuit court, and the termination of petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: October 22, 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