STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
May 13, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

***In re* F.S.**

No. 23-346 (Kanawha County 22-JA-404)

MEMORANDUM DECISION

Petitioner Grandmother S.D.[1] appeals the Circuit Court of Kanawha County's April 26, 2023, order denying her motion to intervene and for placement of the child, F.S.,[2] arguing that it was in the child's best interests to be permanently placed in her home. 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.

The proceedings were initiated in September 2022 when the DHS filed an abuse and neglect petition upon F.S.'s birth, alleging that the mother abused illegal substances while pregnant with the child and had her parental rights to two other children involuntarily terminated in a prior proceeding.[3] The petition also alleged the father abused illegal substances and had his parental rights to another child involuntarily terminated in 2011. At the preliminary hearing, the circuit court ratified the child's removal and placed her with the same foster family who adopted her two older siblings. The petitioner grandmother filed a letter for the circuit court's consideration in November 2022, requesting to intervene in the matter and to have the child placed in her care. The court allowed the petitioner to present her motion and testify on her own behalf at a hearing in

[1] The petitioners are self-represented. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrisey and Assistant Attorney General Andrew T. Waight. Counsel Catherine B. Wallace appears as the child'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").

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

[3] The petitioner sought permanent placement of the children subject to the prior proceeding, and the circuit court denied her request. This Court affirmed the circuit court's decision upon the petitioner's appeal. *See In re J.T.*, No. 21-0136, 2021 WL 5297000, at *5 (W. Va. Nov. 15, 2021) (memorandum decision).

December 2022. The court denied the motion to intervene; however, the DHS and guardian were ordered to visit the petitioner's home and consider her as a potential placement for the child.

The guardian filed a report in February 2023 following examination of the home. At a hearing held in April 2023, the guardian recommended that the circuit court deny the petitioner's pending request for placement and keep the child in the current foster home. The DHS joined the guardian's recommendation. The recommendation was primarily based on the guardian's observation of the child's attachment to her siblings and foster mother and that "it would be extremely traumatic to be removed from the only home that she's ever known." However, while the guardian remarked that the petitioner "loves her new granddaughter" and "is not, per se, unfit," the guardian raised some issues with the petitioner's home. The guardian proffered that the petitioner had a history with Child Protective Services ("CPS") and that her fiancé, who lived in the home, had a prior felony conviction. Despite the fiancé's felony record and a prohibition against his possession of firearms, the petitioner had a gun in the home. Additionally, the petitioner had medical issues and an entire bag full of medications "that she couldn't explain all the sources for." Furthermore, the guardian expressed concern with the petitioner's business operated out of the home that "didn't quite add up." The petitioner represented that the business's purpose was reselling name brand purses; however, "looking on social media, you could see that there [was drug] paraphernalia . . . it just wasn't what she presented to me that it was supposed to be." There were also random individuals who "were dropping by asking to pick up things" related to the business.

The petitioner was given the opportunity to address the circuit court regarding her motion and the DHS and guardian's recommendation. The petitioner disputed the guardian's evaluation of the home, but admitted to selling drug paraphernalia, and explained that "you try to get what your customers want." She also admitted to having a gun in the home but claimed that her fiancé did not know about it. The court then advised the petitioner that the "recommendation is not based on that . . . . It's about the fact that that little girl has been with her brothers and is bonded with her brothers." Based on the foregoing, the court entered an order in April 2023 that denied the petitioner's motion to intervene and request for placement. The court found the current placement to be in the child's best interests. It is from this order that the petitioner appeals.[4]

On appeal from a final order regarding a motion to intervene, we have held as follows:

[4] The parents' parental rights to F.S. were terminated by the circuit court's April 2023 order and the permanency plan is adoption by the child's foster placement. The petitioner asserts in her appellate brief that the parents expressed wishes that the child be placed in her care; however, this stated preference is insufficient to overcome the circuit court's best interests analysis. Moreover, we refuse to address this assertion when the parents' parental rights have been terminated and, thus, they no longer have the right to participate in decisions affecting the child. *See* Syl. Pts. 4-6, in part, *In re Cesar L.*, 221 W. Va. 249, 654 S.E.2d 373 (2007) (explaining that when a parent's rights are terminated, "the law no longer recognizes such person as a 'parent' with regard to the child(ren) involved in the particular termination proceeding," such person no longer has "rights to participate in decisions affecting a minor child," and such person "does not have standing as a 'parent'").

> 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) 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 petitioner argues that the circuit court erred in denying her motion to intervene and for permanent placement because it is in the child's best interests to be placed with family.[5] In consideration of the petitioner's argument regarding her right to intervene in the proceedings, we find no merit. As we have stated,

> West Virginia Code § 49-4-601(h) establishes a "two-tiered framework." *State ex rel. R.H. v. Bloom*, No. 17-0002, 2017 WL 1788946, *3 (W. Va. May 5, 2017) (memorandum decision). 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." *See* W. Va. Code § 49-4-601(h). In contrast, however, "[f]oster parents, preadoptive parents, and relative caregivers" are only granted the right to "a meaningful opportunity to be heard." *See id.* Moreover, for purposes of this statute, the term "custodial" refers to a person who became a child's custodian "*prior* to the initiation of the abuse and neglect proceedings[.]" [*In re*] *Jonathan G.*, 198 W. Va. [716,] at 727, 482 S.E.2d [893,] at 904 [(1996)] (emphasis added) [, *modified on other grounds by State ex rel. C.H. v. Faircloth*, 240 W. Va. 729, 815 S.E.2d 540 (2018)].

In re H.W., 247 W. Va. at 119, 875 S.E.2d at 257 (citing *State ex rel. H.S. v. Beane*, 240 W. Va. 643, 647, 814 S.E.2d 660, 664 (2018) (footnote omitted)). Here, the petitioner failed to present any evidence that she was a party having custodial or other parental rights or responsibilities or that she was a foster parent, preadoptive parent, or relative caregiver in order to be afforded the right to a meaningful opportunity to be heard. Rather, our review of the record revealed that the child was never in the petitioner's care, as the child was appropriately placed with her siblings in

[5] We note that the petitioner cites no legal authority in support of her arguments on appeal. As we have stated, "issues . . . mentioned only in passing but . . . not supported with pertinent authority, are not considered on appeal." *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) (quoting *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)). However, we also recognize that pleadings filed by self-represented parties are to be liberally construed. *See Esposito v. Mastrantoni*, No. 19-1023, 2021 WL 195288, at *4 (W. Va. Jan. 20, 2021) (memorandum decision) (citing *Blair v. Maynard*, 174 W. Va. 247, 252-53, 324 S.E.2d 391, 396 (1984)).

foster care upon her birth. Therefore, the petitioner was not entitled to intervene in this matter under the statutory framework, and the circuit court did not err in denying her motion.

We further find no error in the circuit court's order denying the petitioner's request for placement. The petitioner's argument rests on her belief that it is always in a child's best interests to be placed with a grandparent. While we have recognized a statutory preference for adoptive placement with a child's grandparents as set forth in West Virginia Code § 49-4-114(a)(3), such preference is not absolute and can be overcome "where the record reviewed in its entirety establishes that such placement is not in the best interests of the child." *See* Syl. Pt. 2, in part, *In re J.P.*, 243 W. Va. 394, 844 S.E.2d 165 (2020) (quoting Syl. Pt. 4, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005)). Furthermore, the petitioner ignores that we have also recognized a statutory "preference for placing siblings in the same adoptive home pursuant to W. Va. Code § 49-4-111." *See* Syl. Pt. 2, in part, *In re K.L.*, 241 W. Va. 546, 826 S.E.2d 671 (2019). Here, the court found it was in the child's best interests to remain in the foster home with her siblings to whom she had a significant attachment. Although, on appeal, the petitioner asserts that the only issue with her home was the gun, the court specifically explained to her that the decision to deny placement was based on the child's bond with her brothers and not the guardian's concerns with the home.[6] Therefore, we can discern no error in the circuit court's decision to deny placement with the petitioner.[7]

Accordingly, we find no error in the decision of the circuit court, and its April 26, 2023, order is hereby affirmed.

Affirmed.

ISSUED: May 13, 2024

[6] To the extent the petitioner argues that the circuit court erred regarding visitation, we find no error. Grandparent visitation is in the court's discretion under West Virginia Code §§ 48-10-802 to -803, and the court found the visitation arrangement to be in the child's best interests. *See* Syl. Pt. 3, *In re Samantha S.*, 222 W. Va. 517, 667 S.E.2d 573 (2008) ("'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).").

[7] The petitioner further asserts for the first time on appeal that she had ex parte communications with the judge, through which she was assured she would get custody of the child. However, the petitioner points to no evidence of such an interaction in the record, and we refuse to consider this argument on appeal. *See Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) ("Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." (quoting *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n. 20 (1999))); *see also* W. Va. R. App. P. 10(c)(7) (requiring a petitioner's argument to "contain appropriate and specific citations to the record").

CONCURRED IN BY:

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