

NO. 35138

SUPREME COURT OF APPEALS OF WEST VIRGINIA

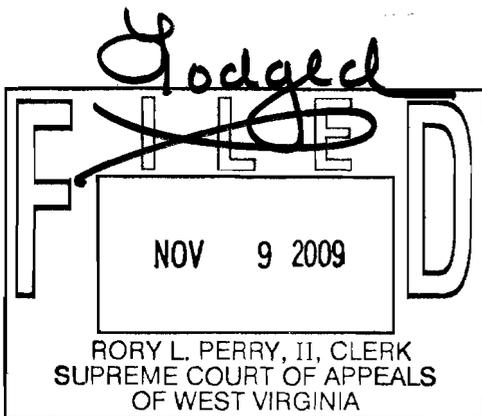
CHARLESTON

IN RE: JUVENILE PETITION NOS.
JOEL T. 08-JA-66-3
KATELYN T. 08-JA-67-3

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A. MATISH, JUDGE

APPELLANTS' BRIEF

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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**STATEMENT OF THE KIND OF PROCEEDING
AND NATURE OF THE RULING BELOW**

On November 10, 2008, maternal grandmother, Charlotte P.¹ and Janet P., maternal aunt, of the infant children Joel T. and Katelyn T., filed a verified private abuse and neglect petition alleging that the infant children were abused and neglected and naming the children's mother, April P. and father Joshua T. as respondents. The petition further alleged that the infant children were in imminent danger to their physical well-being and that continuation in the home was contrary to the best interests of the children.

On November 14, 2008, the West Virginia Department of Health and Human Resources ("WVDHHR") sought and was granted emergency custody of said infant children, which emergency custody was ratified by the Circuit Court on November 17, 2008. On November 21, 2008, an Amended Abuse and Neglect Petition was filed in which the WVDHHR joined as a co-petitioner with Charlotte P. and Janet P., adding additional specific allegations of abuse disclosed by the children to Margaret Tordella ("Tordella"), a counselor employed with the United Summit Center in Clarksburg, Harrison County, West Virginia. The amended petition also named Michael A., Sr., the live-in boyfriend of the mother, April P., as an additional respondent.

On November 21, 2008, Respondent Mother, April P., and Respondent Father, Joshua T. waived their respective rights to a preliminary hearing on the matter of emergency custody being granted to the WVDHHR, said waivers being accepted by the court by order dated December 11, 2008. In said Order Waiving Preliminary Hearing, the lower court found that continuation in the

¹ In keeping with the practice of the West Virginia Supreme Court of Appeals in juvenile and domestic relations cases which involve sensitive facts, this Petition does not utilize the last names of the parties. State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M., 177 W. Va. 688, 689, 356 S.E.2d 181, 182.

home would be contrary to the children's welfare and best interest and granted continuation of temporary legal and physical custody of the children to the WVDHHR, with the children continuing in relative placement with Charlotte P. And Janet P. Visitation was ordered twice weekly with the Respondent Mother, April P. and once bi-weekly with the Respondent Father, Joshua T. All visitation was ordered to occur at the Harrison County Child Advocacy Center or another neutral site.

On December 11, 2008, adjudication was commenced in this matter but was continued by oral motion of the Petitioner, WVDHHR, until January 22, 2009. The continuance was granted with no objections being heard by any of the parties, for the purpose of allowing Channin Kennedy, PhD., of Kennedy Psychological Services in Morgantown, West Virginia, to perform a sexual abuse evaluation of the children. The court further ordered that Dr. Kennedy be prepared to testify in this matter at the January 22, 2009 adjudicatory hearing.

On January 22, 2009, the second day of the adjudicatory hearing was held, but adjudication was not completed on that day due to time constraints. On February 2, 2009, the adjudicatory hearing was completed, with closing arguments being made on February 4, 2008, at the conclusion of which the Court scheduled a hearing for February 18, 2009, for the purpose of announcing its ruling.

On February 18, 2009, the Court orally announced its ruling on the adjudication of the Respondents. Said ruling was reduced to writing by order titled Ruling Following Adjudication of All Respondents and Disposition of Respondent, Joshua T dated February 25, 2009. In its ruling, the Court dismissed the matter with relation to Respondent April P. and her boyfriend,

Respondent, Michael A., Sr.² It is from this ruling that the WVDHHR and attorney for the children appeal.

At the conclusion of the February 18, 2009 hearing, the attorney for the infant children announced to the Court her intent to appeal the ruling and orally moved the lower court to stay its ruling pending the outcome of an appeal to this Court. The Court denied said oral Motion to Stay.

February 18, 2009 counsel for the infant children and all co-petitioners formally moved this Court, to stay the order of the underlying Court pending the outcome of an appeal. Said written motion was denied by this Court in a three (3) to two (2) vote by order dated March 23, 2009.

STATEMENT OF FACTS

April P. is the biological mother of child Katelyn T., born on June 8, 2004, and the child Joel T., born on June 30, 2005. Joshua T. is the biological father of both children. The children resided the majority of their lives on the family dairy farm in Harrison County, West Virginia. Petitioner Charlotte P. is the maternal grandmother of the subject children, and Petitioner Janet P. is the maternal aunt of the children. Charlotte P. and Janet P. Both live on the dairy farm, but live in separate homes. Janet P. lives with her fiancé and her father (the biological grandfather of the children), who is ill and cannot maneuver the steps of the home he owns with Charlotte P. The children have primarily resided in the home of Charlotte P. since their births, both with and without their mother. The children have also been regularly cared for by Janet P and have also resided in her home. At times, the Respondent Mother, April P., has also lived on the dairy farm with her parents and the children, beginning at the time of Katelyn T.'s birth and continuing until June 2007,

² The Court terminated the parental rights of the children's biological father, Joshua T. by the February 25, 2009 order. Said ruling is not the subject of the instant appeal.

when April P. moved in with her current paramour, Michael A., Sr. At times, Respondent Father, Joshua T., also resided on the dairy farm with the child's mother. Joshua T. has not seen the children since the children's joint birthday party in June of 2007 held at the Dairy Farm.

After June of 2007, when April P. stopped residing with her mother on the family dairy farm, the children continued to reside with Charlotte P. and spent weekends with their mother and Respondent Michael A. Sr. After a period of time, the children began spending alternating weeks in the home of Respondent Mother, April P. and her paramour, Respondent Michael A. Sr., and the home of Charlotte P. At all times, Janet P. continuing to provide a great deal of care for the children, including work-related child care for Respondent Mother and assistance for Charlotte P.

On May 14, 2008, Janet P. sought an emergency protective order from the Magistrate Court of Harrison County on behalf of Katelyn T. And Joel T.. Said Emergency Protective Order was granted and a final hearing was set before then Family Court Judge of Harrison County, M. Drew Crislip ("Judge Crislip") on May 27, 2008. Said petition was based, *inter alia*, on the allegation that the child, Katelyn T., informed Janet P. that she had touched Michael A., Sr.'s penis and that it was "big and ugly and that white stuff came out of it."

At a May 27, 2008 hearing before Judge Crislip, scheduled as the final hearing on the domestic violence protective order petition, April P., who was represented by counsel, agreed to continue the matter so that a sexual abuse evaluation could be performed. April P. agreed to allow the children to continue to reside with Charlotte P., with care also being provided for the children by Janet P. The parties sought the services of Kennedy to perform the sexual abuse evaluation; however, Kennedy was not immediately available to perform the evaluation. The parties then mutually agreed upon the use of Tordella to perform the evaluation to determined whether the

allegations were founded.

At a hearing before Judge Crislip on June 6, 2008, Jennifer Grey of the WVDHHR informed the Court that Ms. Tordella was performing the sexual abuse evaluation services on behalf of the WVDHHR. *See* June 25, 2008 Order Rescheduling Final Hearing On Domestic Violence Petition and Modifying Emergency Protective Order. At the June 6, 2008 Family Court hearing, the Emergency Protective Order was reaffirmed, thus remaining in full force and effect. *Id.*

As part of her investigation, Tordella interviewed both children. Tordella held a total of seventeen (17) sessions with one or both children, commencing on May 30, 2008, and ending on December 5, 2008. During the sessions, both of the children disclosed instances of inappropriate sexual behavior by April P.'s paramour, Michael A. Sr. All of the sessions, with the exception of two, were held with the two children together, because Tordella's attempts to separate the children were unsuccessful. The children would cry and refuse to meet with Tordella separately when she tried to separate the siblings. On two occasions, Tordella was able to interview the child, Katelyn T. alone because Joel T. was either asleep or uncooperative on the day of the sessions. *See* January 22, 2009 transcript at 26:16-19.

On June 10, 2008, Joel T. disclosed to Tordella that he and Michael A. Sr., played with the child's toy cars together and that Michael A. Sr. put cars in "his butt" that the child would have to get them out of Michael A. Sr.'s rectum and that they would have "poop" on them when they were removed. When referring to the cars used in this incident, the child referenced a Matchbox car on Tordella's desk. *Id.* At 10:3-7. At the adjudicatory hearing in this matter, April T. and Michael A. Sr. specifically denied that the child, Joel T., had any Matchbox cars or any toy cars the size of Matchbox cars, stating under oath to the lower court that the cars were larger than the size of

matchbox cars. See February 2, 2008 transcript at 17:20-24, 21:6-16, 93:11-12.

At the February 2, 2008 adjudicatory hearing, April P. drew a picture indicating the size of the toy cars that Joel T. possessed, said drawing being admitted into evidence as State's Exhibit 3. Id. at 20:19-24, 21:16. April P.'s drawing indicated that the toy car's were approximately three (3) inches by two and three-quarter (2 3/4) inches. Id. April P. stated that the child had approximately twenty-five (25) toy cars, all the same size as her drawing. Id. 50:2-6.

At the January 22, 2008 hearing, Michael A., Sr. 's son, Michael A., Jr., who is nineteen years old and resides with April P. And Michael A. Sr., stated that the child, Joel T., had small toy cars that were not Matchbox brand toys, but were the size of Matchbox cars, describing the cars as generic. Id. at 121:6-23. Specifically, Michael A, Jr. stated that the cars were approximately two (2) inches by less than one (1) inch in size. He further testified that thirty-two (32) of the small toy cars fit into a toy car carrier (sixteen cars each in two columns) that the child, Joel T., had, which was about eighteen (18) inches long. Id. at 127:18-20, 128:4-14.

On July 18, 2008, Joel T. disclosed to Tordella that Michael A., Sr. played with the cars on his "pee- bug". The child, Katelyn T., who was present with her brother at the appointment with Tordella, agreed that this happened. At this appointment, the child, Joel T., also stated that he saw "milk" come out of Michael A., Sr.'s penis. The child clearly distinguished to Tordella that he was aware of the difference between yellow urine and the white substance which he saw come out of Michael A Sr.'s penis. The child indicated to Tordella that urine came out of his (the child's) penis and that it is yellow. See Id. at 13:2-18.

On June 6, 2008, the child, Joel T., repeated to Tordella that Michael A., Sr. plays with cars on his "butt" and "pee-bug". At the same session the child, Katelyn T., disclosed that she was aware

that Michael A., Sr.'s penis had hair on it. Id. at 17:2-3. On August 15, 2009, the children disclosed to Tordella that incidents with the toy cars occurred at Michael A., Sr.'s house. Id. At an October 31, 2008 session, both children again stated that milk came out of Michael A., Sr.'s penis. Id. at 21:20-23. The children informed Tordella that all of the incidents occurred at the home of Michael A., Sr., and their mother, April P.

On November 10, 2008, Judge Crislip issued an Order of Termination of Protective Order, terminating the Emergency Protective Order as of 11:59 p.m. on November 14, 2008. As the reason for the Termination Order, Judge Crislip stated that "counsel for the Petitioner advises the Court she today filed a private Abuse and Neglect action on behalf of her client against the Respondent herein and the father of the children, Joshua T. The Court can take no further action but to note expiration of the Emergency Protective Order." *See* November 10, 2008 Termination of Protective Order.

At the adjudicatory hearing in this matter, Tordella opined that the children's sexual knowledge was not appropriate for their ages. Id. at 25:6. She further opined that the children's reporting has been consistent and, therefore, the reporting was credible. Id. 25:14:17, 41:23-24 and 41:23-24. Tordella testified that she does not believe the children were coached. Tordella reached this opinion based upon the consistency of the children's reporting throughout the numerous sessions over a period of several months. Tordella also based her opinion on the fact that the children did not automatically blurt out the information upon the start of each session, which would be more indicative of children who were coached by a third-party as to what to tell the interviewer. Id. at 42:16-24.

After the filing of the instant Abuse and Neglect action, Kennedy performed a second independent sexual abuse evaluation at the request of the lower court and by agreement of the

parties. Kennedy met with each of the children individually on January 8, 2009, January 13, 2009, and January 15, 2009. *See* February 2, 2009, transcript at 152:9-11. Kennedy also interviewed April P. on January 13, 2009 and Janet P. on January 14, 2009. Like, Tordella, Kennedy found the children to be hard to separate from each other, as well as hard to separate from Charlotte P. and Janet P., who brought the children to the sessions with her. *Id.* at 154:9-11.

The child, Katelyn T., revealed to Kennedy in her third session that her mother's boyfriend, Michael A., Sr. showed his "pee pee" to her and her brother, Joel T. The child, Katelyn T., also disclosed to Kennedy that Michael A., Sr.'s penis squirted "milk". In relating the incident where she saw milk coming out of Michael A. Sr.'s penis, Katelyn described Michael A. Sr. masturbating stating in her own words stated that "he shook it himself with his hand." Katelyn also revealed that she has seen Michael A. Sr.'s buttocks. She revealed to Kennedy that April P. was present in the house at the time of the masturbation incident, but not in the same room when this occurred. *Id.* 155:24. The child, Joel T., disclosed to Kennedy that Michael A., Sr.'s penis squirts "milk" and that Katelyn T. had touched Michael A., Sr. on his penis. *Id.* 156: 1-10, 157:23-24, 158:1-4.

Like Tordella, Kennedy opined that there was no evidence that the children had been coached. *Id.* 161:3-5, 203:12-15. Kennedy opined that the children's disclosures were developmentally appropriate and that the reporting was credible. *Id.* 166:8-10. Kennedy opined that based upon the information the children disclosed, the children exhibited sexual knowledge that was not age appropriate. Based upon the information obtained during her investigation, Kennedy concluded that the children were sexually abused. *Id.* 170:14-16, 206:17-19.

In her sworn testimony, April P. stated that she does not believe that Michael A., Sr. did anything sexually inappropriate to the children. *Id.* 28:22-24, 37:21-22. As an explanation for the

children's inappropriate sexual knowledge, April P. offered information to both Tordella and Kennedy regarding the possibility that the children walked in on Michael A., Sr.'s son, Michael A., Jr., watching Anime, which she described as Japanese cartoons with sexual content. *Id.* 36:5-20 and February 2, 2009 hearing transcript at 64:18-24, 165:9-10. Michael A., Jr. lives with his father and April P. and is nineteen (19) years old.

She further stated that Katelyn T. walked in on Michael A., Sr. using the bathroom. *See* January 22, 2009, transcript, 36:9-10, 46:15-18. Michael A., Sr. testified that the child, Katelyn T., walked in on him while he was using the bathroom on one occasion. February 2, 2009 transcript 91:19-24. Michael A., Jr. stated that all of the doors on the house, with the exception of the bedroom, have locks on them, which are regularly used by the family. *Id.* 122:8-23. He had no knowledge of either of the children walking into the bathroom while someone else was using the bathroom and stated that "every time someone goes to the bathroom, they lock the door." *Id.*

April P. indicated to Kennedy, Tordella, and Wesley Smith ("Smith"), of Levin & Associates in Bridgeport, West Virginia, that she did not believe that Michael A., Sr. committed the acts reported by the children. *Id.* 158:23-24, 159:2, 74:12-15, January 22, 2009 transcript, 158:23-24, 159:1-2. Specifically, during a psychological evaluation, April P. told Smith that her future goal was to disprove the allegation against Michael A., Sr. February 2, 2009 transcript, 74:12-15.

STANDARD OF REVIEW

This Honorable Court has previously held that

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 the Interest Of: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

ASSIGNMENTS OF ERROR

I. The lower court's findings were clearly erroneous because the petitioners presented clear and convincing evidence that sexual abuse of the minor children occurred.

The West Virginia Code defines an abused child, *in part*, as a child whose health or welfare is harmed or threatened by sexual abuse or sexual exploitation. W. Va. Code § 49-1-3(a) (1994). The Code further defines sexual abuse as “[a]ny conduct whereby a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of [sic] the person making such display, or of the child, or for the purpose of affronting or alarming the child.” W. Va. Code § 49-1-3(l) (1994).

The WVDHHR is required to prove allegations contained in an abuse and neglect petition by clear and convincing evidence. W. Va. Code, § 49-6-2(c) (1980). This Code section “does not specify any particular manner or mode of testimony or evidence by which [the WVDHHR] is

obligated to meet its burden.” Syl. Pt. 5, In the Interest Of: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177, (1996), In the Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867(1981).

In the case at hand, the Petitioners met their burden of proof through testimony of two mental health professionals who independently reached the same conclusion, that the children had been sexually abused by Michael A., Sr. as a result Michael A., Sr. engaging in sexual self gratification in front of the children while in the home that the children shared with Michael A., Sr. and their mother, Respondent April P.

Both Tordella and Kennedy interviewed the children on more than one occasion. The children described acts of masturbation and anal self-gratification performed in front of them by Michael A., Sr. in their mother’s home. Both Kennedy and Tordella found the children to be credible. Both experts agreed that the children did not display behavior in their sessions that is typical of children who have been coached by adults as to what to say to the investigator. Both Janet P. and Charlotte P. revealed independent information to Tordella and Kennedy regarding information that the children related to them similar to that revealed by the children to the mental health professionals. Janet P. and Charlotte P. were not simply mimicking the findings related to them by Tordella and Kennedy because both professionals were careful not to disclose their findings to Janet P. and Charlotte P. prior to receiving information regarding the children’s revelations to them.

The child, Joel T., disclosed that Michael A., Sr. played with the child’s Matchbox size toy cars on his own penis. Joel T. disclosed that Michael A., Sr. put the cars in his anus and that there was “poop” on them when it came out. Joel T. further stated that the child, Katelyn T., touched Michael A., Sr.’s penis. The child, Katelyn T. described Michael A., Sr.’s penis as big and hairy. Both children understood what a penis is and where it is on the body. Both children described milk

coming out of Michael A., Sr.'s penis. The child, Joel T., clearly understood the difference between yellow urine and the white substance he saw coming out of Michael A., Sr.'s penis. The child, Katelyn T., explained to Kennedy that the white stuff came out of Michael A., Sr.'s penis after he shook it. This is clearly a description of masturbation and ejaculation.

Both Kennedy and Tordella opined that the children had inappropriate sexual knowledge for their ages. The child, Katelyn T., was four (4) years old at the time of the interviews and the child, Joel T., was three (3) years old at the time of the interviews. Although Kennedy opined that Tordella did not follow standard protocol for forensic sexual abuse evaluations, specifically by interviewing both children together, Kennedy did not find that the children were tainted by the joint interviews. Both professionals found the children to be wholly credible. Neither professional found the children to show any signs whatsoever of coaching by their aunt or grandmother. The children's disclosures were spontaneous and naturally flowed from the interview questions of the professionals. The children's disclosure did not appear rehearsed and were not blurted out at the beginning of the sessions. The finding by the lower court that "[i]t appears to this Court that someone has told these children that white milk comes out of a man's penis and that it needs to be shaken" is simply not substantiated by any evidence before the court.

Respondents April P. and Michael A., Sr. knew the opinions of both Tordella and Kennedy prior to the lengthy substantive evidentiary adjudicatory hearings. Neither Respondent took the step of hiring their own expert to refute the opinions of Tordella and Kennedy. As a matter of fact, absolutely no evidence was presented on behalf of the Respondents by any expert or fact witness to support the notion that the children were coached or were otherwise not credible in their reporting of Michael A., Sr.'s inappropriate sexual behavior.

The lower court ignored the fact that both Respondents April P. and Michael A., Sr. clearly perjured themselves on the witness stand. The child, Joel T., disclosed to Tordella that Michael A., Sr. played with a car resembling a Matchbox car on his penis and that he put it in his (Michael A., Sr.'s) rectum. Tordella had a Matchbox car on her desk when she interviewed Joel T. The child identified his car as being similar to the one on Tordella's desk. Both Respondents testified that the cars Joel T. played with were much larger than a Matchbox car. April P. actually drew a picture of the size of the toy cars her son played with. The drawing was substantially larger than the actual size of her son's toy cars.

Michael A., Jr. truthfully testified that, in fact, Tordella was correct in that the child's toy cars are the size of Matchbox cars. Michael A., Jr. further testified that the child had another toy that served as a carrier for thirty-two of the smaller, Matchbox size cars. The carrier was only a foot and one-half long. Michael A., Jr. resided in the home with the children and had first hand knowledge of the size of Joel T.'s toy cars. Michael A., Jr. had no motivation to lie to the court. He had not heard the testimony of his father or Respondent April P. prior to his testimony. He took an oath and told the truth, unlike the Respondents.

The Respondents tried to come up with other stories about how the children may have disclosed what they did to Tordella and Kennedy. One such explanation was the fact that Michael A., Jr. watched pornographic cartoons in the home. Even if this were a plausible explanation for the children's reporting, which the experts found it was not, the Respondents lack any credibility because they changed their story in court. Apparently, April P. and Michael A., Sr. panicked and thought that their story about the pornography would have still cause the court to find that abuse occurred due to the exposure of the children to pornography. In court, under oath, after April P.

reported to both Tordella and Kennedy that Michael A., Jr. watched animated pornography, she and Michael A., Sr. both testified that the cartoons were just scantily-clad women. Both testified that the cartoons had no sexual content.

April P. and Michael A., Sr. also tried to espouse another theory for the explanation of the children's reporting by claiming the child, Katelyn T., walked in on Michael A., Sr. while he was urinating. Interestingly, even though Michael A., Jr. lived in the home, he never heard of this incident. Further, Michael A., Jr. did not believe that anyone could walk in on another person using the bathroom in the home, since it was the firm practice to lock the door in each room behind them. At no point during April P. or Michael A., Sr.'s testimony did they mention the lock on the door. Even when discussing the incident and how they discussed how to avoid future such incidents, April P. did not mention the locks.

Further, neither April P. Or Michael A., Sr. testified that Joel T., walked in on Michael A., Sr. using the bathroom and even if he had, Joel T., clearly knew the difference between yellow urine and the white "milk" that came out of Michael A., Sr.'s penis. The child clearly described ejaculate not urine. Both the color and texture of the substance described by the child is different than urine. Further, no explanation was offered to explain why Katelyn T. described Michael A., Sr. shaking his penis when the white substance came out. Interestingly, in the findings issued by the court, no mention at all was made of the perjury testimony of April P. and Michael A., Sr. The lower court findings are also void of any reference to the testimony of Michael A., Jr. and the fact that it was contradictory to the testimony of the Respondents. Michael A., Jr. had nothing to lose by telling the truth, the Respondents did.

Two separate evaluators found these two young, innocent children to have been sexually

abused. The children were credible in their reporting and were not coached. Therefore, the Petitioners proved the allegations of sexual abuse by clear and convincing evidence, and the lower court's ruling should be overturned.

II. The lower court committed error because it held the legal maneuvers of the adults against the children and failed to rule in the best interest of the infant children.

The lower court ignored the long-standing polar star in all matters involving the welfare of children. This court has held that the best interests of the child is the polar star by which decisions must be made. Michael K.T. v. Tina L.T., 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989). "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, State ex rel. Cash v. Lively, 155 W. Va. 801, 187 S.E.2d 601 (1972); Syl.Pt. 4, State ex rel. David Allen B. v. Sommerville, 194 W. Va. 86, 459 S.E.2d 363 (1995). "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, In re Katie S., 198 W.Va. 79, 479 S.E.2d 589 (1996). In child abuse and neglect cases, the best interests of the child are the paramount concern. In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993). "A fundamental mandate, recognized consistently by this Court, is that the ultimate determination of child placement must be premised upon an analysis of the best interests of the child.." Napoleon S. v. West Virginia Dept. of Health and Human Resources, 217 W. Va. 254, 617 S.E.2d 801(2005).

The lower court took great exception with the fact that the abuse and neglect petition filed by Janet P. and April P. was not their first attempt by them to use the judicial system to try to safeguard the children. Janet P. testified that in May of 2009, she filed a Petition for Domestic

Violence Protective Order on behalf of the children after the disclosures alleged in the instant abuse and neglect action were made to her by the children. She also testified that this was not her first attempt at securing a protective order on behalf of the children. Janet P. had previously tried to file a petition for a protective order due to concerns regarding the safety of the children as result of alcohol and drug use of the children's parents and the fact that the children were left by their mother for days on end with Janet P. and Charlotte P. who had no knowledge as to where the mother was or when she would return. Janet P. testified that she did not file the earlier petition for protective order because she was advised that it would not be granted.³

Additionally, in August of 2007, Janet P. hired attorney Thomas Kupec of Clarksburg, to draft a guardianship agreement, which was signed by the children's biological father, Joshua T., but not signed by their mother, April P. Lastly, Janet P. solicited the help of the children's father Joshua T. by requesting that he file a petition for custody in Harrison County Family Court. Janet P. testified that she made this request of Joshua T. because she would not have had standing to file a petition for custody under prevailing West Virginia law. By Joshua T. filing a petition for custody of the children, Janet P. could then intervene in such an action.

West Virginia Code § 48-9-103 deals with standing in child custody cases. The Code states that the following persons have a right to participate in custody actions: the legal parent of the child; an adult allocated custodial responsibility or decision-making responsibility under a current parenting plan; persons who were parties to a prior order regarding custody or decision making authority; or were granted custodial allocation or decision making authority in a prior court order. Further, the

³ The record is not clear as to who informed Janet P. that the Petition would not be granted.

code states that:

“[i]n exceptional cases the court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child’s best interests. The court may place limitations on participation by the intervening party as the court determines to be appropriate. *Such persons or public agencies do not have standing to initiate an action under this article.*”

W. Va. Code § 48-9-103 (2001) (Emphasis Added.)

The lower court made it very clear that it took great exceptions with the many actions attempted by Janet P., Charlotte P., and their counsel. At the February 4, 2009 hearing, the lower court went so far as state that it felt the actions of counsel were bordering on barratry. The court felt strongly that the legal maneuvering in an attempt to secure custody of Katelyn T. and Joel T. was not appropriate. The court viewed the actions of the private petitioners as an attempt to gain custody of the children. Janet P. and Charlotte P. did nothing that was not allowed for by prevailing West Virginia law. Further all of their actions were taken in an attempt to protect the children.

The court’s finding that the co-petitioners’ actions were motivated by their desire to gain custody of the children is simply not supported by the evidence. Janet P. was desperate to protect these children. She used all avenues available to her under prevailing West Virginia law in her attempts to protect the children. There was nothing illegal or procedurally inappropriate about any of the actions she took. She acted under advice of counsel, obviously more familiar with the legal system than Janet P.

At no time during the adjudicatory hearing did any of the Respondents present one bit of credible evidence that supported the notion that Janet P. had staged this whole scenario in a desperate attempt to gain custody of these children. Janet P. testified that she has put her personal life on hold

to take care of the children. Janet P. is engaged to be married and has had to put her wedding on hold in order to take care of the children and put her financial resources into pursuing a judicial remedy to protect the children. Janet P. relied on the advise of counsel and was desperate to find an avenue to protect her niece and nephew who had lived on the dairy farm with her for most of their lives. Janet P. and Charlotte P. are very caring, loving caretakers for the children. They had the natural reaction of any aunt and grandmother to protect the children when they learned that the children had been exposed to sexual behavior by their mother's paramour.

Despite two professionals offering opinions that the children were credible in their reporting and did not appear to be coached, the court found the children's disclosures lacking in credibility. The court raised issue with the fact that the children failed to disclose details of the sexual abuse. Interestingly, the court found that there was a "total lack of details" in the children's reporting to Tordella and Kennedy, right after the court stated that it was disclosed to Kennedy that Michael A., Sr. "shows his pee-pee to Joel and her and it squirts milk and he shakes it with his hand and he shows his butt to her and her mommy. And Joel told her that [Michael A., Sr.] showed his peewee to mommy. It squirts milk and Katelyn touched Mike's pee-bug and takes her clothes off." See February 18, 2009 transcript at 19:17-24.

The court further stated that it appear to it that "someone has told these children that white milk comes out of a man's penis and it needs to be shaken." Id. at 22:24, 23:2. The record is simply void of any testimony or any evidence whatsoever to indicate that the children were told this by anyone. In fact, both professionals testified that the children were not coached and were credible in their reporting. Further, the court's assertion that the children did not disclose details and did not disclose the exact same thing to Tordella and Kennedy supports the notion that the children were *not*

coached.

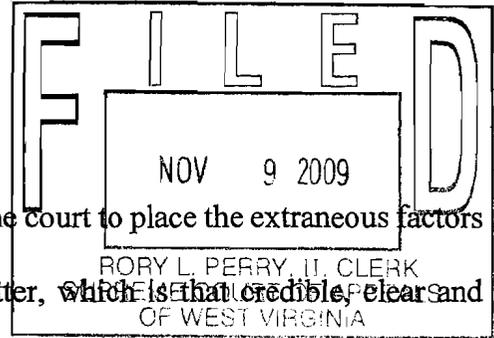
At closing arguments, the children's counsel asked the court to place the extraneous factors aside and focus solely on the issue at the heart of the matter, which is that credible, clear and convincing evidence was presented that these two young children had been sexually abused by exposure to Michael A., Sr.'s sexual gratification in front of them in the home that the children shared with Michael A., Sr. and their mother, April P. The actions of the adult relatives in attempting to protect the children should not have been taken into consideration by the lower court when rendering its decision.

The court ignored the polar star of the best interest of the children and placed the rights of parents above protection of the children. Therefore, the lower court's ruling must be overturned and the Respondents must be adjudicated as abusive and neglectful.

III. The circuit court committed err in dismissing the abuse and neglect petition against the Respondent Mother, April P., because she refused to acknowledge that Respondent Caretaker Michael A., Sr. committed sexual abuse upon her children; therefore, she failed to protect her children.

Termination of parental rights of a parent of an abused child is authorized "[w]here such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. " Syl. Pt. 2, In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).

At the time of the proceedings before the lower court, April P. was pregnant with the child of Michael A., Sr. She was told by Janet P., Tordella, and Kennedy of the children's disclosures regarding Michael A., Sr.'s sexual behavior, yet she continued to believe Michael A., Sr. over her



children. April P. held to her position throughout the domestic violence proceedings and throughout the abuse and neglect proceedings. April P. did not believe the disclosures of her young, innocent children to be true. She stated during her psychological evaluation as part of the abuse and neglect action that her goal was to prove Michael A., Sr. innocent. Although, at one point she attempted to placate the WVDHHR and her family by indicating that she was trying to find a home separate and apart from Michael A., Sr. , she never took the steps to find that home. She did nothing to indicate that she was worried about protecting her children from further sexual abuse. Her sole focus was on maintaining her relationship with Michael A., Sr.

Instead of protecting the children, April P. tried to conjure up stories as to how the children came about this inappropriate sexual knowledge. April P attempted to shift the focus from Michael A., Sr. First, she stated that the children had been exposed to pornography in her house, then backed down from that story when she realized that good mothers do not expose their young children to pornography. She then came up with the story of Katelyn walking in on Michael A., Sr. urinating in the bathroom, yet she never mentioned the fact that the family had a practice of always locking the doors behind them in *all* rooms, not just the bathroom. Michael A., Jr. never heard the story of Katelyn walking into the bathroom while his father was urinating. Interestingly, nobody reminded him to be sure to lock the door so that it did not happen while he was in the bathroom.

And then there is the Matchbox car coverup. Michael A., Jr. corroborated Tordella's testimony that the toy cars Joel T. played with were the size of matchbox cars. If the child's assertion of Michael A., Sr. playing with the cars on his penis and inserting them in his rectum were not true what motivating factor would April P. and Michael A., Sr., have to lie about the size of the toy cars. It is very believable at a three (3) year old boy has Matchbox type cars. If they weren't

used for sexual gratification there would be nothing to hide.

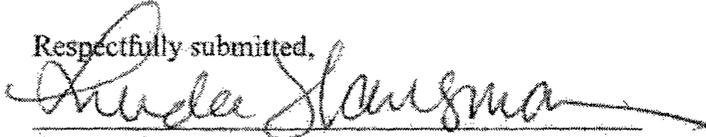
April P. was more concerned with trying to clear the name of her paramour than protecting her children. She came up with stories to attempt to protect Michael A., Sr., but never made an attempt to truly find out what truly happened to her children.

For these reasons, April P. failed to protect her children and, therefore, the lower court erred in its dismissal of the action against April P.

CONCLUSION

The lower court failed to protect these young children from sexual abuse at the hands of their mother's live-in boyfriend. The children have sexual knowledge that is inappropriate for their young ages. The evidence is overwhelming that the children were credible in their reporting of the acts of sexual gratification performed by Michael A., Sr. The lower court allowed its disdain for the legal maneuvering of the private petitioners to cloud its judgment. Two innocent children have been returned to the perpetrator. This court must step in and protect these children by reversing the ruling of the lower court.

Respectfully submitted,



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