STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 4, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

***In re* L.R.-1 and L.R.-2**

No. 20-0195 (Hampshire County 17-JA-79 and 17-JA-80)

MEMORANDUM DECISION

Petitioners, Grandmother C.B. and Grandfather M.B., by counsel Jeremy B. Cooper, appeal the Circuit Court of Hampshire County's January 22, 2020, order denying them placement of and visitation with children L.R.-1 and L.R.-2.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem ("guardian"), Julie A. Frazer, filed a response on behalf of the children in support of the circuit court's order. Petitioners filed a reply. On appeal, petitioners argue that the circuit court erred in (1) establishing jurisdiction in the proceedings, (2) depriving them of due process, and (3) denying them placement of and 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 October of 2017, the DHHR filed a petition against L.R.-1 and L.R.-2's parents alleging that they were addicted to narcotics and abused and neglected the children. According to the DHHR, petitioner C.B., the children's grandmother, contacted the police after she witnessed the children's mother nodding off while speaking and observed what appeared to be drugs in her bedroom. The children's mother was living in petitioners' home with the children at the time. Petitioner C.B. also observed her adult son, the children's uncle, using narcotics in her home. Police later arrested the children's mother for felony child neglect and misdemeanor possession of

[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). Additionally, because both children share the same initials, we will refer to them as L.R.-1 and L.R.-2, respectively, throughout the memorandum decision.

heroin based upon their response to petitioner C.B.'s call. Additionally, the DHHR alleged that a Child Protective Services ("CPS") worker spoke with L.R.-1 at his school, where he reported that he was "mad that mommy is always too tired to play but always has time for the needle in her arm." L.R.-1 further told the CPS worker that he did not know if his father used drugs because he was always in and out of prison. The CPS worker also interviewed petitioner C.B., who said she contacted the police because she did not want the children exposed to "that stuff." The DHHR also alleged that petitioner C.B. said she did not know where the parents were staying or how to contact them, despite the fact that the parents had recently been living in her home. Based on the allegations, the DHHR received emergency custody of the children and placed them with petitioners. The children continued in petitioners' custody throughout the proceedings, which culminated in the termination of the parents' parental rights.

After the termination of the parents' parental rights, petitioners retained placement of the children with a permanency plan for adoption. However, in June of 2019, the DHHR removed the children from petitioners' custody. The DHHR alleged that petitioners allowed the children's parents to vacation with them and the children at a waterpark in Pennsylvania. Petitioners testified that they did not invite the parents to meet them for the trip but admitted that the parents appeared at their hotel within thirty minutes of their arrival and spent the entire vacation with them. Petitioners testified that after leaving the park, the family stopped for lunch at a restaurant before returning home. Petitioners testified that upon leaving the restaurant another daughter, who accompanied them on the vacation, put her seven-year-old daughter and three-year-old L.R.-2 in a vehicle driven by L.R.-2's parents, unbeknownst to petitioners. Petitioners admitted that they did not notify CPS or the police after they realized that L.R.-2 was unsupervised with his parents. Further, petitioners admitted that even after the family arrived at home and discovered the parents had not returned with L.R.-2, they failed to contact authorities. The following morning, the police arrested L.R.-1 and L.R.-2's parents for child endangerment with risk of serious injury or death after finding them in their car intoxicated, with L.R.-2 and his cousin asleep next to a methamphetamine-loaded syringe. Following an investigation, the DHHR substantiated a finding of neglect against petitioners and their home was closed as a foster placement. Petitioners then filed a grievance concerning the decision, which was denied after an administrative hearing.

In July of 2019, petitioners filed a motion to intervene in the abuse and neglect proceedings, which remained ongoing to achieve permanent placement for the children, and requested that L.R.-1 and L.R.-2 be returned to their care or, alternatively, they be granted visitation with the children. Before ruling on petitioners' motion to intervene, the circuit court held a permanency hearing in October of 2019 wherein the guardian testified that, after the children were removed from petitioners' custody, they were placed in foster care with a permanency plan of adoption. Further, the guardian testified that L.R.-1 was in therapy and both children were doing well in their new placement. After the guardian's testimony, the court found that it was in the best interest of the children to remain in the DHHR's custody and in their foster care placement.

The circuit court held a hearing on petitioners' motion to intervene in November of 2019. At the hearing, petitioner M.B. testified that he and petitioner C.B. housed L.R.-1 and L.R.-2 for several years as the children's parents struggled to maintain their own housing and employment. However, petitioner M.B. acknowledged that the children's parents, especially the children's mother, would often live in the household with the children and that he could not verify the living

arrangements because he was "hardly home." Under questioning, petitioner M.B. further testified that the children's parents were not invited to the vacation in June of 2019 but appeared after they "heard we were going on vacation." Petitioner M.B. further admitted that after the entire family stopped at a restaurant on the way home, three-year-old L.R.-2 was placed in a vehicle with his parents. Petitioner M.B. testified that he took "full responsibility for that." He then testified that he did not call the children's parents once he was home because he did not own a cell phone and that the children's mother would not give petitioners her phone number. Petitioner M.B. also explained that he and another daughter went looking for the parents, the daughter's seven-year-old child, and three-year-old L.R.-2. They searched for hours until law enforcement contacted him. Finally, petitioner M.B. claimed that he was not worried enough to contact authorities because he did not think the parents were using or possessed controlled substances on the vacation, despite their past drug abuse. Next, petitioner C.B. testified about the vacation. Specifically, she testified that although she was not certain that the children's parental rights had been terminated, petitioners were told that their rights were likely to be terminated and that the children should not have contact with their parents. Under questioning, petitioner C.B. testified that she wanted to call law enforcement when the children's parents did not return but admitted she did not contact the authorities until calling the DHHR the next morning. Additionally, when the court continued to question petitioner C.B. as to why she allowed the children's parents to stay with them for the entire vacation, she responded that she asked them to leave once but that they did not do so.

Following the presentation of evidence, the circuit court found that petitioners lacked understanding and acknowledgment of the seriousness of the children's parents' substance addictions, which led to further trauma and abuse and neglect to L.R.-1 and L.R.-2. The court further found that petitioners' actions constituted more than just a serious lapse in judgment and that, based upon the evidence, it was convinced the parents would have unfettered access to the children if they returned to petitioners' care. Accordingly, the circuit court found that it would be detrimental and contrary to the health, safety, and welfare of the children to return to petitioners' home. The circuit court denied petitioners placement of and visitation with the children in its January 22, 2020, order. Petitioners now appeal that order.[2]

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

[2]The parents' parental rights were terminated below, and they have not appealed. According to the parties, the permanency plan for the children is adoption by their current foster family.

> 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, this Court finds no error in the proceedings below.

On appeal, petitioners first argue that the circuit court erred in proceeding against them because it lacked jurisdiction. Specifically, petitioners allege that they were required to be made respondents and deny that they were personally served with the abuse and neglect petition nor did they waive service. Upon our review, and based upon the specific facts of this case, we find no error in the proceedings below.

In support of their argument that the circuit court lacked jurisdiction to proceed against them because they were not named as parties, petitioners rely on West Virginia Code § 49-4-601(b), which governs notice for abuse and neglect proceedings and provides, in relevant part, as follows:

> The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how the conduct comes within the statutory definition of neglect or abuse with references to the statute, any supportive services provided by the department to remedy the alleged circumstances, and the relief sought. *Each petition shall name as a party each parent, guardian, custodian, other person standing in loco parentis of or to the child allegedly neglected or abused and state with specificity whether each parent, guardian, custodian, or person standing in loco parentis is alleged to have abused or neglected the child.*

(Emphasis added). However, petitioners ignore the fact that this version of the statute was not in effect at the time the petition was filed in October of 2017 and that the prior version of statute, which remained in effect until May of 2019, did not include the emphasized language requiring petitions to name all custodians of children subject to abuse and neglect proceedings. Further, the record does not establish that petitioners were custodians of the children simply because they lived in petitioners' home along with their parents. The only evidence in support of this assertion below was provided by petitioner M.B., who testified that he could not verify the living arrangements in his own home because he was frequently absent. This is simply insufficient to establish that petitioners were the children's custodians. Because the record contains no evidence that petitioners exercised custody of the children, we find that petitioners are entitled to no relief in this regard.

Contrary to their assertions on appeal, petitioners' involvement in the proceedings was governed by West Virginia Code § 49-4-601(h), which establishes a "two-tiered framework" of parties that enjoy the procedural due process right of a meaningful opportunity to be heard. *State ex rel. H.S. v. Beane*, 240 W. Va. 643, 647, 814 S.E.2d 660, 664 (2018). Specifically, parties having "custodial or other parental rights or responsibilities" are entitled to *both* "a meaningful opportunity to be heard" *and* "the opportunity to testify and to present and cross-examine witnesses." W. Va. Code § 49-4-601(h). Further, we have 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.'" *Beane*, 240 W. Va. at 648, 814 S.E.2d at 665 (quoting *State ex rel. R.H. v. Bloom*, No. 17-0002, 2017 WL 1788946 at *3 (W. Va. May 5, 2017)(memorandum decision)) (emphasis added). These individuals—foster parents, pre-adoptive parents, and relative caregivers—are entitled to a meaningful opportunity to be heard only and are not entitled to an opportunity to testify and to present and cross-examine witnesses. W. Va. Code § 49-4-601(h).

Notably, petitioners are not classified as any of the above-listed individuals entitled to the greater participation rights afforded those with custodial or other parental rights or responsibilities that existed prior to the petition's filing. Petitioners are blood relatives, but the children's parents continued to live with the children at petitioners' home. Additionally, petitioners "do not deny that they were aware of the case." Indeed, the record below indicates that petitioners had knowledge of the proceedings, regular contact with the caseworker regarding the status of the case, and were fully aware of the permanency plan for them to adopt the children. There was no prejudice against petitioners because they were permitted to intervene in the proceedings when their custody of the children was compromised by their neglect, and they were provided multiple evidentiary hearings regarding the children's placement and permanency. Petitioners do not contest notice or the opportunity to be heard and present testimony at these hearings. Further, by providing petitioners a meaningful opportunity to be heard, the circuit court complied with West Virginia Code § 49-4-601(h) and our holding in *Beane*. Therefore, the circuit court did not err in denying petitioners placement of the children on this ground.

Next, petitioners argue that the circuit court erred by proceeding against them without providing them the procedural protections to which they were statutorily entitled. Specifically, petitioners allege that they were not provided counsel throughout the proceedings and the "lack of legal guidance for the petitioners . . . was disastrous[] and prejudiced them greatly." We find petitioners' argument without merit.

West Virginia Code § 49-4-601(f) (2015), the statue in effect at the time of the proceedings, governs the right to counsel in abuse and neglect proceedings and provides, in relevant part, as follows:

> (1) In any proceeding under this article, the child, his or her parents and his or her legally established custodian or other persons standing in *loco parentis* to him or her has the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed.
>
> (2) Counsel shall be appointed in the initial order. For parents, legal guardians, and other persons standing in *loco parentis*, the representation may only continue after the first appearance if the parent or other persons standing in *loco parentis* cannot pay for the services of counsel.
>
> (3) Counsel for other parties shall only be appointed upon request for appointment of counsel. If the requesting parties have not retained counsel and

> cannot pay for the services of counsel, the court shall, by order entered of record, appoint an attorney or attorneys to represent the other party or parties and so inform the parties.

(Emphasis added). Here, under the relevant statute, as it was in effect at the time of the proceedings below, petitioners were not legally entitled to court-appointed counsel because they were not the parents of L.R.-1 and L.R.-2 and had not been established as custodians. Rather, petitioners were relative foster parents who housed the children and, on many occasions, the children's parents. While petitioners argue they provided some care for the children prior to and after the filing of the petition, they were never established or held themselves out to any court, prior to the filing of the petition, as custodians. Further, when petitioners moved to intervene in the proceedings following the termination of the parents' parental rights, the circuit court granted their motion. Once petitioners intervened in the proceedings, they retained their own counsel and do not assert or provide evidence that they would have qualified for court-appointed counsel.

Despite this, petitioners argue they were prejudiced by a lack of counsel during the initial proceedings because they were unsure of the status of the parents' parental rights during their vacation in June of 2019, which ultimately led to petitioners being denied placement of the children. The circuit court explored petitioners' knowledge of the parents' parental rights during two evidentiary hearings in November and December of 2019. At the hearings, petitioner M.B. testified that, although he was unsure of the status of his daughter's parental rights when he allowed her to have unsupervised contact with the children, he had been informed that the DHHR was pursuing termination. Similarly, petitioner C.B. testified that she did not know "for sure" that her daughter's parental rights had been terminated but admitted she "believed" the DHHR caseworker told her that the daughter's rights had been terminated. More importantly, petitioners both acknowledged that they knew their daughter was not permitted to have visitation or contact with the children.

Further, petitioners contend that West Virginia Code § 49-4-601(e) (2015) required that they receive notice of any hearings in the proceedings as relative foster parents of the children. While petitioners are correct that they should have received formal notice of the hearings terminating the parents' parental rights, they never contested the outcome of those proceedings, no allegations were made against them in the DHHR's petition, and they were provided informal updates on the proceedings from the DHHR caseworker. As such, there is no evidence that petitioners were prejudiced by a lack of formal notice in the proceedings concerning the parents' parental rights.

Moreover, when the children were removed from petitioners' care after the termination of the parents' parental rights, petitioners were permitted to intervene regarding placement of the children and afforded all of the rights provided to a party in the case, including notice, opportunity to be heard, and the right to counsel. Because petitioners were relative foster parents and not guardians or custodians, they were not subject to adjudication and not entitled to request an improvement period, as they argue on appeal.

Additionally, we have held that

> "[w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children [alleged] to be abused or neglected has been substantially disregarded or frustrated, the resulting order . . . will be vacated and the case remanded for compliance with that process and entry of an appropriate . . . order." Syllabus point 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

Syl. Pt. 3, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009). None of the issues of which petitioners complain constitute a substantial disregard or frustration of the applicable rules and statutes such that vacation of the dispositional order is warranted.

Next, petitioners argue that the circuit court erred in declining to grant them placement of the children or grant them visitation after removing the children from their residence. While petitioners "do not deny that they made a serious mistake" in allowing the children to have unsupervised contact with their parents, "it was a single mistake made over the course of eight years of caretaking" and "did not actually result in physical injury to a child." We find petitioners' arguments unavailing.

As noted, the circuit court held two permanency hearings in November and December of 2019, wherein petitioners were allowed to intervene, testify on their own behalf, and present evidence. While it is true that much of the circuit court's decision to deny placement stemmed from petitioners' actions during a vacation in June of 2019, they attempt to minimize their role and the consequences of those actions. Petitioners defended their decisions by arguing that no child was actually injured as a result. However, rather than a single momentary lapse in judgment, petitioners made several errors that informed the circuit court's decision to deny them placement of the children. For example, petitioners argue their only mistake was permitting three-year-old L.R.-2 to ride in a vehicle with his parents unsupervised. Petitioners contend that they had no idea the children's parents were using drugs and were assured the parents did not have any controlled substances with them. Yet petitioners themselves were so concerned that the children's parents would use any money given to them to purchase drugs they had planned to meet them at a gas station to pay for their gas rather than give them money directly. Additionally, once petitioners realized that L.R.-2 was left unsupervised with his parents and none of them returned home after the trip, they failed to contact immediately law enforcement or the DHHR. As a result, L.R.-2 was not located until several hours later when law enforcement found him seated near a methamphetamine-loaded syringe in a vehicle with his intoxicated parents. Further, the circuit court evaluated these incidents at length during the permanency hearings and found that petitioners lacked an understanding or acceptance of the parents' substance abuse and the risk of harm it posed to the children. As such, the circuit court had ample evidence to support its findings and conclusion that placement with petitioners was not in the children's best interest.

Finally, petitioners argue that the circuit court erred by denying them visitation with the children. According to petitioners, maintaining a relationship with them is in the children's best interests. We disagree.

West Virginia Code § 48-10-501 provides that "[t]he circuit court or family court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship." Further, this Court has held that

> [a] trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren . . . shall give paramount consideration to the best interests of the grandchild or grandchildren involved." Syllabus point 1, in part, *In re the Petition of Nearhoof,* 178 W.Va. 359, 359 S.E.2d 587 (1987).

Syl. Pt. 3, *In re Samantha S.*, 222 W. Va. 517, 667 S.E.2d 573 (2008).

Here, the circuit court found that it would not be in the children's best interests to participate in visitation with petitioners given the children's placement history and permanency plan. Following the children's removal from petitioners' custody, the children were placed in a new relative placement, which failed. The children were then moved to a third home and have now been outside of petitioners' residence since June of 2018. Additionally, the permanency plan for the children is adoption by their current non-relative foster parents. Accordingly, the circuit court found that it would be detrimental to the children's wellbeing to have continued contact with petitioners because it could cause further disruptions when they need safety, stability, security, and continuity of caregivers.

Moreover, we have previously held that

> [p]ursuant to W.Va. Code § 48-10-902 [2001], the Grandparent Visitation Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

Syl. Pt. 3, *In re Hunter H.*, 231 W. Va. at 118, 744 S.E.2d at 229. Because post-adoption visitation between a grandparent and a child is not contemplated by the Grandparent Visitation Act, the circuit court did not err in denying them visitation. In light of the anticipated adoption by a non-relative, we find that they are entitled to no relief in this regard.

For the foregoing reasons, we find no error in the decision of the circuit court, and its January 22, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison