

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.V. and R.V., :
Petitioners :
 :
v. : No. 1343 C.D. 2014
 : Submitted: December 26, 2014
Department of Public Welfare, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: April 29, 2015

J.V. and R.V. (Grandparents) petition for review of an adjudication of the Department of Public Welfare's Bureau of Hearings and Appeals (Bureau) denying their request for benefits under the Kinship Care Program to reimburse them for the care of their grandchildren. The Bureau adopted the recommendation of its Administrative Law Judge (ALJ) that Grandparents' request had to be denied because Mercer County Children and Youth Services (CYS) did not place their grandchildren in their care. Finding no error by the Bureau, we affirm.

M.W. and D.W. (Children) are ages 16 and 13 respectively. Because they require mental health care services, Children are enrolled in special education and life skills programs. Over the past decade, CYS has provided protective services to Children and has monitored their well being. However, CYS has never initiated dependency proceedings or sought to place Children in foster care.

Children's parents, K.W. (Father) and J.W. (Mother), are divorced, and Father has sole custody.¹ Children lived with Father and his second wife, T.W., when, on February 15, 2012, Father fell at work and broke his hip.² The injury required several weeks of hospitalization and rehabilitation. On February 16, 2012, Grandmother brought Children to her home to stay while Father recovered. On March 7, 2012, Father and Mother agreed to give temporary legal and physical custody of Children to Grandparents. This agreement, which was memorialized in a stipulated court order, allowed Grandparents to make educational and medical decisions for Children. Children have resided with Grandparents ever since. CYS received no advance notice of the custody agreement.

On April 9, 2013, Grandparents requested retroactive and prospective subsidy payments under the Kinship Care Program, but CYS denied the request. Grandparents appealed, and a hearing was held before the ALJ on November 12, 2013. At the hearing, Thomas Whiteman, Children's CYS caseworker, testified on behalf of the Department; Grandmother testified in support of Grandparents' application.

Whiteman testified that after Father's accident on February 15, 2012, Children's school notified CYS that Father was unable to care for Children during his treatment and recovery. On February 16, 2012, Whiteman called Father to inquire about arrangements for Children's care, and he responded that he would ask his mother, Grandmother, to care for them. A few hours later, Grandmother

¹ Mother had supervised visitation rights.

² At the time of Father's accident, he and T.W. were also in the process of divorcing; however he, T.W. and Children still lived together.

informed Whiteman that she was taking Children to her home while Father recovered.

Whiteman testified about his discussions with Grandmother about kinship care benefits, in the following exchange:

[Counsel for the Department]: And what, specifically, did you tell [Grandmother] regarding kinship payments and what kinship means?

[Whiteman]: That [CYS] has to take custody of the children and they have to go through a kinship care program and do all of the provider meetings and become qualified.

[Counsel for the Department]: Did you explain to her that the children would need to be adjudicated dependent for the children to be placed into formal kinship with [Grandparents]?

[Whiteman]: Yes.

[Counsel for the Department]: And did she have a response to any of that?

[Whiteman]: She didn't want the children in foster care.

[Counsel for the Department]: Did you explain to her the difference between foster care and kinship care?

[Whiteman]: Yes.

[Counsel for the Department]: What exactly did you tell her?

[Whiteman]: That basically if we have to pick up the children, it would be through emergency order, and that they would be placed in foster care pending the detention hearing within 72 hours.

[Counsel for the Department]: Did you explain to them what you would need from them to begin that process?

[Whiteman]: Yes.

[Counsel for the Department]: And what did you tell them you would need from them?

[Whiteman]: Social Security numbers, date of births.

[Counsel for the Department]: Did [Grandmother] give you the Social Security numbers and the dates of birth?

[Whiteman]: No.

Reproduced Record at 284-85 (R.R. ___). Whiteman testified that kinship care providers must undergo training before they can be eligible for benefits. Whiteman opined that had Grandparents taken steps to qualify as kinship care providers, CYS would almost certainly have placed Children with them within days of placing them into foster care.

Grandmother testified that she called Whiteman on February 16, 2012, to inform him that she was taking physical custody of Children. Whiteman called her back at 2:00 p.m. and told her that “if [she] didn’t take the girls, they’d be placed in foster care by 4:00 [p.m.]” R.R. 291. Grandmother picked Children up from Father’s home at 4:00 p.m. in order to prevent them from being placed in foster care. She explained that it was important to her and her husband that Children avoid foster care because they “have been through enough.” R.R. 294. She further explained that “in the house where they have lived, my son lived there, his wife lived there, the ex-wife lived there, the ex-wife’s boyfriend lived there and these two little girls, and they have seen so much that they don’t need to be jerked around by a system anymore.” R.R. 299.

According to Grandmother, Children had a difficult time adjusting to living in her home. M.W. has an I.Q. between 50 and 53, and D.W. has an I.Q. between 80 and 83. Children are unable to take care of themselves as are children of equivalent ages. For example, M.W. struggles with personal hygiene, and D.W.

struggles with interacting with her peers. D.W. was suspended from school for threatening to kill another student and taken to a hospital for psychiatric evaluation; hospital staff were unable to consult Grandparents about D.W.'s care because they were not her legal custodians. This incident prompted Grandparents to obtain legal custody of Children with the March 7, 2012, custody agreement.

Grandmother testified about the expenses she and her husband have incurred caring for Children. They have constructed an addition to their house to provide bedrooms for Children, and they have incurred dramatically higher utility and grocery bills. Children's Social Security benefits are not sufficient to cover these financial demands. When Grandparents investigated their eligibility for kinship care benefits, Grandmother testified that Whiteman "told me that we did not qualify because I would not let him take the girls and put them in foster care." R.R. 294. She also explained that, even had she allowed CYS to place Children into temporary foster care, she was not able to attend the training meetings for kinship care providers because they conflicted with her work schedule.

On June 27, 2014, the ALJ issued an adjudication recommending that the Bureau deny Grandparents' request for kinship care benefits. The ALJ found that because CYS never took legal custody of Children and "placed" them with Grandparents, they were not "qualified as kinship care providers." ALJ Adjudication at 5; Finding of Fact No. 42 (F.F. ____). The ALJ also found that Grandparents "never applied in writing [for kinship care benefits], [and] never participated in the training required before they could be certified." *Id.*; F.F. 43. Accordingly, the ALJ recommended that Grandparents' request for kinship care benefits be denied. On July 7, 2014, the Bureau adopted the ALJ's recommended adjudication, and Grandparents petitioned for this Court's review.

On appeal,³ Grandparents raise several assignments of error. First, they contend that the ALJ erred in denying their request for kinship care benefits because Children were in fact “dependent.” Second, they contend that, because Children were in fact “placed” with Grandparents by CYS, the ALJ erred. Third, they argue, alternatively, that even if Children were not “placed” in their home by CYS, denying them benefits violates the intent and spirit of the legislation creating the Kinship Care Program. The Department counters that the ALJ’s finding that CYS did not place Children with Grandparents is supported by substantial evidence and the Bureau did not err in denying benefits. It had no choice under the applicable law.

We begin with a summary of the Kinship Care Program. The program is intended to encourage family members to become involved in those instances “when it is necessary to remove a child from the child’s home.” Section 1301 of the Public Welfare Code, 62 P.S. §1301.⁴ County children and youth services agencies are required to notify grandparents and other adult relatives “of a dependent child within 30 days of the child’s removal from the child’s home *when temporary legal and physical custody has been transferred to the county agency.*” Section 1303(a) of the Public Welfare Code, 62 P.S. §1303(a) (emphasis added).⁵ This transfer of custody may occur through a judicial adjudication of dependency

³ The standard of review of an administrative agency’s adjudication is whether the adjudication is in accordance with the law, does not violate constitutional rights, and is supported by substantial evidence. 2 Pa. C.S. §704; *Lycoming-Clinton County Mental Health/Mental Retardation Program v. Department of Public Welfare*, 884 A.2d 382, 383 n.1 (Pa. Cmwlth. 2005).

⁴ Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §1301. Section 1301 was added by the Act of September 30, 2003, P.L. 169.

⁵ Section 1303 was added by the Act of September 30, 2003, P.L. 169.

under the Juvenile Act, 42 Pa. C.S. §6351,⁶ or by a voluntary placement agreement between the parents and the county child welfare agency under 55 Pa. Code §3130.65.⁷ The county agency must take custody if it determines that grounds for

⁶ It states:

(a) General rule.--If the child is found to be a dependent child the court may make any of the following orders of disposition best suited to the safety, protection and physical, mental, and moral welfare of the child:

(2) Subject to conditions and limitations as the court prescribes transfer temporary legal custody to any of the following:

(i) Any individual resident within or without this Commonwealth, including any relative, who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child.

(ii) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.

(iii) A public agency authorized by law to receive and provide care for the child.

42 Pa. C.S. §6351(a).

⁷ It states, in relevant part, as follows:

(a) Custody of a child may be temporarily transferred to the county agency for no more than 30 days if the child's parents or other person legally responsible for the child freely enter into a written agreement with the county agency. The agreement may not be renewed beyond the 30 days and shall contain:

(1) A statement of the parents' or legal guardian's right to be represented by legal counsel or other spokesperson during conferences with the county agency about voluntary placement.

(2) A statement of the parent's or legal guardian's right to refuse to place the child.

(3) A statement of the parents' or legal guardian's right to visit the child, to obtain information about the child, and to be consulted about and approve medical and educational decisions concerning the child while the child is in voluntary placement.

(4) A statement of the parents' or legal guardian's right to the immediate return of the child upon request of the parent or

(Footnote continued on the next page . . .)

dependency exist. *See Children, Youth and Families Bulletin* 00-03-03, “Kinship Care Policy,” July 28, 2003; R.R. 178a. Relatives who accept placement of children through the county children and youth services agency are eligible for the payments that are available to all foster parents. Section 1303(c)(1)(i) of the Public Welfare Code, 62 P.S. §1303(c)(1)(i).

Grandparents make two arguments to support their request for a kinship care subsidy. First, they contend that both Children meet the definition of “dependent child” in the Department’s relevant regulation at 55 Pa. Code. §3130.5.⁸ Second, they argue that the ALJ disregarded evidence that CYS did in fact “place” Children with Grandparents.

Grandparents’ first argument is unavailing because they cite the definition for “child,” not “dependent child.”⁹ CYS is responsible for providing

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guardian, unless the court orders the legal custody of the child to be transferred to the county agency.

55 Pa. Code. §3130.65.

⁸ In their brief, Grandparents quote 55 Pa. C.S. §3130.5 but mistakenly cite the section as “3150.5.”

⁹ The regulation at Section 3130.5 defines “child” as follows:

Child--An individual whose custody has been transferred to the county agency under 42 Pa.C.S. §§ 6301--6365, or *whom the agency has otherwise accepted for service* and who:

- (i) Is under the age of 18 years.
- (ii) Is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years.
- (iii) Is under the age of 21 years who was adjudicated dependent before reaching the age of 18 years and while engaged in a course of instruction or treatment requests the court to retain jurisdiction until the course has been completed.

55 Pa. Code. §3130.5 (emphasis added).

services to all children “accepted for service,” not just those who have been adjudicated dependent. “Children who receive services” and “children who have been adjudicated dependent” are different groups. See 55 Pa. Code §3130.12(c)(1), (5).¹⁰ Here, CYS did not take custody, petition for dependency, or execute a voluntary placement agreement for Children. Instead, CYS provided general protective services pursuant to a family service plan in order to avoid having to remove Children from their home; Children remained eligible for continued in-home child welfare services while living with Grandparents.

So long as Children’s case was open, CYS monitored their services and their safety. However, CYS’s efforts in that regard did not constitute taking legal custody of Children, which is a necessary prerequisite to “placing” Children with a kinship caregiver, or any foster parent. Section 1303(a.1) of the Public Welfare Code states that

¹⁰ Section 3130.12(c) states:

(c) Each county is responsible for administering a program of children and youth social services that includes:

(1) *Services designed to keep children in their own homes; prevent abuse, neglect and exploitation; and help overcome problems that result in dependency and delinquency.*

(2) Temporary, substitute placement in foster family homes and residential child care facilities for a child in need of the care.

(3) Services designed to reunite children and their families when children are in temporary, substitute placement.

(4) Services to provide a permanent legally assured family for a child in temporary, substitute care who cannot be returned to his own home.

(5) *Service and care ordered by the court for children who have been adjudicated dependent or delinquent.*

55 Pa. Code §3130.12(c) (emphasis added).

the county agency shall exercise due diligence to identify and notify all grandparents and other adult relatives to the fifth degree of consanguinity or affinity to the parent or stepparent of a dependent child within 30 days of the child's removal from the child's home when temporary legal and physical custody has been transferred to the county agency.

62 P.S. §1303(a.1). Simply, because CYS never filed dependency petitions in this case, Children were never adjudicated "dependent" and were never eligible for placement into kinship foster care.

Nevertheless, Grandparents contend that a placement occurred when Whiteman called Grandmother at 2:00 p.m. on February 16, 2012, and told her that Children would be placed in foster care if she did not pick them up by 4:00 p.m. Grandparents argue this ultimatum is the equivalent of a placement. Whiteman called Grandmother because she had already informed Whiteman that she was taking care of the girls while Father recovered. Whiteman believed his phone call was a helpful reminder that CYS would have to take custody if Children were uncared for after school. However, even if Whiteman's call is construed as an ultimatum, it has no legal significance. Grandparents offer no legal support for their theory that a *de facto* placement by a county agency is recognized under the Public Welfare Code.¹¹

¹¹ Because we conclude that Children were not "placed" in Grandparents' home, we need not consider Grandparents' separate argument that they were entitled to notice of the availability of kinship care benefits. In any event, Grandparents' argument is unavailing because they rely on a Department policy that is not applicable to their situation. It states:

When a child is placed with a kinship caregiver, the agency must provide notice to the caregiver including a detailed explanation of foster family care and the agency's requirements for approval. The notice must include the amount of the foster care maintenance payment available.

(Footnote continued on the next page . . .)

Grandparents challenge the ALJ's resolution of witness credibility. They argue that the ALJ's credibility determinations with respect to the testimony of Grandmother and Whiteman were conclusory and lacked sufficient explanation, as required under *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 828 A.2d 1043 (Pa. 2003).

In *Daniels*, a workers' compensation judge (WCJ) found one doctor's deposition testimony more credible than that of another doctor without articulating the basis for that conclusion. On appeal, our Supreme Court held that the WCJ's decision was not "well reasoned" and remanded for the WCJ to explain her credibility determinations. The Court explained:

One potential difficulty [in writing well-reasoned decisions] is that, when the issue involves the credibility of contradictory witnesses who have actually testified before the WCJ, it is appropriate for the judge to base his or her determination upon the demeanor of the witnesses. In such an instance, there often is not much to say, nor is there a need to say much, in order for a reviewing body to determine that the decision was reasoned. Such a credibility determination may involve nothing more than the fact-finder's on-the-spot, and oftentimes instinctive, determination that one witness is more credible than another. The basis for the conclusion that certain testimony has the "ring of truth," while other testimony does not, may be difficult or impossible to articulate-but that does not make such judgments invalid or unworthy of deference Accordingly, in a case where the fact-finder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately "reasoned." We do not believe

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Children, Youth and Families Bulletin 00-03-03, "Kinship Care Policy," July 28, 2003; R.R. 180a (emphasis added). Because Children were not placed with Grandparents, by CYS, they were not entitled to notice under this provision.

that the statute, as amended, was intended to mandate that adjudicative officers explain inherently subjective credibility decisions according to some formulaic rubric or detailed to the “nth degree.”

[However s]ince the WCJ did not observe the respective demeanors of the experts, her resolution of the conflicting evidence cannot be supported by a mere announcement that she deemed one expert more “credible and persuasive” than another.

Daniels, 828 A.2d at 1052-53 (internal citations omitted) (emphasis added).

In a dissenting opinion on which Grandparents rely, Justice Newman opined that all agency factfinders should articulate the basis for their credibility determinations, whether or not they directly observe the witnesses’ testimony. This is a sound and logical position. Nevertheless, this Court has consistently applied *Daniels* only where credibility determinations are made on the basis of reports or depositions and not live testimony. *See, e.g., In re S.H.*, 96 A.3d 448, 459 (Pa. Cmwlth. 2014). Whiteman and Grandmother both testified live before the ALJ and, thus, he was not obligated to explain why he credited Whiteman’s testimony over that of Grandmother. It would have been preferable for the ALJ to explain his decision, but it was not reversible error to omit an explanation.

In their final assignment of error, Grandparents argue that denying them benefits is unjust and conflicts with the purpose of the Kinship Care Program, which is established in Section 1303 of the Public Welfare Code.¹² According to

¹² The statute, in its entirety, reads:

(a) Establishment of program.--The Kinship Care Program is established in the department.

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(a.1) Relative notification.--Except in situations of family or domestic violence, the county agency shall exercise due diligence to identify and notify all grandparents and other adult relatives to the fifth degree of consanguinity or affinity to the parent or stepparent of a dependent child within 30 days of the child's removal from the child's home when temporary legal and physical custody has been transferred to the county agency. The notice must explain all of the following:

- (1) Any options under Federal and State law available to the relative to participate in the care and placement of the child, including any options that would be lost by failing to respond to the notice.
- (2) The requirements to become a foster parent, permanent legal custodian or adoptive parent.
- (3) The additional supports that are available for children removed from the child's home.

(b) Placement of children.--If a child has been removed from the child's home under a voluntary placement agreement or is in the legal custody of the county agency, the county agency shall give first consideration to placement with relatives or kin. The county agency shall document that an attempt was made to place the child with a relative or kin. If the child is not placed with a relative or kin, the agency shall document the reason why such placement was not possible.

(c) Regulations.--

- (1) The department shall promulgate regulations necessary to carry out the provisions of this article. These regulations shall provide all of the following:
 - (i) Relatives shall receive the same foster care rate as other foster parents if they are complying with the regulations governing foster parents.
 - (ii) Foster care payments received by a relative who is a foster parent shall be excluded from consideration when calculating eligibility for public welfare assistance.

(2) The regulations shall be subject to review pursuant to the act of June 25, 1982 (P.L. 633, No. 181), known as the Regulatory Review Act.

62 P.S. §1303.

Grandparents, it makes little sense to provide financial assistance to a foster parent who is not a relative of Children but deny this assistance to their Grandparents.

A kinship care provider must meet all the requirements that foster care parents meet in order to be eligible for the placement of dependent children and to receive payments. Section 1303(c)(1)(i) of the Public Welfare Code states:

Relatives shall receive the same foster care rate as other foster parents if they are complying with the regulations governing foster parents.

62 P.S. §1303(c)(1)(i). The regulations governing foster care parents are extensive and located in Chapter 3700 of Title 55 of the Pennsylvania Code. They require, *inter alia*, that “[a] foster parent shall participate annually in a minimum of 6 hours of approved training.” 55 Pa. Code. §3700.65. The regulations also state:

Foster parents shall pass an initial medical appraisal by a licensed physician prior to being approved. The appraisal must establish that the foster parents are physically able to care for children and are free from communicable disease. Further medical examinations may be required by the agency if the agency has reason to believe that additional medical appraisal is appropriate.

55 Pa. Code. §3700.62(b). CYS must make the following safety assessments before placing a child with a foster parent:

(a) Medication and containers of poisonous, caustic, toxic, flammable or other dangerous material kept in the residence shall be distinctly marked or labeled as hazardous and stored in areas inaccessible to children under 5 years of age.

(b) Emergency telephone numbers, including those for fire, police, poison control and ambulance, shall be conspicuously posted adjacent to all telephones.

(c) Fireplaces, fireplace inserts, wood and coal burning stoves and free-standing space heaters, if allowed by local ordinance,

shall be installed, equipped and operated according to manufacturers' specifications and requirements specified by local ordinance.

(d) An operable smoke detector shall be placed on each level of the residence. The detector shall be maintained in operable condition.

(e) A portable fire extinguisher, suitable for Class B fires, shall be available in the kitchen and other cooking areas. The extinguisher shall be tested yearly or have a gauge to ensure adequate pressure.

(f) Protective safety caps shall be placed in electrical outlets accessible to children younger than 5 years of age.

(g) Exposed electrical wires are prohibited.

(h) Drinking water from an individual water source shall be potable as determined by an annual microbiological test conducted by a laboratory certified by the Department of Environmental Resources.

55 Pa. Code. §3700.67. Grandparents did not comply with these regulations and thus are not eligible to "receive the same foster care rate as other foster parents" under the Kinship Care Program. 62 Pa. C.S. §1303(c)(1)(i).

Grandparents' efforts have been laudable. The purpose of the Kinship Care Program is to encourage what Grandparents did. However, until they satisfy the regulations that apply to foster parents, they are not eligible for kinship care payments.

For these reasons, we are constrained to affirm the order of the Bureau.

MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.V. and R.V., :
 Petitioners :
 : :
 v. : No. 1343 C.D. 2014
 : :
Department of Public Welfare, :
 Respondent :

ORDER

AND NOW, this 29th day of April, 2015, the order of the Department of Public Welfare, Bureau of Hearings and Appeals dated July 7, 2014, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge