

SUPREME COURT OF APPEALS OF WEST VIRGINIA

In re E.F.-1, C.F.-1, and E.F.-2

No. 20-0115 (W. Va. Nov. 4, 2020) · No. 20-0115 · Decided November 4, 2020

SUMMARY

The West Virginia Supreme Court of Appeals reviewed a circuit court's custodial allocation following a child abuse and neglect proceeding. The Court held that the circuit court failed to apply the mandatory custodial-allocation factors and procedures under West Virginia Code §§ 48-9-206, -207, and -209, and therefore reversed and remanded.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Tim Armstead; Justice Margaret L. Workman; Justice Elizabeth D. Walker; Justice Evan H. Jenkins; Justice John A. Hutchison
JURISDICTION	West Virginia
DECIDED	November 4, 2020
DOCKET	20-0115
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Petitioner Mother appealed the Circuit Court of Hardy County's orders allocating custodial responsibility following an abuse and neglect proceeding. The Supreme Court of Appeals of West Virginia reviewed the circuit court's allocation of custody after petitioner completed her post-adjudicatory improvement period.
STANDARD OF REVIEW	Conclusions of law are reviewed de novo. Factual findings in an abuse and neglect case tried without a jury are reviewed for clear error and will not be set aside unless the reviewing court is left with the definite and firm conviction that a mistake has been made.
PRECEDENTIAL VALUE	Published memorandum decision
PARTIES	T.C., Petitioner Mother v. West Virginia Department of Health and Human Resources, C.F.-2, Respondent Father, E.F.-1, C.F.-1, and E.F.-2, through the guardian ad litem

TOPICS

child custody

family law procedure

statutory interpretation

appellate procedure

standard of review

PRACTICE AREAS

family law

child custody

child welfare

appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court was required to apply the factors and considerations in West Virginia Code §§ 48-9-206 and 48-9-207 when allocating custodial and decision-making responsibilities after reunifying children from an abuse and neglect proceeding with parents who no longer cohabit.
2. Whether the circuit court was required to apply the mandatory considerations, procedures, and special-written-findings requirement in West Virginia Code § 48-9-209 after abuse and neglect findings had been established.
3. Whether the circuit court's custodial allocation could be affirmed despite the absence of express discussion or reference to the statutory custodial-allocation factors.

HOLDINGS

1. A circuit court must apply the factors and considerations set forth in West Virginia Code §§ 48-9-206 and 48-9-207 when allocating custodial and decision-making responsibilities for children reunified with parents, guardians, or custodians who are no longer cohabitating at the close of the abuse and neglect proceedings.
2. When findings of abuse or neglect have been established, the circuit court must employ the mandatory considerations and procedures in West Virginia Code § 48-9-209, including making special written findings demonstrating that the allocation adequately protects the child from potential harm arising from the abuse and neglect findings.
3. The custodial-allocation orders could not be affirmed because the circuit court did not discuss or reference the applicability of the statutory factors, and the Supreme Court would not presume that the factors had been considered.

KEY QUOTATIONS

“A circuit court is obligated to apply the factors and considerations set forth in West Virginia Code §§ 48-9-206 (2018) and -207 (2001) in allocating custodial and decision-making responsibilities when reunifying children subject to abuse and neglect proceedings with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings.” (3)

“Where findings of abuse and/or neglect have been established, the circuit court must further employ the mandatory considerations and procedures set forth in West Virginia Code § 48-9-209 (2016), in order to protect the children from further abuse and/or neglect.” (3)

“Given the absence of discussion of the applicability of the factors or reference thereto, we cannot simply presume that the court considered these factors and affirm on that basis.” (3)

FACTUAL BACKGROUND

The DHHR alleged that petitioner exposed the children to controlled substances after her arrests for methamphetamine possession and driving under the influence of a controlled substance. Petitioner stipulated to the abuse and neglect allegations, completed an improvement period, and was found to have remedied the conditions of abuse and neglect. The circuit court nevertheless found that petitioner had encouraged the children not to maintain a meaningful relationship with their father and that C.F.-1 had developed post-traumatic stress disorder as a result of petitioner's conduct. It awarded primary custody of C.F.-1 and E.F.-2 to the father and returned E.F.-1 to petitioner, but did not demonstrate that it had applied the statutory custodial-allocation factors or made the required written findings concerning protection from further harm.

PROCEDURAL HISTORY

The DHHR filed an abuse and neglect petition in July 2018 alleging that petitioner exposed the children to controlled substances. Petitioner stipulated to the conditions of abuse and neglect, was adjudicated an abusing parent, and substantially complied with and completed an improvement period. The circuit court allocated primary custody of E.F.-1 to petitioner and primary custody of C.F.-1 and E.F.-2 to respondent father, then denied reconsideration. The Supreme Court reversed the custodial-allocation orders and remanded for application of the statutory factors and procedures governing custody after abuse and neglect proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The circuit court must hold any hearings it deems necessary, apply the factors in West Virginia Code §§ 48-9-206 and 48-9-207, apply the limitations and procedures mandated by § 48-9-209, make the required protective written findings, and issue a final order within sixty days. Court-appointed attorneys and the guardian ad litem must continue their involvement until permanent placement is achieved through the required custodial and decision-making allocations.

CASES CITED

- In re K.H., 235 W. Va. 254, 773 S.E.2d 20 (2015)
- Melinda H. v. William R. II, 230 W. Va. 731, 742 S.E.2d 419 (2013)
- State v. Brandon B., 218 W. Va. 324, 624 S.E.2d 761 (2005)
- State v. Edward Charles L., 183 W. Va. 641, 398 S.E.2d 123 (1990)
- In Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996)
- In re Cecil T., 228 W. Va. 89, 717 S.E.2d 873 (2011)
- In re T.M., 242 W. Va. 268, 835 S.E.2d 132 (2019)
- James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)
- Z. D. and D. D., 239 W. Va. 890, 806 S.E.2d 814

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS FILED In re E.F.-1, C.F.-1, and E.F.-2 November 4, 2020 EDYTHE NASH GAISER, CLERK No. 20-0115 (Hardy County 18-JA-19, 18-JA-20, and 18-JA-21) SUPREME COURT OF APPEALS OF WEST VIRGINIA MEMORANDUM DECISION Petitioner Mother T.C., by counsel Lauren M. Wilson, appeals the Circuit Court of Hardy County's December 3, 2019, order for custodial allocation following an abuse and neglect proceeding.

1 The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Michael L. Jackson, filed a response in support of the circuit court's order and a supplemental appendix. The guardian ad litem, Marla Zelene Harman, filed a response on behalf of the children in support of the circuit court's order. Respondent Father C.F.-2, by counsel William H. Judy III, made no appearance before the Court.

On appeal, petitioner argues that the circuit court erred in granting her primary custody of E.F.-1 only and granting primary custody of C.F.-1 and E.F.-2 to respondent father after she successfully completed her improvement period. This Court has considered the parties' briefs and the record on appeal.

The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that the circuit court erred in failing to apply the statutory analysis found in West Virginia Code §§ 49-9-206, 207, and 209, in determining custodial allocation.

This case satisfies the "limited circumstances" requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure, and a memorandum decision is appropriate to vacate and remand the matter to the circuit court.

In July of 2018, the DHHR filed a child abuse and neglect petition alleging that petitioner exposed the children to controlled substances in her home. The DHHR alleged that petitioner was 1 Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. See *In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

Additionally, as two of the children share the same initials, we refer to them as E.F.-1 and E.F.-2, respectively, throughout this memorandum decision. Similarly, because one of the children and respondent father share the same initials, we refer to them as C.F.- 1 and C.F.-2, respectively,

throughout this memorandum decision. 1 arrested for possession of methamphetamine in June of 2018, and that she posted bond for that charge, only to be re-arrested for driving under the influence of a controlled substance and possession of methamphetamine a short time later.

According to the DHHR, respondent father was a nonabusing parent of all three children and was awarded primary custody of eight-year-old E.F.- 2 in January of 2018. E.F.-2 remained in the father's custody throughout the proceedings. Following the filing of the petition, the DHHR placed sixteen-year-old E.F.-1 and twelve-year-old C.F.-1 in their maternal grandmother's custody.

Petitioner stipulated to the conditions of abuse and neglect in September of 2018, and the circuit court adjudicated her as an abusing parent. Petitioner moved for a post-adjudicatory improvement period, which was granted.

The parties agreed to a case plan wherein petitioner was required to complete an in-patient substance abuse program and remain drug-free throughout the proceedings. Over the next several months, petitioner substantially complied with her improvement period, and it was extended. Respondent father raised concerns that the maternal grandmother was attempting to alienate E.F.-1 and C.F.-1 from him and moved for physical custody of those children.

The circuit court denied the motion, but ordered the grandmother to encourage visitation between these children and respondent father. The circuit court also ordered the DHHR to provide family therapy for respondent father and the children.

In June of 2019, the DHHR reported that family therapy between respondent father and E.F.-1 was progressing well, but family therapy with C.F.-1 and E.F.-2 had yet to begin. Respondent father again moved for custody of E.F.-1 and C.F.- 1, citing his continued concerns of alienation by the maternal grandmother and other relatives.

The circuit court denied the motion, citing the need for additional therapy between respondent father and the children, but ordered extended visitation for all parties. In September of 2019, the circuit court concluded that petitioner successfully completed her post-adjudicatory improvement period. Petitioner and the father both moved for custody of all three children.

Based on testimony of the children's therapist, the circuit court found that petitioner "encouraged the children to not have a meaningful relationship with their father and the children remain fearful of angering [petitioner.]" The circuit court found that C.F.-1 "in particular has suffered from this situation [and has been] diagnosed with Post-Traumatic Stress Disorder as a result of [petitioner's] conduct." Ultimately, the circuit court found that it was in C.F.-1 and E.F.- 2's best interest to be placed with respondent father, "with ongoing custodial allocation" for petitioner.

E.F.-1 was returned to petitioner's care, with custodial allocation afforded to respondent father. The circuit court ordered the parties to convene a multidisciplinary team ("MDT") meeting to

determine a schedule for custodial allocation.

In October of 2019, upon learning that the parties failed to come to an agreement regarding custodial allocation, the circuit court heard the parties' testimony and arguments, and provided a detailed schedule for custodial allocation and responsibilities. Thereafter, both parties filed motions for reconsideration of the circuit court's custodial allocation order.

The circuit court 2 denied these motions, as memorialized by its December 3, 2019, order. Petitioner now appeals that order. 2 The Court has previously held: "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected.

These findings shall not be set aside by a reviewing court unless clearly erroneous. 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.

However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

On appeal, petitioner argues that the circuit court erred in granting the father primary custody of C.F.-1 and E.F.-2 after she successfully completed her improvement period. She asserts, without any supporting citation to the record, that the children "had very little relationship" with respondent father prior to family counseling, which was initiated during these proceedings.

Petitioner argues that she completed the terms of her improvement period and demonstrated an ability to maintain a suitable home for the children. In her opinion, the children would have been better served by placement in her home. Upon our review of the order on appeal, we note a stark absence of the mandatory considerations and procedure for a custodial allocation found in Chapter 48 of the West Virginia Code.

Recently, in *In re T.M.*, this Court considered whether "allocation of custody [following the dismissal of a child abuse and neglect petition] is governed by the precepts established in our abuse and neglect caselaw or the statutory considerations mandated for the allocation of child custody and decision making responsibilities," as found in West Virginia Code §§ 48-9-206, 207, and 209.

242 W. Va. 268, 276, 835 S.E.2d 132, 140 (2019). We considered that the framework found in West Virginia Code § 48-9-206(a) “sets forth the essential criteria which, in the collective wisdom of the legislature, serve a child’s interests” and codified the “best interests” analysis that permeates our holdings related to abuse and neglect proceedings. *Id.*, at 278, 835 S.E.2d at 142.

Additionally, we noted that the provisions of West Virginia Code § 48-9-209 “bestow broad discretion on a court making a custodial allocation to ensure that a child is protected from any harm the abuse and neglect findings potentially forecast.” *Id.*, at 279, 835 S.E.2d at 143.

To that end, we emphasized that subsection (c) of that section imposes a “mandatory duty upon a court making custodial allocations to make special written findings demonstrating that any such allocation includes 2 The parents retain their parental rights, and the children have achieved permanency in their custody. 3 limitations which will adequately protect the child from potential harm as a result of the abuse and neglect findings of which the court is aware.” *Id.* Based on these considerations, we crafted the following syllabus point: A circuit court is obligated to apply the factors and considerations set forth in West Virginia Code §§ 48-9-206 (2018) and -207 (2001) in allocating custodial and decision-making responsibilities when reunifying children subject to abuse and neglect proceedings with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings.

Where findings of abuse and/or neglect have been established, the circuit court must further employ the mandatory considerations and procedures set forth in West Virginia Code § 48-9-209 (2016), in order to protect the children from further abuse and/or neglect. *T.M.*, 242 W. Va. at 269, 835 S.E.2d at 132, syl. pt. 5.

Here, just as in *T.M.*, we find no demonstrable evidence that the circuit court employed the analysis required by West Virginia Code § 48-9-206. As we held in *T.M.*, we again conclude that “[g]iven the absence of discussion of the applicability of the factors or reference thereto, we cannot simply presume that the court considered these factors and affirm on that basis.” *Id.* at 280, 835 S.E.2d at 144.

Moreover, petitioner’s adjudication as an abusive and neglectful parent, regardless of her success in remedying those conditions of abuse and neglect, imposed an additional statutory consideration upon the circuit court pursuant to West Virginia Code § 48-9-209, which mandates special written findings in that regard.

Accordingly, we must reverse the circuit court’s allocation of custodial responsibilities and remand for consideration of the factors set forth in West Virginia Code §§ 48-9-206 and 207, as well as the limitations and procedures mandated by West Virginia Code § 48-9-209. 3 For the foregoing reasons, we reverse the circuit court’s December 3, 2019, and November 7, 2019, orders as those

orders relate to the circuit court's allocation of custodial responsibility and remand for further proceedings consistent with this decision.

4 The circuit court is directed to hold 3 To the extent petitioner's assignment of error asserts that the circuit court simply erred in its custodial allocation of primary custody to respondent father over petitioner, we similarly find that our remand of this matter moots this argument. 4 We further instruct the circuit court that, on remand, any court-appointed attorneys and the guardian ad litem are to continue their involvement until permanent placement is achieved through the custodial and decision-making allocations required herein.

See Syl. Pt. 5, *James M. v. Maynard*, 185 W. Va. 648, 649, 408 S.E.2d 400, 401 (1991) ("The guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home."). Permanent placement of C.F.-1 and E.F.-2 is required to bring the abuse and neglect proceedings in the instant case to a conclusion and that has not yet occurred.

Therefore, any such court appointments continue to be in effect. But cf. *Z. D. and D. D.*, 239 W. Va. 890, 806 S.E.2d 814 (disapproving use of court-appointed counsel and guardian ad litem where parent attempted to utilize abuse and neglect proceedings to modify shared parenting plan). 4 the hearings it deems necessary, if any, and issue a final order for this case in the next sixty days.

The Clerk is hereby directed to issue the mandate contemporaneously herewith. Reversed and remanded. ISSUED: November 4, 2020 CONCURRED IN BY: Chief Justice Tim Armstead Justice Margaret L. Workman Justice Elizabeth D. Walker Justice Evan H. Jenkins Justice John A. Hutchison 5