

3/3

NO. 35138

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN RE:

Katelyn T.
Joel T.

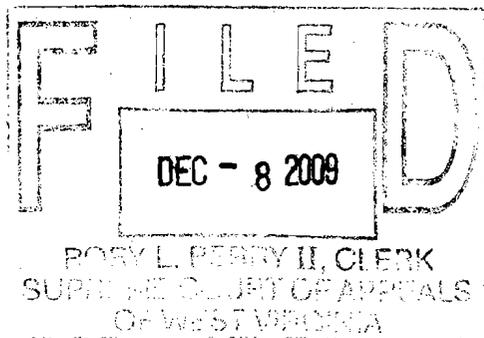
JUVENILE PETITION NOS.

08-JA-66-3
08-JA-67-3

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

APPELLEE'S RESPONSE TO APPELLANT'S BRIEF

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



Counsel for Respondent Mother, April P.
BETSY GRIFFITH, State Bar No. 10303
103 E. Main Street
P.O. Box 653
Bridgeport, West Virginia 26330
Telephone: 304-848-0304
Facsimile: 304-848-0305
Email: betsy@griffithoffice.com

APPELLEE'S RESPONSE TO APPELLANT'S BRIEF

Comes now the Appellee, the respondent mother, April P., by and through counsel, Betsy Griffith (formerly Betsy Poe), and hereby responds to the Appellant's Brief. The February 25, 2009 rulings of the Circuit Court of Harrison County, West Virginia dismissing the Appellee, April P., as a respondent, should be affirmed by this Court as absolutely no evidence was presented at the adjudicatory hearing that April P. abused and/or neglected her children or failed to protect her children from abuse and/or neglect. The Appellants failed to present evidence at the adjudicatory hearing that April P. had knowledge of the allegations of sexual abuse by her paramour, Michael A., Sr., and that April P. failed to protect her children as a result of having that knowledge. Additionally, the Appellants failed to prove by clear and convincing evidence that Michael A., Sr. sexually abused April P.'s children.

“Because of the serious consequences of abuse and neglect proceedings, certain safeguards have been statutorily installed.” *In re Tonjia M.*, 212 W.Va. 443, 573 S.E.2d 354 (2002). “Under W.Va. Codes 49-6-2(c) [1996], circuit courts must follow specific procedures when considering allegations of neglect or abuse; circuit courts must make specific findings, and those findings must be supported by clear and convincing evidence.” *Id.* The Circuit Court of Harrison County, West Virginia made extensive findings of fact and conclusions of law on February 18, 2009, covering the evidence as adduced at hearings held on January 22, 2009 (1 ¼ hours) and on February 2, 2009 (7 ½ hours) and in consideration of closing arguments held on February 4, 2009. The Appellants failed to meet their burden of proof under West Virginia Code §49-6-2, that is proving by clear and convincing evidence that the children were abused and/or neglected and that April P. was an abusing and/or neglectful parent. As a result of this failure,

the Circuit Court of Harrison County, West Virginia properly dismissed the abuse and neglect petition as it related to April P.

The Co-Petitioner, Janet P., testified that on or around March 23, 2008, the child, Katelyn T. disclosed that Michael A., Sr.'s pee pee had milk squirt out of it, she touched it, and it was big and ugly. Janet P. testified that she did not inform April P. of this information until after she filed a domestic violence petition against April P. on May 14, 2008.¹ At the time the abuse and neglect petition was filed, April P. had not had custody of the children since a May 14, 2008 domestic violence order prohibited her from exercising custody of the children.² So at the time of the filing of the abuse and neglect petition, the children had not been in April P.'s care at any time after she had knowledge of the sexual abuse allegations. As such, April P. could not have failed to protect her children because the children were never in her care after she became aware of the sexual abuse allegations against her boyfriend, Michael A., Sr.

Peggy Tordella of the United Summit Center, the children's counselor, testified that the children reported that April P. was not present when any of the alleged events happened in Michael A., Sr.'s living room. Chanin Kennedy, a licensed psychologist, testified that the children did not report that they told April P. about the alleged sexual abuse nor did the children report that April P. was present when the alleged sexual abuse occurred. Ms. Kennedy additionally reported that she did not believe the children would have made the sexual abuse

¹ Prior to May 14, 2008, Janet P. did inform April P. that the children, ages three and four, were running around naked but this comment was not enough for April P. to infer that the children were being sexually abused by Michael A., Sr.

² It should be noted that the Appellant's Brief states that April P. agreed to continue the final hearing on the domestic violence protective order petitions and agreed to allow the children to continue to reside with Charlotte P. However, April P. objected to the continuation of the terms of the domestic violence protective order and requested that the children remain in her custody so long as Mike A., Sr. would be barred from contact with the children as found in the June 25, 2008 Order Rescheduling Final Hearing on Domestic Violence Petitions and Modifying Emergency Protective Orders entered in Family Court Civil Action No. 08-DV-255-4.

disclosures to April P. As such, the Appellant failed to prove that April P. had knowledge of the allegations of sexual abuse and failed to protect her children as a result of that knowledge.

Janet P. made threats to April P. prior to the start of the May 14, 2008 proceedings stating that she would get her kids and had asked April P. to sign her children over to her and her mother. Since 2006, Janet P. had been involved in five attempts to obtain custody of the children. On or about August 15, 2007, Janet P. hired the law firm of Kupec & Associates to draft a custody agreement signed by the children's father, Josh T., purportedly giving Janet P. custody of the children. It was not until March of 2008 that Janet P. alleged that the child, Katelyn T., informed her of the sexual abuse by Michael A., Sr.

If Janet P. was truly concerned about the children's safety, she would have told April P. in March of 2008 that Katelyn T. had made disclosures of sexual abuse instead of waiting approximately seven weeks until after she filed the domestic violence petition on May 14, 2008 to inform April P. of the alleged sexual abuse disclosures. Moreover, if Janet P. was truly concerned for the children's safety, she would not have left the children with Michael A., Sr. for seven weeks while making no sexual abuse disclosures to April P. or Michael A., Sr.

Furthermore, for the reasons outlined herein and in the February 25, 2009 Ruling Following Adjudication of All Respondents and Disposition of Respondent, Joshua T. , the circuit court correctly dismissed the petition as it related to Michael A., Sr. because the Appellants failed to meet their burden of proof that is proving by clear and convincing evidence that Michael A., Sr. sexually abused April P.'s children.

It is important to note that the co-petitioners, Janet P. and Charlotte P., originally filed a private abuse and neglect petition because the WVDHHR had closed the file after conducting an investigation into the alleged sexual abuse. A referral of sexual abuse was made just days before

Janet P. filed a domestic violence petition against April P. on May 14, 2008. Jennifer Gray, Child Protective Service worker with the WVDHHR, interviewed the children on May 16, 2008 and all that Ms. Gray could get out of the children was Katelyn T.'s statement that toys came out of Mike's pee wee in the bathtub, but Katelyn T. did not see it. Ms. Gray further testified that Katelyn T. told her that she had never seen Michael A., Sr.'s pee wee. *See* February 2, 2009 transcript at 239: 2-8.

During the course of her investigation, Ms. Gray contacted Peggy Tordella, the children's counselor, around the end of August of 2008, and Ms. Tordella advised that she was not able to get very far with the kids, but that a comment was made by Joel T. that milk came out of Michael A., Sr.'s pee bug. As a result of this conversation, Ms. Gray closed the file. For reasons unknown, Ms. Tordella failed to inform Ms. Gray of Joel T.'s alleged disclosures in June and July of 2008 regarding Michael A., Sr. putting cars up his butt and having Joel T. get them out.

Ms. Kennedy met with the children on three separate occasions for interviews. The children only made disclosures in one of the three interviews. The only statements made to Ms. Kennedy by the children were in each of the children's third and final sessions with Ms. Kennedy. Katelyn T. disclosed that Michael A., Sr. shows his pee-pee to Joel T. and me, that Michael A. Sr.'s peewee squirts milk, that "he shook it himself with his hand," and that Michael A., Sr. shows his butt. Katelyn T. also stated that her mother was in the house but was not present. *See* February 2, 2009 transcript at 156: 1-10. Joel disclosed that Michael A., Sr. squirts milk, that Michael A., Sr. had shown his penis to his mommy, that Katelyn T. had touched Michael A., Sr. on his penis, and that Katelyn T. takes off her clothes. *See* February 2, 2009 transcript at 158: 1-7. It should be noted that Katelyn T. confirmed that Joel T. made the

statement concerning Katelyn T. touching Michael A., Sr.'s penis but failed to confirm that she had actually touched Michael A. Sr.'s penis. *See* February 2, 2009 transcript at 194: 1-2.

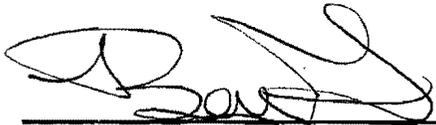
Ms. Kennedy concluded that the children were exhibiting sexualized behaviors and knowledge that were not age and/or developmentally appropriate and that they were exhibiting emotional and behavioral characteristics that were often seen in sexually abused children. *See* February 2, 2009 transcript at 170: 14-20. Despite this finding, a circuit court cannot just assume that the children are abused and/or neglected children as defined by the West Virginia Code. The circuit court must review all the evidence in its totality and determine whether the Petitioners have met their burden of proof under the West Virginia Code.

Ms. Tordella, who is not an expert, interviewed the children in this matter on 17 separate occasions. The children were interviewed together in all but one of these sessions. Ms. Kennedy testified that interviewing the children together in a sexual abuse evaluation is against protocol and said interview technique raised many concerns.

The Harrison County Circuit Court correctly found that there was no consistency in the children's disclosures and that Ms. Tordella's technique of interviewing the children together tainted their statements. Testimony was also given that the children often mirrored each other.

It would be a travesty for any court to find that a parent such as April P. abused and/or neglected their children when no evidence was placed on the record that the parent had knowledge or should have had knowledge of the abuse and/or neglect. The Appellants must meet their burden of proof in order to adjudicate a parent as an abusive and/or neglectful parent under the West Virginia Code. Here, the Petitioner's did not meet that burden. The best interests of the children were served by returning the children to their mother, April P. As such,

the February 25, 2009 Order of the Circuit Court of Harrison County, West Virginia should be affirmed.



Betsy Griffith,
Counsel for the Appellee, April P.

Betsy Griffith, WV State Bar ID #10303
103 E. Main Street
P.O. Box 653
Bridgeport, West Virginia 26330
Telephone: 304-848-0304
Facsimile: 304-848-0305
Email: betsy@griffithoffice.com

NO. 35138

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: KATELYN T. and JOEL T.

CERTIFICATE OF SERVICE

I, Betsy Griffith, do hereby certify that on the 7th day of December, 2009, I transmitted a copy of the foregoing "*Appellee's Response to Appellant's Brief*" upon counsel of record, by depositing true copies thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Katherine M. Bond
Assistant Attorney General
WVDHHR/BCF/Region I
9083 Middletown Mall, Suite 200
White Hall, West Virginia 26554

Linda Hausman
Kaufman & McPherson, PLLC
P.O. Box 768
Bridgeport, West Virginia 26330

Gale Carroll
Attorney at Law
352 West Main Street
Clarksburg, West Virginia 26301

April Conner
Attorney at Law
427 W. Pike Street Suite 503
Clarksburg, West Virginia 26301

Charlotte and Janet P
Rt. 5, Box 671
Clarksburg, West Virginia 26301



Betsy Griffith, WV Bar ID #10303