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. 14-0191 (Harrison County 11-JA-105 through 11-JA-108)

MEMORANDUM DECISION

Petitioners T.W. and D.W., the children's respective aunt and uncle, by counsel Christina C. Flanigan, appeal the Circuit Court of Harrison County's January 27, 2014, order denying them 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, petitioners allege that the circuit court erred in denying them permanent placement of the children and in denying them continued visitation with the children.

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 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 of the parents, other than D.H.-1's biological mother, the circuit court ultimately terminated all parents' parental rights to these children.

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

[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.

some of the subject children. During the altercation, J.H. threatened to stab Petitioner T.W.'s husband, Petitioner D.W., and was presently in possession of a pocket knife. J.H. also threatened to shoot Petitioner D.W. and grabbed for a gun holster. Additionally, J.H. threatened to burn down petitioners' home. When Petitioner T.W. threatened to call the police, the grandmother said she would commit suicide if the police were called because it would jeopardize the children's placement in her home. Petitioner T.W. did not contact the police. A multidisciplinary treatment team ("MDT") meeting took place two days later on October 29, 2012, and the grandmother did not inform the MDT members about the altercation. It wasn't until Petitioner D.W. informed the DHHR of the incident on October 30, 2012, that the agency became aware of the altercation. Thereafter, the DHHR removed the children from the grandmother'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 the grandmother's home. Ultimately, the circuit court determined removal was appropriate, but allowed the grandmother to continue in the matter as a party-in-interest and directed that she be given immediate and regular visitation. Petitioners also participated as parties-in-interest below. However, following the children's removal, the grandmother posted numerous statements on Facebook that were accessible to the children. In these posts, the grandmother 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, the grandmother purchased a tablet computer for the oldest child, D.H.-1, and gave it to him as a Christmas gift. The grandmother 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 the grandmother's home study, citing concerns about her ability to protect the children. That same month, the DHHR approved petitioners' home study for placement of the two oldest children only. The home study concluded that petitioners did not have the capacity to care for all four children, in addition to five children of their own, and that their home did not have the capacity for a family of eleven. In July or August of 2013, the grandmother sent a letter to a United States District Attorney asking for an investigation into the abuse and neglect case. In the letter, the grandmother 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, both the paternal and maternal grandmothers, and petitioners. 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 petitioners placement of the children, allowing them to remain in the foster parents' home. The circuit court also denied continued visitation with petitioners. 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 petitioners placement of the children or in denying them continued visitation with the children.

In support of their assertion that the circuit court erred in denying them placement of the children, petitioners cite to the statutory preference for placing children with grandparents as found in West Virginia Code § 49-3-1(a)(3). While petitioners acknowledge this preference does not explicitly apply to them as paternal aunt and uncle, they argue that children's best interests are inherently served by placement with biological relatives. However, petitioners fail to address our prior holdings on this issue. Specifically, we have held that "[i]t is clear from our jurisprudence that the only statutory preference within our laws regarding the adoption of a child involves grandparents and reunification of siblings . . . . It does not appear, however, that a preference is granted to blood relatives generally." *Kristopher O. v. Mazzone*, 227 W.Va. 184, 193, 706 S.E.2d 381, 390 (2011). As such, the grandparent preference as set forth in West Virginia Code § 49-3-1(a)(3) has no applicability to the circuit court's denial of placement in the petitioners' home.

Further, petitioners fail to address the statutory preference for placing siblings in the same home, which this Court has addressed as follows:

> W.Va.Code § 49–2–14(e) (1995) provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children. In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded *only* where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit or that placement of the child with his or her siblings is not in the best interests of one or all of the children.

Syl. Pt. 4, *In re Carol B.*, 209 W.Va. 658, 550 S.E.2d 636 (2001). The record shows that the home study conducted in regard to petitioners' home approved them for placement of two of the children only. This determination was made, in part, because they did not have a bond with D.H.-2 or T.H. The home study also raised concerns about petitioners' ability to care for additional children in their home in light of the fact that they already had four children and were expecting a fifth at the time the study was completed. The home study specifically found that petitioners' "home is not large enough to accommodate a family of eleven." Further, this finding fails to take into consideration the fact that Petitioner D.W.'s father was also living in the home.

Appropriately, the circuit court made its placement decision based upon the children's best interests, as this Court has directed. We have held that "'the best interests of the child is the polar star by which decisions must be made which affect children.' *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989)." *Kristopher O.*, 227 W.Va. at 192, 706 S.E.2d at 389. In determining that placing the children in petitioners' home was not in the children's best interests, the circuit court relied upon substantial evidence that petitioners would be unable to properly protect or provide for the children. Specifically, the circuit court relied upon the October 27, 2012, incident of physical violence at the paternal grandmother's home to illustrate petitioners' inability to protect the children. According to the circuit court, Petitioner T.W.'s "failure to timely report [the incident], at the request of [paternal grandmother S.H.], illustrates that she will not protect the [c]hildren from other family members." Further, at the time of the permanent placement hearing, the circuit court found that Petitioner T.W. continued to minimize the incident, in which she was actively engaged in physical violence with a family member in the presence of some of the subject children.

The circuit court further found that, based upon the paternal grandmother's prior actions, placement in petitioners' home raised "grave[] concern[s] that there would be unsupervised contact with the birth parents and other inappropriate relatives." Additionally, as raised in the DHHR's home study evaluation, the circuit court also addressed financial concerns with placement in petitioners' home, finding that such placement would burden the family with

"unreasonable financial and logistical strains . . . ." For these reasons, the circuit court did not err in denying placement in petitioners' home because it was not in the children's best interests.

Additionally, the circuit court did not err in denying petitioners continued visitation with the children because it specifically found that continued visitation would not be in the children's best interests. This is in keeping with our prior holdings, wherein we have stated that

> [b]ecause this Court has said that children have a right to continued association with those to whom they have formed close emotional relationships, the circuit court should also consider whether the current circumstances justify continued association/visitation by the child with whichever family ultimately is not chosen as her permanent custodian.

Id., 227 W.Va. at 196, 706 S.E.2d at 393 (citing Syl. Pt. 11, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996)). This finding was supported by the fact that petitioners did not have a bond with two of the children. Further, petitioners previously failed to protect the children during a violent incident at the paternal grandmother's home and failed to timely report the incident, among other evidence. In fact, testimony established that Petitioner D.W. reported the incident only because he wished to make a criminal complaint against J.H., not out of concern for the safety of the children at issue. Additionally, Petitioner D.W. testified that Petitioner T.W. was angry with him for reporting the incident.

Ultimately, the circuit court found that continued contact with petitioners was not in the children's best interest "in light of [their] manipulative, outright lying, attempts of abuse of process of the [c]ourt, the mental instability, and outright inappropriate and bizarre behavior on the part of the adult respondents . . . ." Based upon the evidence outlined above, in addition to the voluminous evidence addressed in the circuit court's permanency order, it is evident that the circuit court did not err in finding that continued visitation with petitioners 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