STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: **A.D.**

No. 12-0779 (Harrison County 11-JA-118-1)

MEMORANDUM DECISION

Petitioner[1], by counsel Betsy Griffith, appeals the Circuit Court of Harrison County's order entered on June 4, 2012, denying placement of A.D. with petitioner. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, its attorney, has filed its response. The foster parents, by counsel Elizabeth A. Slater and Jeremy D. Bragg, and the guardian ad litem for the child, Terri L. Tichenor, have filed a joint response. Petitioner has filed a reply.

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.

The abuse and neglect petition in this matter was filed after A.D. was born six weeks premature and severely addicted to several drugs. The child was immediately removed and was placed in a foster home when a kinship placement willing to take her was not located. However, petitioner then contacted the DHHR to inform them that she had custody pursuant to a guardianship order of her paternal granddaughter T.O., who is A.D.'s half-sibling, as the two share the same mother.[2] Petitioner was made a party-in-interest and was appointed counsel. She sought custody of A.D. under the sibling preference, and a home study was ordered. Although petitioner passed the home study, the DHHR had concerns based on petitioner's statements to DHHR workers that T.O. stays six months of the year with petitioner's daughter, and that petitioner's daughter claimed T.O. as a dependent on her taxes and applied for daycare assistance for T.O.[3]

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[1] Petitioner is not related to A.D. but has custody of A.D.'s half-sister T.O., who is petitioner's granddaughter.

[2] T.O.'s father is petitioner's son.

[3] Petitioner explains that her daughter claimed T.O. as a dependent because petitioner owes up to $80,000 in student loan debt that dates back over twenty years. Thus, should petitioner claim T.O. as a dependent, any tax return funds would go to paying off her debt. Petitioner claims now that T.O. did not in fact spend six months per year with petitioner's daughter. Petitioner has no explanation as to why her daughter would have applied for daycare benefits for T.O.

The DHHR then became further concerned when petitioner inquired into what financial benefits A.D. would receive, but failed to inquire as to A.D.'s health although A.D. has serious health concerns, and failed to request visitation for herself or for T.O. The circuit court denied petitioner's request for placement, and petitioner requested a hearing on the same. After a hearing, the circuit court again denied placement of A.D. with petitioner, based on A.D.'s best interests. The circuit court noted that the guardian had changed her recommendation in favor of placement of A.D. with petitioner, and noted that there is no bond between A.D. and petitioner, or A.D. and T.O. Further, the circuit court noted that there were concerns that petitioner was financially motivated to gain custody of A.D.

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).

Petitioner argues that the circuit court erred in disregarding the sibling preference found in West Virginia Code § 49-2-14(e). Petitioner argues that the facts in this matter are substantially similar to those in *In re Shanee B.*, 209 W.Va. 658, 550 S.E.2d 636 (2001), in that petitioner herein had legal guardianship of A.D.'s half-sibling T.O., and the foster parents herein have only had A.D. for five months. Petitioner argues that there are no compelling circumstances in this case to negate the sibling preference. Petitioner further argues that the fact that there was not yet a sibling bond does not negate the sibling preference, nor does the fact that petitioner has only legal guardianship of T.O. Petitioner admits that A.D.'s half-sibling T.O. was claimed by petitioner's daughter as a dependent, but that there was no evidence presented that the half-sibling was not actually living with petitioner at this time since petitioner moved, but previously the half-sibling went back and forth between petitioner's home and her daughter's home in a connected duplex. In fact, petitioner filed an amended tax return claiming the half-sibling as a dependent for prior years during the pendency of this case. Finally, petitioner argues that she visited A.D. shortly after her birth and requested placement of A.D. one month later.

The DHHR responds in favor of the circuit court's order denying petitioner placement, and argues that the circuit court did apply the sibling preference properly but found that placement with petitioner was not in the child's best interests. The DHHR notes that the best interests of the child

always trump the sibling preference, and adds that petitioner is not related to A.D. Further, the DHHR argues that there was evidence that called into question petitioner's motivation for requesting custody of A.D., including that petitioner inquired as to what benefits A.D. would receive, but failed to inquire into her health problems or ask for visitation.

The foster parents and the guardian filed a joint response, arguing in favor of placement with the foster parents. They jointly argue that the sibling preference is to be incorporated into the overarching analysis required to determine what is in the best interests of the child. The foster parents and guardian note that the foster parents are the only people who have cared for A.D., and petitioner has not met the child. Further, they argue that the sibling preference does not apply as the half-sibling is neither in a foster home, nor has she been adopted by another family, as she is currently with petitioner on a guardianship basis. Additionally, they argue that it is in A.D.'s best interest to remain with them, as she has known only one family in her life, the foster parents are best suited to A.D.'s special needs, and A.D. has never even met her half-sibling.

West Virginia's sibling preference statute reads, in pertinent part, as follows:

> When a child is in a foster care arrangement and is residing separately from a sibling or siblings who are in another foster home or who have been adopted by another family and the parents with whom the placed or adopted sibling or siblings reside have made application to the department to establish an intent to adopt or to enter into a foster care arrangement regarding a child so that said child may be united or reunited with a sibling or siblings, the state department shall upon a determination of the fitness of the persons and household seeking to enter into a foster care arrangement or seek an adoption which would unite or reunite siblings, and if termination and new placement are in the best interests of the children, terminate the foster care arrangement and place the child in the household with the sibling or siblings: Provided, That if the department is of the opinion based upon available evidence that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children or if the child has a physical or mental disability which the existing foster home can better accommodate, or if the department can document that the reunification of the siblings would not be in the best interest of one or all of the children, the state department may petition the circuit court for an order allowing the separation of the siblings to continue: . . . In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the court determines that clear and convincing evidence supports the department's determination. In any proceeding brought by the department seeking to maintain separation of siblings, notice shall be afforded, in addition to any other persons required by any provision of this code to receive notice, to the persons seeking to adopt a sibling or siblings of a previously placed or adopted child and said persons may be parties to any such action.

W. Va. Code § 49-2-14(e). However, the Court has also held 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.' Point 2 Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). In the present case, this Court finds no error in the circuit court's decision to place the child with the foster parents. The circuit court properly examined the sibling preference and determined that it was not in the best interests of the child to be placed with her half-sibling, with whom she had no relationship.

For the foregoing reasons, we find that the circuit court did not err in denying placement of A.D. with petitioner and the circuit court order is affirmed.

Affirmed.

ISSUED: November 19, 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