IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

CHARLESTON

In Re:

Jason S. and Jasmine B.

Case No. 33009

BRIEF OF APPELLANTS

Appeal From the Circuit Court of Harrison County

Justices:

Hon. Robin Jean Davis, Chief Justice
Hon. Joseph P. Albright
Hon. Elliott E. Maynard
Hon. Brent D. Benjamin
Hon. Larry V. Starcher

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Rory L. Perry, II, Clerk
2006

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In Re:

Jason S. and Jasmine B. Case No. 33009

BRIEF OF APPELLANTS

The Appellants, Peggy M. S and Misty B , respectfully submit the following as Appellants' Brief before the West Virginia Supreme Court of Appeals as follows:

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

The Circuit Court of Harrison County entered a Final Order entered on July 20, 2005, Refusing Appellants' Petitions for Appeal, regarding the Family Court Order entered on May 16, 2005, restoring the Appellee, Joseph M. B , unsupervised "Schedule A" visitation with his infant children, that he has with the Appellants.

The Appellents, Peggy M. S and Misty B each filed separate petitions for Modification of Parenting Time based on allegations that Joseph M. B , had sexually abused their children. The cases were consolidated for hearing on the Petitions. An evidentary hearing was held in the matter on November 16, 2004. A temporary order was entered in December, 2004. Another evidentary hearing, was held on February 17, 2005. Throughout the proceedings, these cases were heard concurrently.

The Appellants maintain that there were multiple errors in the proceedings and findings below and requests this Court to review the findings of the Family Court and reverse the same to protect their children.

STATEMENT OF FACTS

1. Peggy M. S is the mother of J.S.and Misty B is the mother of J.B.[1]

2. Joseph M. B , is the father of J.S. and J.B.

3. The basic facts in this case are essentially undisputed, however, for some reason, misinterpreted or ignored by the Family Court.

4. The West Virginia Department of Health and Human Resources originally brought both actions in an effort to obtain child support from Mr. B concerning these children and thereafter Mr. B and the mothers have engaged in numerous hearings before the Family Court concerning various allegations of abuse and misconduct.

5. Joseph M. B ., has been determined to be the father of J.B. and J.S. and his name has been placed upon the birth certificate, although it was discovered in these proceedings that Mr. B s name may not be Joseph M. B .., as he testified that he legally changed his name to Joseph Matthew C and that he was convicted of two counts of arson under the name of Joseph Matthew C which of course was not known at the time of filing the Appellants' original Petitions.

6. Peggy S first became aware of the allegations of abuse to her child from her child who stated that the Appellee sexually abused him and immediately contacted a physician's office.

7. Her son, J.S., was examined by a a certified nurse practitioner/registered nurse with a master of science degree in nursing, where J.S. disclosed that his father sexually abused him and that his father told him that he could not report it. The nurse took immediate action to report this matter to the West Virginia Department of Health & Human Resources and referred Ms. S to

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[1] ***The children are referred to only by their initials.***

a child psychiatrist.

8. Thereafter, the child was referred to a psychologist, Dr. Amy Wilson Strange. The child disclosed to Dr. Amy Wilson Strange, that he had been sexually abused by his father and she opined that his statement was credible.

9. Thereafter, Maryanne Shehann of Harrison County Child Protective Services was contacted and requested Peggy S take the child to the Director of Children Services for West Virginia Pediatrics in Morgantown for evaluation. The child again disclosed to a trained expert, certified by the Court, that he had been sexually abused by his father. The child also disclosed to the same expert that he had witnessed his father sexually molesting J.B.., the child of Misty B . That expert was certified and acknowledged as an expert by the Family Court, without objection, and testified undisputed that he found J.S.'s story of sexual abuse at the hand of his father was credible. He reported the disclosure back to Child Protective Services. The same individual attempted to discuss the matter with J.B., however, because of her tender age and language difficulties was unable to ascertain anything.

10. Both children now continue to be seen by child psychologist, Tammy Hamner. However, she did not do a clinical evaluation of sexual abuse, as she testified that it was not her roll to do so, in this case, however, she did note that J.S. communicated with her that his father had sexually abused him. Her testimony was clear that she did not evaluate whether the allegations of sexual abuse were true because she was asked to provide therapy. She testified, once again unrefuted, as an expert, that she believed that J.S. and J.B., have been sexually abused and that they have sexual knowledge that they should not have and both have indicated to her in counseling sessions of inappropriate touching and sexual abuse by their father.

11. Further, Tammy Hamner's testimony was, that based upon her years of experience, expertise and many sessions with these children "my conclusion is that each of these children is more sexually aware than he or she should be, I believe something happened or something is wrong." She further opined that Mr. B should only have supervised visitations.

12. The Guardian Ad Litem testified that the child disclosed to her that his father sexually assaulted the children and that in her opinion Mr. B should receive only supervised visitation.

13. Further, a past Guardian Ad Litem, looking into allegations of abuse and fitness of Mr. B , also was of the opinion that he should only have supervised visitation.

14. The Harrison County Sheriff's Department investigated the alleged offense and determined that it would not have sufficient evidence to obtain a criminal conviction based upon the inability of the children to testify in a clear and precise manner and that Mr. B was not "polygraphable." Deputy Sothen from the Harrison County Sheriff's Department, indicated that there may have been enough evidence to issue a warrant but not to prosecute criminally. He indicated that his main reason for not pursuing sexual abuse criminal charge against Mr. B was the lack of physical evidence and that he had never even spoken to either one of the children.

15. There was not one shred of evidence rebutting any expert's opinions, that all indicated that Mr. B had sexually abused his children, with the exception that "no criminal charges were brought" and that Child Protective Services "had taken no action."

POINTS AND AUTHORITY

1. Keith Allen A. v. Jennifer J.A. 500 S.E. 2d 552, (W.Va. 1997) clearly states that supervised visitation should be ordered when necessary to protect the best interests of the children. This Court went on to say in determining the best interests of the children, when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation to

the parent, who allegedly committed the abuse, against the risk of harm of such visitation to the child. The Family Court failed to do so.

2. Further, this Court stated that if there is an allegation involving whether one of the parents sexually abused the child involved, the court must obviously make a finding with respect to whether that parent sexually abused the child. The standard set by this Court was that of "credible evidence". The Family Court failed to apply the proper burden of proof.

3. Credible evidence has been held to exist on the testimony of expert testimony that may not be sufficient for conviction in a criminal case. The Supreme Court held that credible evidence was significantly less than clear and convincing and preponderance of the evidence when it stated "credible evidence of sexual allegation is all that is necessary for a Family Law Master or Circuit Court to Order supervised visitation". See Meadows v. Meadows, 504 S.E.2d 154, (W.Va. 1998) and Haller v. Haller, 481 S.E.2d 793, (W.Va. 1996).

4. This Court in the case Sharon V. W. v. George V.W., 507 S.E.2d 401, (WV 1998), clearly stated that the standard is lower than a preponderance of the evidence as it was only credible evidence. That since the termination of parental rights was not involved the lower standard of credible evidence was all that was necessary to justify supervised visitation. (at page 404) Also see, Mary D. v. Watt, 438 S.E. 2d 521, (W.Va. 1992).

5. This Court also ordered "Reconciliation Counseling" in the Keith Allen case, which was never Ordered in this case and is obviously necessary to protect the infant children prior to unsupervised visitation, since Mr. B has not seen his children for months.

DISCUSSION OF LAW

This Court has held that the standard for review is that of clearly erroneous as to the facts and an abuse of discussion of "*de nova*" review as to the application of law. In this case it is the position

of the Appellants that the Family Court was clearly erroneous in it's interpretation of the facts and that it used an incorrect standard of law in making it's decision. In the Final Order Denying Petition for Modification, the Family Court states that "if the likelihood of significant misunderstanding and/or intentional deception is at least just as great [as the likelihood of sexual abuse], as it clearly is herein, the petition for modification seeking elimination or in the alternative supervision of Mr. B .'s visitation must fail."

The standard for whether limitations should be placed on the Joseph M. .'s visitation with his children is not the standard set forth above by the Family Court but rather whether credible evidence was presented regarding the allegations of sexual abuse. The use of any other standard is improper.

The Family Court some how seems to conclude this lack of action of the criminal system or the Department of Human Resources as "supportive" of his decision. The Family Court apparently misinterprets the burden of proof needed in the various proceedings and also ignores his finding in his prior Order that as long as the children were in the custody of the non-abusive parent and was seeking court action to restrain visitation or modify visitation with the alleged abusive parent, that the Child Protective Service would take no action whatsoever.

The Family Court used eighteen (18) pages to set forth the testimony of the witnesses and then sets forth it's findings of facts and conclusions of law. He finds that each of the children have been sexually abused, but says "That the Respondent has utterly failed to establish by credible, clear and convincing evidence, a preponderance of the evidence or any other applicable standards that Mr. B is in any way responsible for this abuse or that he in any way has abused his child."

The Family Court does so in face of all of the eighteen (18) pages of testimony that he recites and the recommendation and acknowledgment of the Guardian Ad Litem that the infant child reported to her of sexual abuse by Mr. B The Court then goes on to address Keith Allen A. v. Jennifer J.A. 500 S.E. 2d 552, (W.Va. 1997). However the Family Court ignores the standard of credible evidence and some how elevates credible evidence to evidence superior to clear and convincing or a preponderance of evidence, which of course is not consistent with the Ruling of this Honorable Court.

Therefore, there is no question that the Family Court abused it's discretion in it's findings of facts, in that it totally ignored all of the unrebuted expert testimony that was given by various experts and the Guardian Ad Litem that clearly showed that Mr. B had sexually abused his children. Every expert that testified, testified that they believed sexual abuse did occur. There was no evidence or testimony, other than Mr. B 's denial, that it did not occur.

Further, every recommendation, by the experts and by two (2) separate Guardian Ad Litems, given to the Court, in regard to contact between Mr. B and the children was that it be done by supervised visitation. It is impossible to imagine what other evidence, without a confession, the Court would need to find credible evidence of sexual abuse to a minor child who is unable to testify in Court.

Further, it should be noted that Mr. B has not even availed himself the opportunity of the Temporary Order giving him supervised visitations with his children in the presence of his sister.

In addition, this Court has long held that the best interest of the child is paramount in visitation. See, Carter v. Carter 196 W.Va. 239, 470 S.E. 2d 193 (1996). This Court has held that in deciding whether visitation should be supervised, the Court must "weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the

abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true." Syl. Pt. 3, Carter v. Carter, supra.

In this case, if under the first part of the analysis set forth in Carter, the allegations are false, then if supervised visitation were granted, although Mr. B ., would likely visit his infant children with someone to supervise him, there would also be a benefit and very little harm to the Appellee. The children's counselor, Tammy Hamner testified the Appellee would also benefit from supervised visitation because supervision will eliminate the likelihood of any further allegations of abuse. However, it is very strange that Mr. B has failed to see his children for months even though he was awarded supervised visitation under the supervision of his sister, whom he selected as a supervisor.

Under the second part of the analysis set forth in Carter, the risk of harm to both children is indeed very high if the allegations are true. If the allegations are true, the children would be put at great risk for further sexual assault by Joseph M. B ., if he were given unsupervised "Schedule A" Visitation as Ordered by the Family Court.

Similar type cases have been before this Court on various occasions. See, Meadows v. Meadows, 504 S.E. 2d 154, 202 W.Va. 327 (1998), Haller v. Haller, 481 S.E. 2d. 793, 198 W.Va. 487 (1996), Keith Allen A. v. Jennifer J.A., 500 S.E.2d 552 (W.Va. 1997) and Carter v. Carter, supra and this Court has always held that the evidentiary standard was that of credible evidence. The Family Court totally ignores it's own findings of fact to reach his conclusion. First, he acknowledges the Guardian Ad Litem reported to the Court and testified Jason described to her in detail the sexual abuse of his father. It then reviews the three (3) expert witnesses (all qualified by the Court), the first Kerry Jones, qualified by the Court as an expert in child abuse stating unequivocally that the child's

statement of abuse by the father was credible. The second expert, likewise qualified, also testified as to what the child, Jason, said concerning sexual abuse by his father, there was no question as to the credibility of Jason and she reported the incident to Child Protective Services. The last expert is Tammy Hamner, who qualified her testimony by stating she did not do an evaluation on the issue of sexual abuse because her job was to provide therapy. However, she was clear that she felt supervised visitation was appropriate, as she stated, "I do believe something happened or something's wrong."

The Court then went on to state why he failed to find the evidence of sexual abuse to the children by the father. However, he finds the children have been sexually abused, but failed to take any action to protect them.

The Court misapplied the law to the facts of this case and certainly did not apply the proper standard.

The best interest of J.S. and M.B. dictates, at a minimum, that Joseph M.. B 's visits with his children be supervised by an non-related adult and in a way that creates minimum harm to the children and is closely monitored by a professional.

Therefore, the Court was wrong in granting the Appellee unsupervised visitations with the parties' infant children and the Family Court Order of May 16, 2005 and the Order of the Circuit of July 20, 2005, should be reversed.

RELIEF REQUESTED

It is clear that nothing other than supervised visitation should be granted to Mr. B and that the Family Court was clearly erroneous in it's findings of fact and it's decision was an abuse of

the Court's discretion in the application of law and this Court should determine that the Appellee's visitation with the parties' infant children should only be supervised visitation.

DESIGNATION OF RECORD

Entire Record - Including all Pleadings, Motions, Order and Reports of Guardians Ad Litem

NAMES AND ADDRESSES OF PERSONS UPON WHOM NOTICE OF THIS ACTION SHOULD BE SERVED

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Appellee, Pro Se

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Attorney at Law
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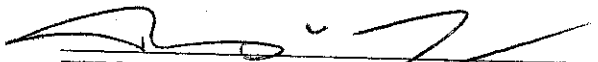
Guardian Ad Litem

Respectfully Submitted:



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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2006, I served the foregoing **Brief of Appellants** on behalf of the Appellants upon the following persons, by depositing a true and exact copy thereof in the United States mail, postage prepaid and properly addressed as follows:

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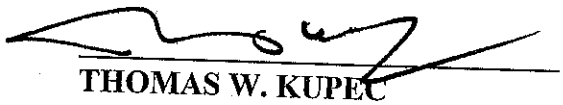

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