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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 23-506 – *In re M.M.*

ARMSTEAD, Chief Justice, dissenting:

An abuse of discretion occurs "when a material factor deserving significant weight is ignored" or "when an improper factor is relied upon." *Amanda A. v. Kevin T.*, 232 W. Va. 237, 245, 751 S.E.2d 757, 765 (2013) (additional quotations and citation omitted). In this case, the circuit court ignored the fact that M.M. had been in the custody of her foster parents for more than two years and disregarded expert evidence indicating that removing M.M. from her foster parents with whom she had a secure attachment could cause significant long-term psychological, developmental, and emotional harm. Compounding that error, the circuit court proceeded to rely upon the fact that respondent E.L. is M.M.'s biological aunt as a primary justification for removing M.M. from the only home she had ever known, even though this Court has made clear that "no preference is afforded to blood relatives, generally when placing a child for adoption." *In re K.L. and R.L*, 241 W. Va. 546, 556, 826 S.E.2d 671, 681 (2019). Because the circuit court clearly abused its discretion when it granted custody of M.M. to her aunt, its order should have been reversed by this Court. *See* Syl., in part, *Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977) (providing that custody determinations are within the sound discretion of lower courts "unless it clearly appears that such discretion has been abused"). Instead, the majority has sanctioned the decision which resulted in M.M. being moved across the country so that she could not even have any visitation with the individuals she then knew as her parents. Our law demanded a different result. Therefore, I dissent.

"For a century-and-a-half, the courts of this State have been guided by the fundamental rule that, when addressing custody issues involving children, the best interests of the child trump all other considerations." *Brooke B. v. Ray*, 230 W. Va. 355, 361, 738 S.E.2d 21, 27 (2013). In other words, "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W. Va. 801, 187 S.E.2d 601 (1972). Simply put, "[i]n visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996). To that end, "West Virginia Code § 49-2-126(a)(5) (2020) requires a circuit court to conduct a best-interest-of-the-child analysis before removing a foster child from his or her foster family home and placing that child in a kinship placement." Syl. Pt. 5, *In re G.G.*, 249 W. Va. 496, 896 S.E.2d 662 (2023).

In determining a child's best interests, this Court has "developed a policy that stable relationships should be preserved whenever feasible." *State ex rel. Treadway v. McCoy*, 189 W. Va. 210, 213, 429 S.E.2d 492, 495 (1993). Indeed, this Court has expressly held that "[t]he best interests of a child are served by preserving important relationships in that child's life." *Id.* at 210, 429 S.E.2d 492, syl. pt. 2. In so holding, we have recognized that "'continuity of relationships, surroundings and environmental influence during a child's first three years of life' is vitally important." *In re G.G.*, 249 W. Va. at 505, 896 S.E.2d at 671, quoting *In re K.E. & K.E.*, 240 W. Va. 220, 227, 809 S.E.2d 531, 538 (2018)

(additional quotations and citation omitted). As the majority in its opinion acknowledges, "[p]resumptively, if a child is in a loving and caring foster home, the child will be harmed by being removed from that home and placed in a strange, unknown home." *Treadway*, 189 W. Va. at 213, 429 S.E.2d at 495. Therefore, this Court has made clear that "in cases where a child has been in one home for a substantial period, '[h]is environment and sense of security should not be disturbed without a clear showing of significant benefit to him.'" *In re Brandon*, 183 W. Va. 113, 121, 394 S.E.2d 515, 523 (1990), quoting *Lemley v. Barr*, 176 W. Va. 378, 386, 343 S.E.2d 101, 110 (1986) (internal quotations and citations omitted).

In this case, there was no clear showing that M.M. would significantly benefit by removing her from her foster parents' home where she had resided for more than two years and transporting her to California, where she had never been before, to live with someone whom she did not know prior to the proceedings below. To the contrary, the evidence showed that it was in M.M.'s best interests to remain with her foster family. In that regard, evidence was produced during the placement hearings indicating that M.M. was residing in a loving and caring home with her foster parents whom she called "Mommy and Daddy," and their three sons whom she considered to be her brothers. Her foster mother, A.P.-1, was providing constant care as a full-time, stay-at-home mom and ensuring that M.M. attended her numerous therapy and doctor appointments. Through her foster parents, M.M. had an extended family of grandparents, aunts, uncles, and cousins. The guardian ad litem reported to the circuit court that A.P.-1 and A.P.-2 are "very mature,

articulate and experienced foster caregivers" and related that M.M. "is well bonded with the entire [foster] family." Elaborating, the guardian ad litem explained:

> She has been living with them for the past twenty-three (23) months. She calls [A.P.-2] dad and [A.P.-1] mom. She considers her 3 foster brothers to be her brothers. [A.P. -1 and A.P.-2] have been married for nearly 19 years, they own their own home and it appears that they offer [M.M.] a very stable and loving home.

Of particular significance, both the guardian ad litem and DHS recommended that M.M. remain with her foster family. Nonetheless, as recognized by the majority, the report of the guardian ad litem, whose basic role in this case is to represent the best interests of M.M., was not even referenced in the circuit court's order.

The evidence also included testimony and a report from Timothy S. Saar, Ph.D., who rendered a forensic psychological opinion that it was in M.M.'s best interests to remain in the custody of her foster parents. In his written report, Dr. Saar explained:

> [T]he critical factor for consideration is [M.M.'s] primary caregiver attachment. From the age she was placed in foster care, the length of time in which she has been in the care of [A.P.-1 and A.P.-2], which is now 19 months, and the obvious secure attachment she displays when interacting with strangers and others, she has developed a secure primary caregiver attachment with them. [Respondent E.L.], despite her excellent credentials and family tie, does not have that basic, core attachment with the child. [M.M.] shows affection and trust with [Respondent E.L.] as well as with this examiner and others with which she interacts, but this is based on her secure attachment to [A.P.-1 and A.P.-2]. The research . . . also indicates she has also likely formed a strong sibling bond with the other children in the household. For these reasons, severing this connection and disrupting the primary caregiver and sibling attachments [M.M.] has developed could cause

> significant long-term psychological, developmental, and emotional harm.
>
> As a result of all of the factors noted above and the research findings relating to primary caregiver and sibling attachment, as well as the interviews and observation in this evaluation, this examiner believes [M.M.'s] best interests, within a reasonable degree of psychological certainty, would be best served in her being placed in the care and custody of [A.P.-1 and A.P.-2].

Instead of giving Dr. Saar's opinion the significant weight it deserved, the circuit court concluded that because he "could not quantify the likelihood that any adverse effect may happen" to M.M. if she were removed from her foster parents, his opinion "should be only one factor in the Court's consideration." The majority found it was within the circuit court's sound discretion to essentially disregard Dr. Saar's opinion as to the potential outcomes for M.M. because the circuit court found the opinion of E.L.'s expert, Dr. Clayman, more credible. However, both the majority and the circuit court overlooked the critical import of Dr. Saar's opinion – his determination that M.M. "had developed a secure primary caregiver attachment" to her foster parents, which notably E.L.'s expert did not challenge. Dr. Clayman merely criticized Dr. Saar's methodology for rendering his opinion that severing the relationship could have a devastating effect. As required by *Treadway*, it was the existence of an important stable relationship between M.M. and her foster parents that was the material factor that deserved the most weight in determining M.M.'s permanent placement. The circuit court erroneously disregarded it.

The circuit court was also clearly wrong when it focused on the familial relationship that M.M. "could possibly" have with her aunt and her biological siblings. Significantly, there was no pre-existing relationship between M.M. and her aunt. Prior to her removal from her biological mother's custody, M.M. had only seen her aunt twice. Both occasions occurred when M.M. was less than nine months old. Obviously, M.M. had no memory of her aunt prior to the visitation that began after her aunt was allowed to intervene in the underlying proceedings. The visitation between M.M. and her aunt started in December 2021, but her aunt did not temporarily relocate to West Virginia until M.M.'s foster parents filed for intervenor status in October 2022. Before M.M.'s aunt moved to West Virginia, only six hours of visitation occurred. Despite her purported relocation to West Virginia, by the time of the final placement hearing in May 2023, respondent E.L. had missed or cancelled twenty pre-scheduled visits with M.M. because of her out-of-state residence and employment. While M.M. may have had "positive interactions" with her aunt during her visits prior to the final placement hearing, she certainly did not have a well-established bond like she had with the foster parents after living with them for twenty-three months.

Also of significance is the fact that M.M. was not going to be placed with any of her siblings if she was living in her aunt's home. Two of M.M.'s siblings are adults, and one resides with a grandparent. None of them live in California, nor do any of M.M.'s other biological family members. The circuit court merely speculated that M.M.'s aunt "would encourage [M.M.] to have as much as a relationship with her biological siblings as

possible." By finding that the biological family relationship between M.M. and her aunt needed to be maintained, the circuit court clearly determined that the existence of blood relatives was the most important factor to be considered. However, this Court has consistently reiterated that there is no adoptive placement preference for blood relatives. *In re G.G.*, 249 W. Va. at 501, 896 S.E.2d at 667; *see also In re K.L.*, 241 W.Va. at 556, 826 S.E.2d at 681 ("[N]o preference is afforded to blood relatives, generally when placing a child for adoption."); *Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011) (recognizing "the only statutory preference within our laws regarding the adoption of a child involves grandparents and reunification with siblings"). As such, the circuit court's reliance upon this improper factor to make its placement decision was a clear abuse of discretion.

Notably, this Court was recently confronted with two other cases involving children in circumstances just like M.M. and reached a different result. The first was *In re G.G.*, which the majority suggests was "meticulously applied" in this case. In fact, had the circuit court actually applied the decision in *In re G.G.*, it would have allowed M.M. to remain with her foster parents.

Just as in this case, G.G.'s maternal aunt and uncle sought to intervene in the underlying abuse and neglect case and adopt their niece. By the time the circuit court held the placement hearing, G.G. had been residing with her foster parents for nine months. G.G.'s aunt and uncle argued that they were entitled to placement because they were G.G.'s

blood relatives. Turning to our existing precedent, this Court quickly disposed of the argument that there is a placement preference for blood relatives. *Id.* at 502, 896 S.E.2d 668. Not only did we reiterate that the statutory preference is limited to grandparents and siblings, we also dispelled the notion that the newly enacted Foster Care Bill of Rights provided a placement preference for blood relatives. We determined that "[a]s written, West Virginia Code § 49-2-126(a)(5) (2020) simply provides a right to a foster child, not an adoptive placement preference for the child's relatives." *Id.* at 498, 896 S.E.2d at 664, syl. pt. 6.

As to G.G., the circuit court's placement determination was clearly based on an assessment of the relationship she had with her foster parents. We found no merit to the aunt and uncle's argument that the nine months G.G. had resided with her foster parents was "not . . . long enough to have formed a significant bond . . . given that she was just two years old." *Id.* at 504, 896 S.E.2d at 670. In rejecting that argument, we explained that "it is well-established that significant bonds are formed between a child and his or her caregivers at this young age, and, critically, any disruption of those bonds has the potential to severely impact the child's growth and development." *Id.* Ultimately, we found that the circuit court had not erred when it determined that it was in G.G.'s best interests to remain in her placement with her foster parents and be adopted by them, explaining that,

> [T]he evidence presented during the hearing below supports the circuit court's decision. In that regard, there was evidence indicating that G.G. referred to the respondents as "Mommy" and "Daddy" and viewed them as her parents. The treatment coordinator, who was responsible for overseeing

> G.G.'s placement with the respondents, testified that she had been in the foster home biweekly and that having observed G.G. interact with the respondents for more than six months, she believed G.G. had developed an "extreme bond" with them. Elaborating, she testified,
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> > And what I mean by "extreme bond" is she is a very happy-go-lucky little girl. Whenever they are not there or if they use the bathroom or walk out to the garage to let the dog in, she instantly changes and, in my professional opinion, that is an extreme bond.
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> In addition, the guardian ad litem submitted a comprehensive report in which she concluded that "moving G.G. at this time would be contrary to her best interests." She recommended a permanency plan for G.G. to be adopted by the respondents. Given this evidence, we are unable to find that the circuit court abused its discretion in its assessment of G.G.'s best interests.

Id. at 505-06, 896 S.E.2d at 671-72.

In another decision issued this same term of court, we decided that the circuit court had not erred when it refused to remove a child from her foster parents upon an adoptive placement request made by the child's grandparents. In *In re G.H.*, No. 23-736, 2024 WL _____(W. Va. Nov. 6, 2024) (memorandum decision), this Court found that, despite the statutory preference for grandparents in determining adoptive placement, the circuit court did not err when it concluded that it was not in G.H.'s best interests to be adopted by her grandparents. We explained that the "decision did not rest entirely on the [grandparents'] suitability, *rather it hinged on the child's significant bond to her foster family, given that she lived with them since her discharge from the hospital—approximately twenty months—and became 'attached.'" Id.*, at *3 (emphasis added).

Given the decisions in *In re G.G.* and *In re. G.H.*, as well as the other cases discussed herein, wherein this Court has consistently and repeatedly found that it is in a child's best interests to remain in a foster home when there is evidence of a significant bond between the child and the foster parents, there was simply no basis for the majority to uphold the circuit court's decision in this matter. As discussed above, the evidence here showed that M.M. had a significant bond and secure attachment to her foster family. Moreover, there was no evidence presented that the foster parents were unsuitable in any way. It was quite the opposite. By all accounts, the foster parents were providing a loving, caring home to M.M.

Our Court has long held that a reviewing court may only set aside a circuit court's findings in an abuse and neglect matter if it concludes such findings are clearly erroneous. We have clarified that "[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." Syl. Pt. 1, in part, *In Int. of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). For the reasons set forth above, I firmly believe that such a mistake was, in fact, made by the circuit court in removing M.M. from the only family in which she had an established pre-existing relationship.

The only relevant factor that sets M.M. apart from G.G. and G.H. is the fact that as a result of the circuit court's erroneous decision, M.M. has lived with her aunt in California for more than a year. Indeed, M.M. is fortunate to have both the foster parents and her aunt willing to provide for her needs. I realize that at this juncture, M.M. has likely formed a bond with her aunt. However, disregarding our precedent in these specific circumstances sends the wrong message to our circuit courts. It is critical that in abuse and neglect cases we provide consistent guidance to our lower courts as to the material factors that deserve significant weight when making an adoptive placement decision. As this case illustrates, it is the decision of lower courts in the first instance that can shape the future of a child when they are the most vulnerable.

Certainly, current circumstances cannot be ignored. Rule 11 of the Rules of Appellate Procedure requires parties in abuse and neglect cases to provide a written statement regarding the current status of the child one week before oral argument is scheduled so that this Court is made aware of any change in circumstances. In light of the information provided in the status updates here, I would have ordered the same course of action this Court employed in *In re Hunter H.*, 227 W. Va. 699, 715 S.E.2d 397 (2011). Similar to what happened in this case, the circuit court in *In re Hunter H.* erroneously removed a child from his foster parents' home where he had lived for three years and immediately placed him with his maternal grandmother. By the time this Court reversed the decision upon a finding that the circuit court had clearly erred by elevating the grandparent preference over the best interests of the child, Hunter H. had been living with

his grandmother for almost a year. In order to avoid another traumatic change in custody, this Court reversed the decision and remanded with directions that "the circuit court shall set a hearing forthwith, bringing all the parties and their counsel together for a full hearing on the most effective means of gradually transitioning Hunter from [his grandmother] to his foster family." *Id.* at 706, 715 S.E.2d 404. This Court further directed that it was "imperative for all of the parties involved to work together for the ultimate goal: providing [the child] with a stable, loving environment." *Id.*

As *Hunter H.* demonstrates, it is possible to correct a clear abuse of discretion by the circuit court and this Court should have done the same thing here. Because it was undoubtedly in M.M.'s best interests to remain in the loving, stable home created for her by her foster parents and their other children, with whom she had established a strong bond, I agree with the DHS and the guardian ad litem that the circuit court erred in ordering M.M.'s removal from that home. Accordingly, I dissent as to the majority's decision in this case.