

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In re O.E.

No. 23-121 (Ohio County CC-35-2021-JA-108)

MEMORANDUM DECISION

Petitioner Grandmother S.E.¹ appeals the Circuit Court of Ohio County’s January 31, 2023, order denying her motion to intervene and seeking permanent placement of O.E.² Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court’s order is appropriate. *See* W. Va. R. App. P. 21.

In August 2021, the DHS filed a petition alleging that the child’s mother and the child tested positive for fentanyl upon the child’s birth. The petition noted that petitioner, who is the child’s maternal grandmother, had knowledge that the child’s mother was using drugs during her pregnancy. The proceedings regarding the child and the parents resulted in all parental rights being terminated. Petitioner moved to intervene and requested that the child be permanently placed with her. Upon petitioner’s request, the DHS initiated a home study, which included, among other things, a background check on petitioner’s boyfriend, A.G., who lived with petitioner. A.G. was determined ineligible by the entity that conducted the background check. A.G. then attempted to pass the background check again, so he was re-fingerprinted and his criminal record was run a second time by the same entity. He was again determined ineligible. However, after being

¹Petitioner appears self-represented. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee A. Niezgoda. Counsel Joseph J. Moses appears as the child’s guardian ad litem.

Additionally, pursuant to West Virginia Code § 5F-1-2, the agency formerly known as the West Virginia Department of Health and Human Resources was terminated, effective January 1, 2024, and is now three separate agencies—the Department of Health Facilities, the Department of Health, and the Department of Human Services. For purposes of abuse and neglect appeals, the agency is now the Department of Human Services (“DHS”).

²We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

determined ineligible for a second time, A.G. timely requested a “variance”³ and was inexplicably determined eligible. On his request for a variance, A.G. stated as follows: “Ten years ago was my last [e]ntanglement with the law.” This variance procedure led to petitioner and A.G. passing a home study.

In April 2022, the DHS issued petitioner and A.G. a certification approving them as certified kinship providers. However, the record shows that the home study revealed that A.G. had a lengthy criminal record, including convictions for domestic violence incidents that occurred as recently as 2018. After the multidisciplinary treatment team (“MDT”) received a copy of A.G.’s criminal record, it was discovered that A.G. was charged with driving under the influence in August 2022—while the proceeding below was ongoing and *after* the home study was approved. Thus, A.G.’s claim that he had no criminal record for the past ten years was proven untrue.

In January 2023, the court heard petitioner’s motion to intervene and second request for placement. Petitioner presented evidence from a Child Protective Services (“CPS”) employee and her boyfriend, A.G. Petitioner also testified. A.G.’s criminal record was admitted into evidence, among other exhibits. The court noted that A.G. was dishonest on his variance request and that the MDT did not recommend placement with petitioner. The court found that petitioner chose to cohabitate with A.G., who has a significant criminal record. Ultimately, the court denied petitioner’s motion and held that it was not in the child’s best interest to be placed with petitioner.⁴ It is from this order that petitioner appeals.

On appeal from a final order in an abuse and neglect proceeding, this Court reviews the circuit court’s findings of fact for clear error and its conclusions of law *de novo*. Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011). Before this Court, petitioner contends that the circuit court erred by not permanently placing the child in her care.⁵

³The entity performing the background check has a “variance” procedure by which applicants who are initially denied may request reconsideration based upon the “passage of time, extenuating circumstances such as the applicant’s age at the time of conviction, substance abuse, or mental health issues, demonstration of rehabilitation such as character references, employment history, and training, and relevancy of the particular disqualifying offense(s) with respect to the type of employment sought.” This Court is not addressing whether the “variance” procedure is applicable to abuse and neglect proceedings.

⁴The permanency plan for the child is adoption in the current placement.

⁵Petitioner makes several arguments that we decline to consider, as she makes no references to the record or to applicable legal authority. “The decisions of this Court are quite clear. ‘Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but [that] are not supported with pertinent authority, are not considered on appeal.’ *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996).” *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013).

According to petitioner, the child should have been placed in her home because she is the child's grandmother. Petitioner is correct that West Virginia Code § 49-4-114(a)(3)⁶ establishes a preference for placement of a child with a grandparent. However, "[t]he grandparent preference must be considered in conjunction with our long standing jurisprudence that 'the primary goal in cases involving abuse and neglect . . . must be the health and welfare of the children.'" *In re Hunter H.*, 227 W. Va. 699, 703, 715 S.E.2d 397, 401 (2011) (citation omitted). Moreover, "[t]he preference is just that—a preference. It is not absolute . . . the child's best interest remains paramount." *In re K.E.*, 240 W. Va. 220, 225, 809 S.E.2d 531, 536 (2018). In the instant case, although petitioner's home study was considered passed, the court specifically held that it was not in the child's best interest to be placed with petitioner. While petitioner argues that because A.G. does not have a documented history with CPS, he is an appropriate caregiver for the child, this argument ignores A.G.'s criminal history, which includes domestic violence charges and a DUI that occurred during the pendency of the proceeding below. The court found these facts to be paramount in its decision to deny petitioner's motion. Based upon all circumstances of the case, including, but not limited to, the home study, the court found that petitioner's home was not a suitable placement for the child. We agree and conclude that court's decision to deny petitioner placement of the child was consistent with the evidence presented.

For the foregoing reasons, we find no error in the decision of the circuit court, and its January 31, 2023, order is hereby affirmed.

Affirmed.

ISSUED: February 7, 2024

⁶West Virginia Code § 49-4-114(a)(3) sets forth the following:

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 assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents. A circuit judge may determine the placement of a child for adoption by a grandparent or grandparents is in the best interest of the child without the grandparent or grandparents completing or passing a home study evaluation.

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn