# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**FILED**

August 29, 2014

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

**In Re: D.H., K.H., D.H., & T.H.**

**No. 14-0190** (Harrison County 11-JA-105 through 11-JA-108)

## MEMORANDUM DECISION

Petitioner Paternal Grandmother, by counsel Christina C. Flanigan, appeals the Circuit Court of Harrison County's January 27, 2014, order denying her permanent placement of, and visitation with, D.H.-1, K.H., D.H.-2, and T.H.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Katherine M. Bond, filed its response in support of the circuit court's order. The guardian ad litem, E. Ryan Kennedy, filed a response on behalf of the children supporting the circuit court's order. The children's foster parents, J.S. and A.S., by counsel Julie N. Garvin, filed a response in support of the circuit court's order. On appeal, petitioner alleges that the circuit court erred in denying her permanent placement of the children and in denying her continued visitation with them.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In November of 2011, the DHHR filed an abuse and neglect petition against the parents, alleging that the children were abused by the mother's drug use and infant T.H. being born addicted to drugs. The DHHR later filed an amended petition alleging drug use by the father, and both parents stipulated to adjudication based upon their drug use. Subsequently, the DHHR filed a second amended petition to include D.H.-1's biological mother in the proceedings and alleging abandonment against her. After granting post-adjudicatory improvement periods to all the parents, other than D.H.-1's biological mother, the circuit court ultimately terminated all parents' parental rights to these children.

Because the parents continued to provide positive drug screen results and exhibited an overall lack of progress during the improvement periods, the circuit court granted physical custody to petitioner, the children's paternal grandmother, in April of 2012. On October 27, 2013, an incident took place in petitioner's home. Petitioner's adult son, J.H., hit one of petitioner's grandchildren, who is also the son of T.W. Upon learning of this, T.W. slapped J.H. and J.H. engaged T.W. in a physical altercation in the presence of at least some of the subject

[1]Because two children in this matter share the same initials, the Court will refer to them as D.H.-1 and D.H.-2 throughout this memorandum decision.

children. During the altercation, J.H. threatened to stab T.W.'s husband, D.W., and was presently in possession of a pocket knife. J.H. also threatened to shoot D.W. and reached for a gun holster. Additionally, J.H. threatened to burn down the home of T.W. and D.W. When T.W. threatened to call the police, petitioner said she would commit suicide if the police were called because it would jeopardize the children's placement in her home. T.W. did not contact the police. A multidisciplinary treatment team ("MDT") meeting took place two days later, and petitioner did not inform the MDT members about the altercation. It wasn't until D.W. informed the DHHR of the incident on October 30, 2012, that the agency became aware of the altercation, and the DHHR removed the children from petitioner's home and placed them in foster care.

In December of 2012, the circuit court held two evidentiary hearings regarding the children's removal from petitioner's home. Ultimately, the circuit court determined removal was appropriate, but allowed petitioner to continue in the matter as a party-in-interest and directed that she be given immediate and regular visitation. However, following the children's removal, petitioner posted numerous statements on Facebook that were accessible to the children. In these posts, petitioner attacked the integrity of the circuit court, the DHHR, and the guardian ad litem; threatened harm to the Child Protective Services ("CPS") worker assigned to the case; and undermined the children's placement in foster care by promising she would rescue them. That same month, petitioner purchased a tablet computer for the oldest child, D.H.-1, and gave it to him as a Christmas gift. Petitioner used this tablet to communicate with the child, telling him what he should say to the judge and guardian. The child also received text messages from the parents on this tablet after their parental rights had been terminated.

In June of 2013, the DHHR denied petitioner's home study, citing concerns about her ability to protect the children. In July or August of 2013, petitioner sent a letter to a United States District Attorney asking for an investigation into the abuse and neglect case. In the letter, petitioner denied that the children's parents engaged in any abuse or neglect, minimized the altercation that occurred at her home on October 27, 2012, distorted the record, accused the guardian ad litem of being a mouthpiece for the DHHR, and accused the circuit court and DHHR of corruption.

In August of 2013, after meetings to determine the best placement for the children, it was discovered that they had not been living with their assigned foster parent. Rather, the male children had been staying with a neighbor, J.S., with whom the oldest child, D.H.-1, had formed a significant bond through school. It was also determined that the female children had been living with the foster parent's son. After reviewing all home study materials and thoroughly discussing which placement option would be in the children's best interest, it was agreed that the male children would be placed in the home of J.S. and his wife, A.S., and that the female children would be gradually transitioned into that home.

Thereafter, the circuit court held evidentiary hearings regarding permanent placement on October 18, 2013, and November 8, 2013. The circuit court considered placement with the foster parents, petitioner, the children's paternal aunt and uncle, and the maternal grandmother. At the close of evidence, the circuit court requested proposed findings of fact and conclusions of law. In December of 2013, the circuit court additionally met with the three oldest children in camera. Ultimately, by order entered on January 27, 2014, the circuit court denied petitioner placement of

the children, allowing them to remain in the foster parents' home. The circuit court also denied continued visitation with petitioner. It is from this order that petitioner appeals.

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 our review, the Court finds no error in the circuit court denying petitioner placement of, or continued visitation with, the subject children.

In support of her assertion that the circuit court erred in denying her placement of the children, petitioner cites to the statutory preference for placing children with grandparents, as found in West Virginia Code § 49-3-1(a)(3). However, petitioner fails to address the fact that this code section requires that any grandparent seeking placement of a grandchild must first undergo a home study and have the home deemed suitable for the child's placement. Specifically, West Virginia Code § 49-3-1(a)(3) states, in pertinent part, that "[i]f the [DHHR] determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents."

This code section clearly requires a positive home study in order for a grandparent to be considered as a placement option for a grandchild. This is in keeping with our prior holdings concerning children's best interest in custody matters, and we have specifically stated that

> "[b]y specifying in W.Va. Code § 49–3–1(a)(3) that the home study must show that the grandparents 'would be suitable adoptive parents,' the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances." Syl. pt. 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005).

Syl. Pt. 3, *In re Aaron H.*, 229 W.Va. 677, 735 S.E.2d 274 (2012). Not only was petitioner precluded from consideration as a placement option due to her failed home study, but the

evidence below also established that placement in petitioner's home was not in the children's best interest.

In evaluating petitioner's home, the DHHR indicated that there were many issues that led to denying petitioner status as a foster care provider, including her failure to acknowledge that the children's biological parents ever abused them, her failure to acknowledge the harm that the October 27, 2012, incident in her own home presented to the children, and her history of poor decision making. These factors, among others, indicated that petitioner could not properly care for or protect the children at issue. This is further supported by the circuit court's numerous factual findings and conclusions of law in regard to the fact that placement in petitioner's home would not be in the children's best interests.[2]

Specifically, the circuit court found that petitioner "still refuses . . . to recognize that the birth parents did anything wrong or that the [c]hildren should have been removed." Additionally, the circuit court found that petitioner's testimony during the placement hearings lacked credibility in light of the enormous contrary evidence and, in fact, found that "her statements before [the] [c]ourt were a further attempt to manipulate" the circuit court and other parties to the proceedings. The circuit court noted petitioner's many posts to social media contained statements that "threatened the lives of persons in this case and . . . defamed various people, including [the] [c]ourt." The circuit court also agreed with the home study evaluation that petitioner was unable to properly protect the children, citing her failure to recognize dangerous situations in the past. This includes the fact that she previously married a child molester, and the fact that she not only failed to protect the children during the October 27, 2012, incident in her home, but actively "engaged in cover ups and denials." For these reasons, it is clear that the circuit court did not err in finding that permanent placement in petitioner's home was not in the children's best interest and did not err in denying that request.

Additionally, the circuit court did not err in denying petitioner continued visitation with the children because it specifically found that continued visitation would not be in the children's best interests. This finding was supported by substantial evidence, including the fact that petitioner failed to adhere to the rules in place during the proceedings below through her clandestine communications with D.H.-1 after his removal from her home. Further, petitioner's presence in the children's lives led to her "facilitate[ing] an unhealthy relationship between [K.H.] and [T.H.] . . . ." Additionally, petitioner's actions resulted in direct communication between D.H.-1 and the parents after their parental rights were terminated, leading the circuit court to anticipate future clandestine meetings between the parents and the children should petitioner have the opportunity to facilitate the same. This is especially true in light of the circuit court's finding that petitioner was unlikely to comply with direct orders from the circuit court.

We have previously held that

[2]The circuit court's "Order Following Permanency Hearing" consists of fifty-four pages containing voluminous evidence of petitioner's actions throughout the proceedings, including verbatim recitations of petitioner's Facebook posts and clandestine communications with D.H.-1, among other evidence.

> "[a] trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to W.Va.Code, 48–2–15(b)(1) [1986] or W.Va.Code, 48–2B–1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved." Syl. Pt. 1, *In re Nearhoof*, 178 W.Va. 359, 359 S.E.2d 587 (1987).

Syl. Pt. 5, *In re Visitation of A.P.*, 231 W.Va. 38, 743 S.E.2d 346 (2013). Based upon the evidence outlined above, in addition to the voluminous evidence further set forth in the circuit court's permanency order, it is clear that the circuit court did not err in finding that continued visitation with petitioner would not be in the children's best interest. As such, we find no error in the circuit court denying petitioner visitation with the children.

For the foregoing reasons, we find no error in the decision of the circuit court and its January 27, 2014, order is hereby affirmed.

Affirmed.

**ISSUED**: August 29, 2014

**CONCURRED IN BY**:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II