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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* W.B. III**

No. 20-0949 (Randolph County 17-JA-86)

MEMORANDUM DECISION

Petitioners S.S. and R.S., by counsel Shannon R. Thomas, appeal the Circuit Court of Randolph County's October 27, 2020, order denying them permanent placement of W.B. III.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee A. Niezgoda, filed a response in support of the circuit court's order and a supplemental appendix. The guardian ad litem, Heather M. Weese, filed a response on the child's behalf in support of the circuit court's order. On appeal, petitioners argue that the circuit court erred in failing to adhere to the procedural requirements for modifying a dispositional order and in finding that modifying the final dispositional order was in the child's best interests and a result of a substantial change in circumstances.

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 2017, the DHHR filed a child abuse and neglect petition alleging that the mother and father had abused or neglected then newborn W.B. III. Upon release from the hospital, the child was placed with petitioners, the maternal grandparents of the child, where he

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

remained throughout the proceedings.[2] In January of 2018, the circuit court adjudicated the parents as abusing parents. At a dispositional hearing in February of 2019, the parents ultimately voluntarily relinquished their parental rights to the child. The circuit court accepted their relinquishments, terminated their parental rights to the child, and granted permanent custody of the child to the DHHR. The circuit court also granted the father post-termination visitation with the child, to be supervised by a service provider. Following the termination of the parents' parental rights, the circuit court also conducted a permanency hearing and determined that the most appropriate permanency plan for the child was adoption by petitioners. The circuit court found that the DHHR was making reasonable efforts to finalize the child's permanency plan, and the child continued in petitioners' care.

In January of 2020, the circuit court held a permanency hearing, and the DHHR disclosed that the child was removed from petitioners' care "due to allegations concerning the maternal grandmother's inappropriate interactions with the child's biological father." The father had been incarcerated in December of 2019 after an alleged attempt to run over the child's mother and set her on fire. While incarcerated, the father continued to call the child at petitioners' home, and their conversations, which were recorded by the jail, were the basis for the child's removal. According to the DHHR, the recorded calls raised concerns that petitioners were inappropriately physically disciplining the child and permitting inappropriate contact between the child and the parents. As a result of these concerns, the DHHR removed the child from petitioners' care in late December of 2019. The circuit court set a date for an evidentiary hearing on the child's permanent placement, and the child remained in foster care pending that hearing.

Following a series of delays related to petitioners' retainment of counsel and the COVID-19 pandemic, the circuit court held the evidentiary hearing in August of 2020. The circuit court heard evidence in support of the DHHR's recommended permanency plan, which was adoption by the child's current foster family. The DHHR also introduced recordings of the grandmother's recorded conversations with the father, and those recordings were admitted without objection. Petitioners moved for the child to be returned to their custody for adoption and presented the testimony of several witnesses, including the grandmother, in order to explain the grandmother's statements to the father during the recorded phone calls.

The circuit court was concerned that petitioners continued to allow the father to have contact with the child after he had been charged and incarcerated for crimes against the child's mother (petitioners' daughter). The court noted that while the father was incarcerated, the grandmother verbalized that she would never keep the child away from him (stating, "I ain't going to keep him from ya, you know that"). The circuit court considered the grandmother's testimony that she believed she had to allow contact between the father and child per the court's order for visitation and found it concerning that she did not "at least inquire if she could cut off contact" with the father after his incarceration for violent crimes against the mother. In one call, the father told the grandmother that he would "f***ing kill" the child's mother and made other

[2]It appears from the record that petitioners moved to intervene during the proceedings below. However, it is unclear from the record provided whether that motion was granted.

"angry and vulgar statements" about the mother, yet the grandmother then put the child on the phone with the father and did not deem the contact to be inappropriate.

The circuit court also found that the grandmother had facilitated contact between the father and child, as well as contact between the father and mother while he was incarcerated. The grandmother "put money on [the father's] books" so that he could make phone calls and also helped the father activate a phone in the mother's possession so that he could call her as well. Notably, due to the nature of the father's charges, he was not permitted to have contact with the mother. The court observed that the grandmother testified that the money she "put on [the father's] books for phone calls was money that she had collected for him after his incarceration and that [was] what he asked her to do with it." However, the circuit court was troubled that the grandmother would find it appropriate to collect money for the father, accept his calls, facilitate calls with the child and the mother, or conduct any business for the father in light of the allegations against him. It found that "[i]t was clear from the phone calls that [petitioners] were assisting [the father] with a number of personal matters during his incarceration." Related to the grandmother facilitating contact between the father and the mother, the circuit court recounted the father "pleading with [the grandmother] to encourage her to have [the mother] change her story regarding the events that led to his incarceration and that [the grandmother] did in fact do so."

The circuit court noted its concern that the grandmother would allow the father to have unsupervised contact with the child and had permitted the mother to have contact as well. During the recorded calls, the grandmother told the father that she would not allow the child to stay with the mother unless he was there. The grandmother also admitted that the mother had seen the child once when she visited the father's home, stating, "I mean she seen him and stuff and you know talked to him there but didn't… and then when we was leaving she wasn't eve[n] going to tell him bye. So, I told him to go in there and give her a kiss bye." The court also noted that, during a different call, the grandmother stated that if the mother wanted to see the child "she'll have to come down here and see him."

Related to the DHHR's concern that the grandmother engaged in physical discipline of the child, which was prohibited by foster care policy, the circuit court found that during one conversation, the father stated, "yeah, bust [the child's] . . . a** for him, Let him know." The grandmother replied, "Oh, I did." Later in that same call, the grandmother yelled at the children while on the phone with the father, stating "When I get off this phone, I'm beaten [sic] three [boys'] a**es! Not one, not two, but three!" (Emphasis removed.)[3]

Finally, the circuit court weighed the grandmother's testimony that she "only communicated and/or assisted [the father] . . . because she wanted to make him think that she was still on his side so that he would not interfere with her adoption of the child and that she was lying to [the father]." The court noted that this "rationalization ha[d] been offered by [the

[3]Several references are made during these recorded phone calls to two other children that were in petitioners' care in December of 2019. These children are not at issue in this appeal.

grandmother] after the insinuating communications ha[d] come to light." Rather than believe the grandmother was lying to the father, the court "chose to let [the grandmother's] recorded communications with [the father] speak for themselves."

Ultimately, the circuit court found that "there were clearly a number of legitimate concerns raised by the phone call [recordings] supporting the [DHHR's] removal of the child from [petitioners]." The court noted that petitioners were fully aware of the potential ramifications of allowing inappropriate contact as the child was removed once during the pendency of the abuse and neglect proceeding due to allegations of inappropriate contact with the parents. Despite knowing this, the circuit court found that there was "clear and convincing evidence that [petitioners] thereafter still allowed unauthorized contact with [the mother]." The court concluded that petitioners' failure "to recognize the inappropriateness of the continued contact between the child and [the father]," failure "to take action to cease all contact," and "their actions to continue to assist [the father] with personal matters, including facilitating continued contact between [the father] and the victim of his alleged crime," raised serious questions about petitioners' "judgment and ability to ever be able to protect the child." Thus, the circuit court determined that it was not in the child's best interests to be placed with petitioners and found that it was in the child's best interests to be adopted by his current foster family. Accordingly, the circuit court denied petitioners' motion to return the child to their care by its October 27, 2020, order. Petitioners now appeal this order.[4]

This Court has previously held:

> "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).

On appeal, petitioners argue that the circuit court failed to adhere to the procedure required for modifying a dispositional order set forth in West Virginia Code § 49-4-606. They

[4]As previously mentioned, the parents voluntarily relinquished their parental rights to the child. The permanency plan for the child is adoption in his current placement.

further argue that the circuit court erred in finding that modifying the dispositional order was in the child's best interest and a result of a substantial change in circumstances, which West Virginia Code § 49-4-606 requires prior to the modification of a dispositional order. However, petitioners have misconstrued what occurred below and conflated two distinct processes of abuse and neglect proceedings: namely disposition, under West Virginia Code § 49-4-604, and permanent placement of the child, under West Virginia Code § 49-4-608. Upon our review of the record, we find no error below.

To begin, we note that the circuit court did not modify the ultimate disposition of the abuse and neglect proceeding as petitioners allege. West Virginia Code § 49-4-606(a) provides that

> [u]pon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section six hundred four of this article and may modify a dispositional order if the court finds by clear and convincing evidence a material change of circumstances and that the modification is in the child's best interests.

The dispositional options of an abuse and neglect proceeding are set forth in West Virginia Code § 49-4-604(c). *See* Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011) (referencing the dispositional alternatives found in West Virginia Code § 49-6-5, now West Virginia Code § 49-4-604(c)). In this case, following the parents' voluntarily relinquishment of their parental rights, the circuit court imposed the most restrictive dispositional option, which was termination of the biological parents' parental rights, and granted the DHHR permanent legal guardianship over the child. *See* W. Va. Code § 49-4-604(c)(6).[5] The circuit court's disposition, terminating the parents' parental rights and granting the DHHR permanent legal guardianship of the child, was not modified, and, therefore, West Virginia Code § 49-4-606 does not apply.[6]

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[5]West Virginia Code § 49-4-604(c)(6) provides, in part, that the circuit court may

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

[6]Notably, the circuit court held a permanency hearing in accordance with West Virginia Code § 49-4-608 immediately following the parents' voluntary relinquishment of their parental rights and included the requisite findings of that code section in its final dispositional order. The circuit court's findings included that, in February of 2019, "the most appropriate permanency plan to serve the best interests of the child is adoption by the child's maternal grandparents

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Moreover, the circuit court provided petitioners due process in accordance with West Virginia Code § 49-4-111(a), which governs the removal of children from a foster care placement. West Virginia Code § 49-4-111(a) provides that

> [t]he department may temporarily remove a child from a foster home based on an allegation of abuse or neglect, including sexual abuse, that occurred while the child resided in the home. If the department determines that reasonable cause exists to support the allegation, the department shall remove all foster children from the arrangement, preclude contact between the children and the foster parents, provide written notice to the multidisciplinary treatment team members and schedule an emergency team meeting to address placement options. If, after investigation, the allegation is determined to be true by the department or after a judicial proceeding a court finds the allegation to be true or if the foster parents fail to contest the allegation in writing within twenty calendar days of receiving written notice of the allegations, the department shall permanently terminate all foster care arrangements with the foster parents.

Here, the DHHR alleged that petitioners inflicted corporal punishment on the child and exposed him to inappropriate people (his mother whose parental rights had been terminated and with whom the circuit court had directed he have no contact). These allegations were based upon the grandmother's own statements made to the father during the recorded phone calls and were sufficient for the temporary removal of W.B. III from his foster home, i.e. with petitioners. The circuit court held an evidentiary hearing on these allegations as well as the permanent placement for the child. Importantly, at this hearing, petitioners were afforded a meaningful opportunity to be heard as well as an opportunity to present evidence and cross-examine witnesses, which under West Virginia Code § 49-4-601(h) is the highest level of participation available during these proceedings and reserved for "the party or parties having custodial or other parental rights or responsibilities to the child."[7] We have previously explained that "[a] person 'who obtains physical custody *after* the initiation of abuse and neglect proceedings – such as a foster parent – does not enjoy the same statutory right of participation as is extended to parents and pre-petition custodians.'" *State ex rel. H.S. v. Beane*, 240 W. Va. 643, 648, 814 S.E.2d 660, 665 (2018)

[petitioners in this matter]." The circuit court set forth a clear distinction between the dispositional findings and the permanency plan findings in its February 22, 2019, order. ("In conjunction with this hearing, the [circuit] [c]ourt conducted a hearing regarding the permanency plan of the child[], from which the [c]ourt makes the following FINDINGS and CONCLUSIONS . . . .").

[7]This Court has previously discussed that West Virginia Code § 49-4-601(h) establishes a "two-tiered framework" between "parties having custodial or other parental rights or responsibilities to the child" and "[f]oster parents, preadoptive parents, and relative caregivers." *State ex rel. H.S. v. Beane*, 240 W. Va. 643, 647, 814 S.E.2d 660, 664 (2018).

(citation omitted). The circuit court afforded petitioners (individuals who received custody of W.B. III after the initiation of the abuse and neglect proceedings) a level of participation above and beyond what was required by West Virginia law. It is clear, upon our review, that petitioners were afford their right to due process throughout the proceedings.

Turning now to the substance of the DHHR's allegations against petitioners, we consider their argument that the DHHR failed to fully investigate the grandmother's statements made to the father on the recorded phone calls. Petitioners argue that had the DHHR initiated a thorough investigation into the grandmother's specific statements, it would have been revealed that her statements to the father were not truthful. They emphasize that there was no evidence that they had physically disciplined the child, purposefully exposed him to inappropriate people, or that the grandmother otherwise cooperated with the father.[8] Upon our review of the record, we find petitioners are entitled to no relief.

It is worth reiterating that petitioners are the grandparents of W.B. III, and West Virginia law sets forth a preference for adoption of a child by their grandparents if possible. *See* W. Va. Code § 49-4-114(a)(3).[9] "[West Virginia Code § 49-4-114(a)(3)] contemplates that placement

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[8]Petitioners also argue that the DHHR did not adhere to specific terms of an adoption contract that they entered into following the parents' relinquishment of their parental rights. However, it appears from the record that petitioners did not raise this argument before the circuit court. "'Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.' *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)." *Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009). Furthermore, petitioners failed to include this contract in the appendix on appeal, which is in contravention of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure. Under this rule, petitioners' brief must "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignment of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal." Additionally, in an Administrative Order entered December 10, 2012, Re: Filings That Do Not Comply With the Rules of Appellate Procedure, the Court specifically noted that "[b]riefs with arguments that . . . do not 'contain appropriate and specific citations to the record on appeal . . .' as required by rule 10(c)(7)" are not in compliance with this Court's rules. As petitioner cannot show that this point was presented to the lower court or preserved for appeal, we decline to address it now.

> [9]For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall

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with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child." Syl. Pt. 7, in part, *In re P.F.*, 243 W. Va. 569, 848 S.E.2d 826 (2020) (internal citation omitted). As we have held, the "grandparent preference" is not absolute and that placement must "be in the best interests of the child, given all circumstances of the case." *Id*. at --, 848 S.E.2d at 827, syl. pt. 8, in part. Therefore, in order to deny petitioners permanent placement of W.B. III, the circuit court must have concluded that placement outside of that home was in the child's best interests.

Here, we find no error in the circuit court's ultimate conclusion that placement with petitioners was not in the child's best interests. We agree that the grandmother's conduct during the calls raised serious concerns about petitioners' care for the child. During the calls, the grandmother admitted to using physical discipline on W.B. III once in response to the father's comment and again threatened its use against the children in her home unprompted by the father. Further, the grandmother admitted during the calls that the mother saw W.B. III during a visit to the father's home, which he had requested, and that the grandmother encouraged the child to say goodbye to the mother. Even more concerning, the grandmother agreed to help the father contact the victim of his crime and stated that she herself had attempted to persuade the mother to lie about the events that gave rise to the father's criminal charges. Despite petitioners' contention that there was no evidence that the grandmother's statements during the recorded calls were truthful, those very phone calls alone are substantial evidence against placement with petitioners. The circuit court reviewed the phone calls in conjunction with the grandmother's testimony that her statements therein were false and meant to placate the father. The court concluded that the calls "speak for themselves," which was a credibility determination that this Court will not reconsider. *See Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) ("A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations."). Finally, although petitioners argue that the DHHR should have investigated the grandmother's statements to determine their veracity, they cite to no authority requiring such an investigation, especially in light of the grandmother's own statements that gave rise to the concerns at hand. Indeed, there is no authority that would require the DHHR to have interviewed additional witnesses, such as the law enforcement officer that investigated the father's crime against their daughter, in an effort to exonerate the grandmother of her admitted physical discipline of the child, continued exposure of the child to the mother, or cooperation with the father in furtherance of his efforts to be acquitted of the crime against petitioners' daughter. Further, to the extent that petitioners assert that this evidence would have given crucial context to the evidence introduced against them, they were likewise in a position to present that evidence at the permanent placement hearing, and, yet, they declined to do so.

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assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

W. Va. Code § 49-4-114(a)(3).

Accordingly, we find petitioners' argument unpersuasive. After a full and fair judicial proceeding, the circuit court had serious concerns with permanent placement of W.B. III in petitioners' custody and concluded that it was not in the child's best interests to return to that placement. We find no error in this decision.

For the foregoing reasons, we find no error in the decision of the circuit court, and its October 27, 2020, order is hereby affirmed.

Affirmed.

ISSUED: June 3, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton