

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re R.M.

No. 23-559 (Preston County 21-JA-93)

MEMORANDUM DECISION

Petitioner M.M.,¹ the child’s paternal grandmother, appeals the Circuit Court of Preston County’s August 28, 2023, order denying her motion for placement of the child, arguing that the court abused its discretion by refusing to place the child in her care.² Upon our review, we determine that oral argument is unnecessary and that a memorandum decision vacating the circuit court’s August 28, 2023, order and remanding for further proceedings is appropriate in accordance with the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

At the outset, we note that the record on appeal in this matter is limited, given that the petitioner was not granted intervenor status below. In August 2021, R.M. was born drug-affected, and R.M.’s father was incarcerated at the time of his birth.³ Accordingly, the DHS filed an abuse and neglect petition against R.M.’s mother and father.⁴ Initially, there was a question regarding R.M.’s paternity. Because there were no known relative placements at the time of R.M.’s birth, the child was placed in a foster home. In December 2021, paternity testing confirmed that the

¹ The petitioner appears by counsel Edmund J. Rollo. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Lee Niezgodka. Counsel Teresa J. Lyons appears as the child’s guardian ad litem (“guardian”). Respondents C.L. and D.L., the child’s foster parents, appear by counsel Thomas W. Kupec.

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 father remained incarcerated throughout the proceedings below.

⁴ The parental and custodial rights of the mother and father were later terminated.

petitioner's son was R.M.'s biological father. After paternity was confirmed, the petitioner inquired about placement of the child. The petitioner was previously granted guardianship of two of the father's older children, R.M.'s half-siblings. In February 2022, the circuit court directed the DHS to investigate placing the child with the petitioner and to obtain records regarding the guardianship of the two older children. The DHS confirmed the petitioner was granted guardianship of the children. Importantly, neither guardianship order required the petitioner to restrict contact between the children and their father. In March 2022, the petitioner filed a motion to intervene in the abuse and neglect proceeding.

The DHS approved the petitioner's home study in March 2022. In May 2022, the petitioner filed a motion requesting placement of R.M. and attached her approved home study, her certificate of completion of the West Virginia Parent Resources for Information Development and Education course for foster and kinship placements, a certificate of completion of a "Trauma Training for Foster and Adoptive Process" sponsored by Concord University, and a certificate of completion of basic life support training through United Hospital Center. The circuit court held a hearing in October 2022 on the petitioner's motion requesting placement of the child. During the hearing, the DHS informed the court that it intended to file an amended abuse and neglect petition adding the petitioner as an offending adult respondent because the petitioner allowed contact between the two older siblings in her care and their father. However, at a hearing in November 2022, the DHS informed the court that no such petition would be filed as "it would be detrimental to the well-being" of the two older children to remove them from the petitioner's home.

For reasons unclear from the record, the circuit court did not schedule another hearing on the petitioner's motion requesting placement until July 2023. At the hearing, the petitioner testified that she obtained guardianship of two of R.M.'s siblings; one child entered her care thirteen years prior, and the other child entered her care over a year prior. She explained that both children had contact with their father, but that she always monitored the contact. She also explained that the children visited their father once while he was incarcerated but, currently, the children only had contact with their father by phone. She further stated that the father was not welcome in her home and that she wanted to cut off contact between the children and their father. She testified that if the circuit court placed R.M. in her custody and ordered no contact between R.M. and his father, she would abide by the court's ruling. A DHS worker testified that she saw no issues with the petitioner's home other than the phone contact between the older children and the father.

The circuit court entered an order on August 28, 2023, denying the petitioner's motion for placement of the child.⁵ Although the court found that the petitioner appeared to be a fit caregiver, the court denied the petitioner's motion for placement of the child based on the contact between the two older children and their father, finding that the father was "not an appropriate person" for R.M. to contact or visit. It is from this order that the petitioner appeals.⁶

⁵ The circuit court's order also denied the petitioner's motion to intervene. However, because the petitioner does not raise any arguments regarding her motion to intervene, the denial of that motion is not at issue on appeal.

⁶ Both parents' parental rights were terminated. The permanency plan for the child is adoption in the current placement.

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,

“[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). The petitioner argues that the circuit court erred by denying her placement of the child. On appeal, the DHS and the guardian both agree that the circuit court failed to properly weigh all required factors and that the case should be remanded to allow for a new hearing on placement of the child. Specifically, the DHS concedes that the circuit court gave undue weight to the petitioner allowing contact between the father and the two older siblings when there were no restrictions against her doing so.

When considering placement options for a child, West Virginia Code § 49-4-114(a)(3) directs the DHS to “first consider the suitability and willingness of any known grandparent or grandparents to adopt the child.” If the DHS 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.” *Id.* We have explained that this statute “contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such a placement is not in the best interests of the child.” Syl. Pt. 4, in part, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). In denying the petitioner's motion for placement of the child, the circuit court focused entirely on the petitioner allowing contact between the father and the two older siblings in her care rather than reviewing the totality of the circumstances. The circuit court's order makes no mention of case law and statutes establishing a grandparent preference for placement of a child, the petitioner's approved home study, the petitioner's completion of trauma certifications and kinship placement courses, or the potential connection between R.M. and R.M.'s half-siblings. Accordingly, we conclude that the circuit court erred in denying the petitioner placement of the child without properly considering all required factors.

For the foregoing reasons, we vacate, in part, the circuit court's August 28, 2023, order denying the petitioner's motion for placement of the child and remand the matter with instructions for the circuit court to hold a new hearing considering whether placement with the petitioner or the foster parents serves the best interests of the child, consistent with this opinion, relevant case

law, and Chapter 49 of the West Virginia Code.⁷ The Clerk is directed to issue the mandate contemporaneously herewith.

Vacated and remanded, with directions.

ISSUED: November 6, 2024

CONCURRED IN BY:

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

⁷ As previously stated, the circuit court's denial of the petitioner's motion to intervene is not at issue on appeal. Given the petitioner's participation in the prior hearing on R.M.'s placement, we find it unnecessary to direct the court to reconsider the motion to intervene and direct the court to again permit the petitioner to participate in the new hearing on R.M.'s placement.