

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **M.K.-1 and M.K.-2**

No. 23-199 (Logan County CC-23-2020-JA-43 and CC-23-2020-JA-44)

MEMORANDUM DECISION

Petitioners M.M. and C.M.¹ appeal the Circuit Court of Logan County’s March 20, 2023, order denying their motion to intervene, arguing that they should have been entitled to intervention.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.

Petitioners herein were originally the foster parents for the children pursuant to abuse and neglect proceedings initiated against the parents. According to the record, the parents’ parental rights were terminated during the proceedings. Thereafter, petitioners notified the DHS of “their intention to surrender” M.K.-1. After the court was informed of this issue and a multidisciplinary team (“MDT”) meeting was scheduled to address the issue, petitioners surrendered both children to the DHS without notice and before the MDT could convene.

Several months later, petitioners filed a motion to intervene in the proceedings, among other relief. We note, however, that petitioners have failed to include the motion in the appendix record. It should be noted that, although they do not address this in their briefing before this Court,

¹Petitioners appear by counsel Anthony M. Salvatore. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Deputy Attorney General Steven R. Compton. Counsel Rebecca E. Mick appears as the children’s guardian ad litem (“guardian”).

Additionally, pursuant to West Virginia Code § 5F-2-1a, the agency formerly known as the West Virginia Department of Health and Human Resources was terminated. It is now three separate agencies—the Department of Health Facilities, the Department of Health, and the Department of Human Services. *See* W. Va. Code § 5F-1-2. 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). Further, because the children share the same initials, we use numbers to differentiate them.

the circuit court explicitly stated that the motion to intervene “relates only to the Infant, [M.K.-2], and makes no reference to the Infant, [M.K.-1].” It is also critical to note that the circuit court explicitly found that petitioners advanced arguments at the hearing that were not properly raised in the motion, including an assertion that the surrender of the children was a result of duress or threats by the DHS.

In November 2022, the circuit court held a hearing on petitioners’ motion to intervene, during which both petitioners testified and presented other evidence in support of their motion. The DHS objected to petitioners’ intervention and presented testimony from an adoption specialist in opposition to petitioners’ evidence. The guardian joined in the DHS’s objection. Ultimately, the court found that petitioners were former foster parents with no right to intervene and, further, that intervention was contrary to the children’s best interests. Accordingly, the court denied petitioners’ motion to intervene.³ It is from the order denying the motion to intervene that petitioners appeal.

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). Further,

[a] circuit court’s decision on an individual’s motion for permissive intervention in a child abuse and neglect proceeding pursuant to West Virginia Code § 49-4-601(h) (2019) is reviewed under a two-part standard of review. We review de novo whether the individual seeking permissive intervention was afforded “a meaningful opportunity to be heard” as required by West Virginia Code § 49-4-601(h), and we review for an abuse of discretion a circuit court’s decision regarding the “level and type of participation” afforded to individuals seeking permissive intervention, i.e., foster parents, pre-adoptive parents, and relative caregivers, pursuant to Syllabus point 4, in part, *State ex rel. C.H. v. Faircloth*, 240 W. Va. 729, 815 S.E.2d 540 (2018).

Syl. Pt. 1, *In re H.W.*, 247 W. Va. 109, 875 S.E.2d 247 (2022).

The resolution of petitioners’ appeal turns on a narrow legal issue and requires little analysis. Before this Court, petitioners fail to include any application of West Virginia Code § 49-4-601(h), which, as set forth above, is integral in determining whether such intervention is permitted. Instead, petitioners predicate their entire argument upon West Virginia Code § 49-2-127(a) of the “Foster and Kinship Bill of Rights,” and argue that the circuit court refused to consider them as “foster parents” under that statute. Petitioners erroneously argue that they “met the statutory definition of Foster Parents” under West Virginia Code § 49-2-127(a)(14) and (15)⁴

³The permanency plan for the children is adoption in the current placement.

⁴West Virginia Code § 49-2-127(a) sets forth, in relevant part, the following:

(a) Foster parents and kinship parents play an integral, indispensable, and vital role in the state’s effort to care for children displaced from their homes, and such parents and persons have the following rights:

and ignore the fact that this statute contains no definition of “foster parent.” Instead, that term is defined in West Virginia Code § 49-1-206, in relevant part, as “a person with whom the department has placed a child.” It is undisputed that the children were not placed with petitioners when they sought intervention and had not been placed in their home for many months. Although the children had previously been placed in their home, petitioners disrupted this placement when they voluntarily returned the children to the DHS’s custody. Because petitioners make no attempt to explain how they met the definition of “foster parent” under the applicable statute, they cannot be entitled to relief. Finally, while petitioners argue that permitting their intervention was in the children’s best interests, we conclude that their failure to establish they were foster parents and their reliance on West Virginia Code § 49-2-127(a) preclude relief.

For the foregoing reasons, we find no error in the decision of the circuit court, and its March 20, 2023, order is hereby affirmed.

Affirmed.

ISSUED: April 15, 2024

CONCURRED IN BY:

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

....

(14) The right to be considered, where appropriate and consistent with the best interests of the child, as a permanent parent or parents for a child who is available for adoption or legal guardianship;

(15) The right to move to intervene in the pending case, without fear of retaliation, once parental rights have been terminated[.]