

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33226

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

IN RE: THE MARRIAGE/CHILD OF

MISTY D. FARMER (now GOWINS), Petitioner Below,

and

RODNEY L. FARMER, Respondent Below

RODNEY L. FARMER, Appellant

BRIEF OF THE APPELLANT

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**KIND OF PROCEEDING AND NATURE
OF RULING IN LOWER TRIBUNAL**

This appeal seeks the reversal of the entry of an Order Reversing the Family Court Order of November 18, 2005 by the Circuit Court of Raleigh County on April 11, 2006 and the affirmation of an Order of Modification entered by the Family Court of Raleigh County on November 8, 2005. During the proceedings below, the Family Court entered an Order of Modification on November 8, 2005, in which it found that the petitioner, Misty D. Gowins' then live-in boyfriend (and current husband) sexually abused the daughter that Mrs. Gowins shared with the respondent below and appellant herein, Rodney L. Farmer. Based upon the Family Court's finding that the child had been sexually abused, that Mrs. Gowins had failed to appropriately protect the child from abuse and that Mrs. Gowins had encouraged the child to recant her allegations after the sexual abuse was initially disclosed, the Family Court entered an Order of Modification in which it granted Mr. Farmer's petition for modification of child custody and restricted Mrs. Gowins' custodial time with the child so that she could only exercise supervised custodial time with the parties' child. On appeal, the Circuit Court reversed the Family Court's Order of Modification, finding that the Family Court had improperly relied on inadmissible expert witness testimony and inadmissible hearsay. Instead of remanding this matter to the Family Court for a determination as to whether the remaining, admissible evidence was sufficient to sustain Mr. Farmer's petition for modification or whether the Family Court wished to reconsider its decision to deny Mr. Farmer's motion to take the child's testimony, however, the Circuit Court summarily concluded that there was insufficient remaining evidence to sustain Mr. Farmer's petition for modification and entered an Order denying the petition. Mr. Farmer now seeks the

reversal of the Circuit Court's Order and an affirmation of the Family Court's Order of Modification granting his petition for modification of child custody.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter is ultimately before this Court as the result of a petition for modification of child custody filed by the respondent below and appellant herein, Rodney L. Farmer, against the petitioner below, Misty D. Gowins. (See Petition for Modification and Emergency Relief.) Prior to the parties' divorce on August 21, 2003, a child, Lexis Nicole Farmer, was born to Mr. Farmer and Mrs. Gowins on May 25, 1999. (See Order of Modification, ¶¶ 1-2.) Following the parties' divorce, Mr. Farmer was allocated primary custody of the parties' child and Mrs. Gowins was awarded custodial time with the child no less than two days per week, to be exercised in a manner that allowed Ms. Gowins to spend custodial time with the child on her days off from her employment. (See Order of Mod., ¶ 2.) Mr. Farmer and Mrs. Gowins exercised custodial time with their daughter without incident under this custodial schedule until November 20, 2003, when Mr. Farmer filed a petition for modification and emergency relief, alleging that the parties' daughter had been sexually abused by Mrs. Gowins' then-boyfriend, Thomas Gowins. (See *id.* at ¶ 4.)

Following the filing of Mr. Farmer's petition, the Family Court suspended the exercise of custodial responsibility by Mrs. Gowins with the parties' daughter on an *ex parte* basis until such time as a temporary hearing could be held by the Court pursuant to this Court's decision in State ex rel. Chris Richard S. v. McCarty, 200 W.Va. 346, 489 S.E.2d 503 (1997), and appointed Stacy Lynn Daniel-Fragile to serve as guardian *ad litem* for the child. (See Order of Mod., ¶ 5.) After a temporary hearing at which Mrs. Gowins offered to relinquish her parental rights to the child in return for the dismissal of Mr. Farmer's petition,

after Mrs. Gowins' subsequent marriage to the alleged perpetrator of the sexual abuse during the pendency of these proceedings and after a report by the guardian *ad litem* in which the guardian *ad litem* indicated that both Mrs. Gowins and the alleged perpetrator, Thomas Gowins, had been deceitful about Mr. Gowins' access to the child during the time when the abuse was alleged to have occurred, the Family Court conducted two days of evidentiary hearings on Mr. Farmer's petition. (See id. at ¶¶ 6-8.)

Based upon the evidence presented in support of and in opposition to the petition, the Family Court concluded that Thomas Gowins had sexually abused the parties' daughter. (See Order of Mod., ¶ 9.) The Family Court based this finding on, among other evidence, the fact that the child had begun experiencing vaginal soreness and irritation upon return from visits at Mrs. Gowins' home. (See id.) The parties' child further began acting out in ways that were sexually inappropriate for a child of her age at around the time that the abuse was believed to have begun. (See id.) During counseling sessions and at other times, the child indicated that Thomas Gowins had been the perpetrator of the sexual abuse. (See id.) The Family Court's findings that Thomas Gowins had sexually abused the child were further buttressed by the fact that both Thomas Gowins and Mrs. Gowins were deceitful to the guardian *ad litem* during her investigation into the allegations made by Mr. Farmer in his petition, including denying the presence of a wooded area near Mrs. Gowins' home where the child alleged the abuse to have occurred and being dishonest about the amount of time that the child had spent alone with Mr. Gowins. (See id. at ¶¶ 6-8.)

In addition to these findings, the Family Court found that Mrs. Gowins had demonstrated a complete unwillingness to protect the child from abuse by Thomas Gowins. (See id. at ¶ 10.) This finding was based on, among other things, the following facts:

1. Mrs. Gowins married Thomas Gowins at a time when she admitted she was unsure of the truth of the allegations of sexual abuse made by her daughter;
2. In an interview with the guardian *ad litem*, Mrs. Gowins denied that Thomas Gowins had ever been left alone with the child during the time when the abuse was alleged to have occurred. During a separate interview with the guardian *ad litem* on the same day, Mr. Gowins acknowledged that he had in fact been left alone with the child. Mrs. Gowins acknowledged during her sworn testimony during the final hearing on the petition for modification that she had made false statements during her interview with the guardian *ad litem*;
3. Mrs. Gowins encouraged the child to recant her allegations of abuse against Mr. Gowins during sexual abuse counseling sessions;
4. Mrs. Gowins denied that there were any wooded areas around her home in response to statements by the child's counselor that the abuse was alleged to have taken place in a wooded area around Mrs. Gowins' home. Other members of Mrs. Gowins family confirmed that there wooded areas in the locations described by the child; and
5. Mrs. Gowins took the child a Christmas card signed by Thomas Gowins to a Christmas visitation after the child had disclosed the sexual abuse and after the Court had prohibited contact between the child and Thomas Gowins.

(See id.) Based upon the Family Court's findings, the Family Court granted Mr. Farmer's petition for modification and ordered that all future custodial time exercised with the child by Mrs. Gowins take place under the supervision of the Women's Resource Center Supervised Visitation Program in Beckley, West Virginia. (See id. at COL # 3.)

Following the entry of the Family Court's Order of Modification, Mrs. Gowins appealed the Order to the Circuit Court, alleging that the Family Court had improperly considered inadmissible hearsay evidence, had improperly considered expert opinion evidence from the child's counselor, Susan McQuaide, and had applied an improper standard of proof in deciding Mr. Farmer's petition. (See Petition for Appeal.) After considering the issues raised by Mrs. Gowins, the Circuit Court concluded that the Family Court had improperly considered opinion evidence by the child's counselor on the issue of

whether Thomas Gowins had abused the child and that the Family Court had improperly admitted statements made by the child to her counselor during counseling sessions, in violation of evidentiary rules prohibiting the admission of hearsay. (See Memorandum, April 11, 2006.) Rather than remanding the case to the Family Court for a determination of whether the properly-admitted evidence that remained would have been sufficient to sustain the Family Court's findings (and whether the Family Court would then reconsider its decision not to allow Mr. Farmer to elicit direct testimony from the child because such evidence was available through other means), the Circuit Court reviewed the remaining evidence that it deemed admissible and determined that it was insufficient to sustain Mr. Farmer's petition for modification. (See id.) Based upon this conclusion, the Circuit Court reversed the Family Court's Order of Modification, effectively denying Mr. Farmer's petition for modification and restoring Mrs. Gowins to the schedule of custodial responsibility that she was exercising at the time the Family Court found that the child had been sexually abused. (See Order, April 11, 2006.)

After he received the Circuit Court's ruling reversing the Family Court's Order of Modification, Mr. Farmer moved the Circuit Court to stay enforcement of its decision until such time as Mr. Farmer could present his petition for appeal to this Court. (See Motion to Stay.) In support of his request, Mr. Farmer argued that restoring Mrs. Gowins to the schedule of custodial time that she exercised prior to the filing of the petition for modification would expose the child to the risk of further abuse while Mr. Farmer attempted to have the Circuit Court's Order overturned. (See id.) As Mrs. Gowins had been exercising the same supervised visitation provided for under the Order of Modification throughout the proceeding, Mr. Farmer argued that the decrease in time to Mrs. Gowins was

far outweighed by the need to protect the child while this matter was further litigated. (See id.) On May 12, 2006, the Circuit Court entered an Order granting Mr. Farmer's motion to stay, suspending the enforcement of its April 11 Order until the expiration of the period in which an appeal could be filed with this Court or until action was taken by the Court on Mr. Farmer's appeal, if an appeal was filed. (See Order Granting Motion to Stay.) Based upon the fact that the Circuit Court erred in its evidentiary rulings and erred in failing to remand this matter back to the Family Court following the appeal for a determination as to whether sufficient evidence remained to support the Family Court's ruling following the evidentiary rulings made by the Circuit Court, the Circuit Court's Order should be reversed and this matter should be remanded to the Circuit Court for the reinstatement of the Family Court's Order of Modification.

ASSIGNMENTS OF ERROR

- 1. The Circuit Court erred in its conclusion that the Family Court improperly considered inadmissible hearsay and expert witness opinion evidence in rendering its decision to grant the petitioner's petition for modification of child custody.**
- 2. Even if the Circuit Court were correct in its conclusion that the Family Court improperly considered inadmissible hearsay and expert witness opinion evidence in rendering its decision to grant the petitioner's petition for modification of child custody, the Circuit Court erred by not remanding the matter to the Family Court for a determination as to whether sufficient evidence remained to grant the petitioner's petition for modification and whether the Court would reconsider its decision to permit the presentation of testimony from the parties' child in light of the Circuit Court's ruling.**

DISCUSSION OF LAW AND RELIEF PRAYED FOR

- 1. Standard of Review.**

This Court's standard of review for an appeal from a circuit court that reviewed a family court's final order, or refused to consider a petition for appeal to review a family

court's final order, is the same. In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, this Court will review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. Questions of law are reviewed *de novo*. See Syl. pt. 1, May v. May, 214 W.Va. 394, 589 S.E.2d 536 (2003).

2. The Circuit Court erred in its conclusion that the Family Court improperly considered inadmissible hearsay and expert witness opinion evidence in rendering its decision to grant the petitioner's petition for modification of child custody.

In its April 11 Order, the Circuit Court essentially held that the Family Court committed two evidentiary errors in support of its decision to grant Mr. Farmer's petition for modification based upon the Family Court's finding that Mrs. Gowins' live-in boyfriend had sexually abused the parties' daughter. First, the Circuit Court held that the Family Court erred by permitting an expert witness offered by Mr. Farmer in the field of sexual abuse counseling to opine, based upon statements made by the child during counseling, that Mrs. Gowins live-in boyfriend had sexually abused the child. Second, the Circuit Court held that the Family Court improperly considered hearsay statements made by the child in violation of the West Virginia Rules of Evidence. The Circuit Court erred in each of these holdings.

As to the Circuit Court's finding that the Family Court improperly considered expert opinion evidence from the child's sexual abuse counselor that Mrs. Gowins' live-in boyfriend had committed the sexual abuse, there is nothing in the record made during the proceedings in Family Court to suggest that the Family Court based the ruling contained within the Order of Modification on any such opinion evidence. The Order of Modification entered by the Family Court contains, including sub-findings, contains seventeen separate

findings of fact made by the Family Court to supports its ruling. None of these seventeen findings make any reference to opinion evidence that was offered by the child's sexual abuse counselor that Mrs. Gowins' live-in boyfriend had in fact committed sexual abuse against the child. Rather, the Family Court's ruling was based upon factual findings that included testimony about the child's physical condition, testimony about the child's knowledge of sexual activity, testimony about the child's sexual acting out and testimony regarding the child's identification of Mrs. Gowins' live-in boyfriend as the perpetrator of the abuse during counseling sessions, which were admitted for the truth of the statements as an exception to the rule prohibiting hearsay testimony because the statements were made for the purpose of medical diagnosis or treatment. The Family Court's ruling was further based upon conduct by Mrs. Gowins and her live-in boyfriend after the allegations of sexual abuse became known, including the fact that Mrs. Gowins and her live-in boyfriend lied to the guardian *ad litem* and the child's sexual abuse counselor regarding Mr. Gowins' access to the child during the time when the abuse is alleged to have occurred and the location about where the abuse was to have occurred. Hence, to the extent that the Family Court heard evidence regarding the child's sexual abuse counselor's opinion on whether Mrs. Gowins' live-in boyfriend had committed sexual abuse in error, such error was harmless because the Family Court did not consider such evidence in rendering its decision.

As to the child's extrajudicial statements that were admitted as evidence in the final hearing on Mr. Farmer's petition for modification, the Circuit Court's holding that such statements were not admissible as statements for the purposes of medical diagnosis is clearly wrong. In support of its holding, the Circuit Court incorrectly stated that the admissibility of the statements made by the child during sexual abuse counseling turned on the purpose for

which the statements were offered into evidence, rather than the purpose for which the child was seeking counseling in the first place. (See Memorandum, p. 7.) The Circuit Court relied on State v. Pettrey, 209 W.Va. 449, 549 S.E.2d 323 (2001) to support its holding. Contrary to the Circuit Court's holding, however, the Family Court found that the statements made to the child's sexual abuse counselor were statements that were made for the purpose of medical diagnosis, as opposed to statements made as part of a forensic investigation aimed at gathering evidence in support of Mr. Farmer's petition for modification. As this Court held in Pettrey and reaffirmed in State v. Shrewsbury, 213 W.Va. 327, 582 S.E.2d 774 (2003), statements made by a child to the child's therapist are admissible as an exception to the hearsay rule under Rule 803(4), as statements for the purpose of medical diagnosis, where the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible, however, if the evidence was gathered strictly for investigative or forensic purposes. See id.

The Circuit Court, in its memorandum ruling, did not dispute that the statements made by the child to the child's sexual abuse counselor were the type of statements that were reasonably relied on by the child's counselor as part of her treatment of the child. Moreover, the Circuit Court did not find that the child was enrolled in counseling solely for investigative or forensic purposes and the Circuit Court did not find that the child's reason for seeing the counselor was to promote treatment of the problems that she had been having as a result of being sexually abused. Instead, the Circuit Court found that, because the statements were considered by the Court as proof that Mrs. Gowins' live-in boyfriend had

actually sexually abused the parties' child, they ceased to be statements for the purposes of medical diagnosis and were inadmissible hearsay.

In its analysis, the Circuit Court incorrectly held that the initial consideration in determining whether a statement can be admitted under the medical diagnosis exception to the hearsay rule is the purpose for which the statement is being offered. Such an analysis is inconsistent with the holdings of this Court in Pettrey and Shrewsbury, in which this Court clearly held that the threshold inquiry on the admissibility of statements made to medical providers to be whether the statement was being offered for the purposes of treatment or whether the statement was being offered for investigative purposes. If the trial court, after conducting that threshold inquiry, determines that the statements were made for the purposes of medical treatment, then the statements would be admissible under Rule 803(4) of the West Virginia Rules of Evidence as an exception to the rule prohibiting the admission of hearsay evidence. Once the statements are determined to be admissible, however, under Rule 803(4), the statements may be considered by the trial court for any purpose, including to prove the truth of the matters asserted in that statement. The Family Court properly considered the statements made by the child during counseling as statements made for the purpose of medical diagnosis and treatment, and held that such statements were admissible for their truth under Rule 803(4) of the West Virginia Rules of Evidence.

Accordingly, based upon the Family Court's conclusion that the statements were made by the child to the child's sexual abuse counselor for the purposes of the child's medical treatment, the statements were admissible as an exception to the hearsay rule under Rule 803(4). Upon admission, the Family Court was then free to consider the statements to prove the truth of the matters asserted in those statements, that Thomas Gowins had sexually

abused the child. Inasmuch as the Circuit Court concluded that the statements were inadmissible hearsay because they were being offered to prove the truth of the matter asserted, the Circuit Court's April 11 Order was erroneous and should be overturned by this Court. Moreover, because the Family Court's Order of Modification does not contain any factual findings that would suggest that the Family Court relied on the opinion of the child's counselor as to whether Thomas Gowins had perpetrated sexual abuse against the child, any such opinion evidence that was admitted in error was harmless and cannot be the basis for overturning the Family Court's Order of Modification.

3. **Even if the Circuit Court were correct in its conclusion that the Family Court improperly considered inadmissible hearsay and expert witness opinion evidence in rendering its decision to grant the respondent's petition for modification of child custody, the Circuit Court erred by not remanding the matter to the Family Court for a determination as to whether sufficient evidence remained to grant the respondent's petition for modification and whether the Court would reconsider its decision to permit the presentation of testimony from the parties' child in light of the Circuit Court's ruling.**

During the proceedings in Family Court, Mr. Farmer filed a motion under Rule 17 of the West Virginia Rules of Practice and Procedure for Family Court in which he requested that the Court take the *in camera* testimony of the parties' child regarding the allegations of sexual abuse against Mrs. Gowins' live-in boyfriend. (See Motion to Take Testimony of Minor Child.) Prior to the conclusion of Mr. Farmer's case-in-chief, Mr. Farmer requested that the Family Court take the child's testimony *in camera* in regards to the issues raised by Mr. Farmer's petition for modification. Under Rule 17, prior to deciding whether to consider testimony of a child under the age of fourteen years, a family court is required to determine whether the necessity of the child's testimony outweighs the potential

psychological harm to the child that might be caused if the child is required to testify.¹ Specifically, a family court may exclude the child's testimony if it finds that "(A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than other forms of evidence presented; and (C) the general purposes of these rules and the interests of justice will be best served by the exclusion of the child's testimony." W.Va. R.C.A.N.P. 8.

Primarily because the Family Court had heard the statements made by the child during the course of her sexual abuse counseling, the Family Court refused to permit Mr. Farmer to offer the child's testimony about who perpetrated the sexual abuse upon her. Although the Circuit Court concluded that the Family Court erred by admitting evidence regarding the statements made by the child to her counselor, the Circuit Court simply inserted its own judgment as to the probative value of the remaining evidence and did not remand the case to the Family Court for a determination as to whether it would be appropriate to reconsider the motion to take the child's testimony in light of the Circuit Court's evidentiary rulings. In refusing to allow the further factual development of the record in this matter on remand and in refusing to allow the Family Court to consider whether sufficient additional evidence remained to justify its ruling, the Circuit Court substituted its judgment as the appellate court for the Family Court as the trial court on matters that are properly to be decided by the trial court. In so doing, the Circuit Court committed error.

¹ Rule 17 of the West Virginia Rules of Practice and Procedure for Family Court incorporates by reference the provisions of Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 8 provides the framework under which a family court judge must consider a motion to take testimony from a child under the age of fourteen years.

While Mr. Farmer recognizes that the Circuit Court, as the initial appellate court, is charged with deciding disputed questions of law in appeals that are brought before it, the Circuit Court in the instant case should have recognized that the evidence that was excluded as hearsay (the child's statements) was available as direct evidence through testimony from the child. Moreover, Mr. Farmer's intention to present this evidence (and to prevent the exact type of evidentiary challenge employed by Mrs. Gowins) was evident from the recording of the final hearings that was considered by the Circuit Court on appeal and in the written motion filed by Mr. Farmer in accordance with Rule 17 of the West Virginia Rules of Practice and Procedure for Family Court. Inasmuch as the Family Court's refusal to permit the presentation of testimony from the child was predicated upon the availability of identical evidence through the child's statements to the child's sexual abuse counselor for medical diagnosis, the Circuit Court should have recognized that the exclusion of that evidence removed the basis for the Family Court's refusal to permit Mr. Farmer to offer the child's testimony. Although it cannot be certain that the Family Court would have allowed the child's testimony, it is clear that such a determination is to be made by the Family Court in accordance with the provisions of Rule 17 of the West Virginia Rules of Practice and Procedure for Family Court. In this case, the Family Court was never given the opportunity reassess the factors provided under Rule 17 because the Circuit Court substituted its own judgment for the Family Court's and decided the matter in the way it deemed fit without remand. Although the Circuit Court's ruling might have been appropriate if the hearsay declarant had been unavailable at the time of the final hearing, the record in this case is clear that the child was available to give testimony that might have been identical to the statements attributed to her by her sexual abuse counselor. In the event that the matter was

remanded and those statements were admitted, there would have been a clear basis for the entry of the Order of Modification. Hence, if this Court agrees with the Circuit Court's decision to exclude the child's statements to her sexual abuse counselor under the hearsay rule, this Court must remand this action to the Family Court for a determination as to whether the Court would permit Mr. Farmer to offer the child's testimony in support of his petition for modification. It was clear error for the Circuit Court to provide for such a remand.

CONCLUSION

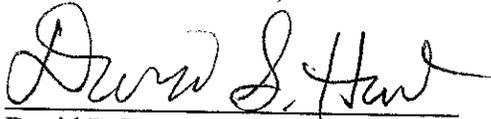
As demonstrated by the facts developed below and the legal authority cited herein, the Circuit Court erred in its decision to overturn the Order of Modification entered by the Family Court on November 8, 2005. As to the Circuit Court's finding that the Family Court improperly considered expert opinion evidence from the child's sexual abuse counselor that Mrs. Gowins' live-in boyfriend had committed sexual abuse against the child, there is nothing in the record made during the proceedings in Family Court to suggest that the Family Court based its ruling on any such opinion evidence. As to the Circuit Court's findings that the Family Court improperly considered the child's extrajudicial statements that were admitted as evidence in the final hearing on Mr. Farmer's petition for modification, the Circuit Court's holding that such statements were not admissible as statements for the purposes of medical diagnosis is clearly wrong. Finally, to the extent that the Circuit Court was correct in its rulings, this matter should be remanded to the Family Court for a determination as to whether sufficient evidence remains to support the Family Court's Order of Modification and for a determination of whether the Family Court would

reconsider its refusal to allow Mr. Farmer to present *in camera* testimony from the child on the issues raised by Mr. Farmer's petition for modification.

WHEREFORE, the respondent below and appellant herein, Rodney L. Farmer, prays that this Court grant his petition for appeal and permit presentation of the appeal to the Court; that the Order Reversing the Family Court Order of November 18, 2005 entered by the Circuit Court of Raleigh County be overturned and that this Court affirm the Order of Modification entered in this matter by the Family Court of Raleigh County, or, in the alternative, that this matter be remanded to the Family Court for further proceedings as deemed necessary based upon the relief awarded to the appellant; and for such other and further relief as the Court may deem just.

RODNEY L. FARMER
By Counsel

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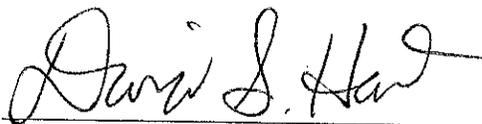
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CERTIFICATE OF SERVICE

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Petition for Appeal upon the following parties or their counsel, by United States mail, first-class, postage prepaid, on the 11th of August, 2006, to the following address:

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