

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

IN THE INTEREST OF:

JOHN PAUL T

MICHAEL T

NATALIE T

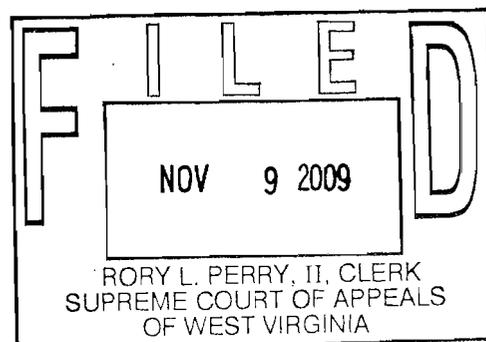
CLARE T

SUPREME COURT NO. 90904

Civil Action Nos. Below: 07-JA-54-57

APPELLANT JEAN

BRIEF



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## **I. KIND OF PROCEEDING AND NATURE OF RULING IN CIRCUIT COURT**

This appeal is from a circuit court order for the payment of attorney fees and costs of \$72,493.40 from one parent to the other pursuant to an abuse and neglect case filed by the Department of Health and Human Resources (DHHR).

In March, 2007, an abuse and neglect petition was filed by Kanawha County Prosecuting Attorney's office at the direction of the DHHR against Michael T. (Father) and Jean (Mother). At the time of filing and to this day, the unchallenged and uncontraverted medical and forensic evidence was that the parties' youngest daughter was sexually abused by Father. No evidence or testimony was given that Mother sexually abused her daughter.

In spite of this and after filing the petition against both parents, the prosecuting attorney decided not to proceed against Father and the circuit court dismissed Father as a party. For the next two years, Father continued to participate in the proceedings as if he was still a respondent examining and cross-examining witnesses, filing motions, arguing, and preparing orders for the court. Essentially, he prosecuted the case and now wants Mother to pay his attorney fees and costs in spite of the fact that four different times in three different courts, Father unsuccessfully requested his attorney fees and costs be paid by Mother. All requests were denied until Father's fifth attempt with the fourth judge. In each attempt Father alleged fraudulent misrepresentation, bad faith, vexatious, wanton conduct and oppressive actions by Mother.

Father alleged in his motion and the court found that:

- (1) Mother's conduct was the sole reason that the abuse and neglect proceeding was filed;
- (2) Mother's conduct was why the case took over 2½ years to reach disposition;
- (3) Mother's sexual abuse allegations against Father were baseless;
- (4) Mother's reports of sexual abuse were initiated only by her; and
- (5) Mother's sexual abuse allegations against Father were fraudulent.

The evidence failed to support any of these findings and was clearly and convincingly wrong and an abuse of discretion.

## **II. STATEMENT OF FACTS**

This case initially arose from a contentious divorce between two dentists.

Michael T (Father) and Jean (Mother) were married in 1988. Mother retired her dental license to raise their four children: NAT who is now 18 years old; JPT who is 16 years old; MJT who is 14 years old; and CMT who is seven years old. After 17 years of marriage, Mother filed for divorce in June, 2005.

Nine months later in March, 2006, after having been with her father, CMT told her mother that her daddy gave her "candle baths." ( circuit court pp.13-14). The next day CMT told her mother that her daddy put candles around the bathtub, closed the door, turned off the lights, and put his finger in her "wee." ( circuit court May 21, 2007, pp.4,13-14,24,28,30,105). Father never denied this. Causing Mother concern, she phoned the family doctor, Susan Cavender, M.D., who told her to call CAMC. Mother spoke with the social worker at CAMC who told her to have CMT medically examined, contact CPS, and seek a protective order.

Mother took CMT to Dr. Cavender who examined her and noted that there was a nonspecific vaginal odor and white discharge around her labia which was unusual. Dr.

Cavender noted that since September, 2005, she had seen CMT several times for genital irritation and complaints of soreness that did not exist prior to the parties' separation. (Cavender circuit court May 21, 2007, pp.34,36-38). About one month later in April, 2006, CMT told a psychologist appointed by the family court that her daddy hurt her "wee." (Crowder Report, 2006). At this same time NAT, the oldest daughter, told DHHR that her father fondled her breast. (W.Va. Safety First/Safety Assessment). She was not believed and DHHR documented that the children were safe with Father.

On October 16, 2006, CPS interviewed CMT who reported that she did not like to go to her daddy's house and that he was mean and hurt her. (CPS report #10463408).

On February 4, 2007, after having been with her father for several days, CMT disclosed to her mother that her daddy licked her "wee." ( circuit court p.28)(Kobbah family court p.19). Mother immediately contacted CAMC for an examination and upon examination redness was observed to the skin around her vaginal area. (Kobbah family court pp.3-4)(Powell family court p.10). Mother was instructed to follow up with CPS and Dr. Cavender. (CAMC Aftercare Instructions). ( circuit court May 21, 2007, pp.4,13-14,24,28,30,105)(Kobbah family court pp.3,4).

The next day, February 5, 2007, Dr. Cavender examined CMT. Her panties had a lot of yellowish vaginal discharge and her vaginal tissues were red, swollen, and protruding externally. ( circuit court pp.4,28-30,105).

On February 10, 2007, Dr. Cavender again examined CMT at CAMC because her condition was worse. ( circuit court p.33)(Cavender family court pp.43,80-81). Dr. Cavender found a fissure on the perineal body and curdy white discharge around

the minora or inner lips, and the introital tissues were substantially swollen and tender. (Cavender circuit court pp.11,48-49). CMT drew a picture with three circles and an elongated thing and said, "That's Daddy's wee." She explained that a substance came out that was gray yellow and watery that her daddy had to clean up. (Cavender family court pp.44-47). She explained that her daddy was naked, put his fingers in her wee, and licked her wee. (Cavender family court p.34). CMT played with a stuffed dog whose tail protruded between the legs as viewed from his abdomen and spontaneously stated that it looked "like daddy's wee" and pointed to where her daddy touched his wee when touching and biting her wee. (Cavender family court pp.44-50,99,105-106)(Cavender medical notes dated February 10, 2007) (Cavender circuit court May 21, 2007, pp.10-11,48-49)(Cavender family court at 99). Dr. Ewing, medical supervisor at CAMC, reviewed Dr. Cavender's report and concluded that the examination was done correctly and the information obtained was accurate. (Ewing family court p.18). After this visit Dr. Cavender was convinced that CMT was sexually abused in that a four year old knew that a man had a wee, what it looked like, that a substance came out of it that needed to be cleaned up, and there was noise associated with it. (Cavender family court pp.105-106).

On February 10, 2007, Mother spoke with Trooper Link who told her to seek a protective order. ( Circuit Court pp.31,32,33).

On February 18, 2007, the results of one of the cultures taken several days before showed positive for streptococcus pyogenes, typically an oral infection and extremely rare in the vaginal area. (Cavender family court pp.52-53). Clinically and medically Dr. Cavender was certain that CMT had been sexually abused. (Cavender

family court pp.41,62-64,105-106)(Cavender circuit court May 21, 2007, p.30)(Kobbah family court pp.41,46-47)(Ewing family court p.41).

Dr. Cavender's and two other medical doctors unrefuted expert medical testimony put the time of the sexual abuse of CMT during Father's care. (Cavender family court p.118)(Cavender circuit court p.22). It takes at least 48 hours for the streptococcus pyogenes bacteria to show inflammation. (Cavender family court p.118)(Cavender circuit court p.22). CMT was with Mother less than 24 hours when the inflammation began to show and Father at least 48 hours previously. In determining who sexually abused and infected CMT with streptococcus pyogenes the question is who had custody 48 hours before her vaginal area became inflamed, not who had custody 24 hours before her vaginal area became inflamed. Dr. Cavender's unrefuted expert medical opinion was that the streptococcus pyogenes was transmitted orally from Father through oral sexual contact that CMT consistently described. (Cavender family court p.118)(Cavender circuit court p.22). No one testified differently, including Father.

Two days later on February 20, 2007, CMT was seen by a child forensic interview specialist for an assessment pursuant to a request by the prosecuting attorney's office, the DHHR, and the state police. (Runyon circuit court pp.16-17). CMT reported that her daddy licked her "wee," put his fingers in her "wee," and it hurt. The prosecuting attorney wanted the interviewer to use the anatomical correct dolls. (Runyon circuit court p.25). On one of the female dolls CMT pulled up the dress, pulled down the panties, and pointed to the vaginal opening on the anatomical doll and said that was where she was touched. When asked what touched her there, CMT opened the male

doll's pants, pulled out the penis, and said her daddy's "wee." (Runyan circuit court p.26). CMT took the penis on the male doll and put it on the vaginal area of the female doll. (Runyan circuit court pp.16,25-27).

Although CPS agreed that CMT would not be interviewed again, CPS continued with more interviews of CMT. (Confere circuit court t pp.5,6)(Runyon circuit court pp.36,44-46). The next day on February 21, 2007, CMT told CPS that her daddy put his finger in her "wee" and that she did not want to go to his house. (Confere circuit court pp.5,17).

On the March 20, 2007, CPS and the Guardian *ad Litem* took CMT out of her pre-school class and questioned her for over two hours. (Confere circuit court pp.5,6,28). Not satisfied and "determined to get to the truth" they directed the interview to lying. (Confere circuit court pp.30,31). After two hours of talking about lying CMT finally recanted after one year of consistently disclosing the abuse. (Confere circuit court pp.8,9,10,31). The questions were, "absolutely completely inappropriate questions." (Runyon circuit court pp.36,46). CPS and the Guardian *ad Litem* asked leading questions, implied that CMT was lying, and that CMT needed to tell the truth. (Runyon circuit court pp.37-39,40-41). In his motion for attorney fees Father claimed that CMT "recanted without prodding or questions." (Father's Motion for Attorney Fees and Costs).

In February and March, 2007, there were hearings in family court with regard to the protective order that Mother got on February 10, 2007, as advised by the state police. Father refused to testify in court and asserted his 5<sup>th</sup> amendment rights. CMT lived with Mother and visitation with Father was at the home of friends of Father. Family

court dismissed the protective order and referred the matter to circuit court pursuant to the allegations of abuse and neglect. The testimony from family court and corresponding transcripts were made part of the record in the abuse and neglect proceeding in circuit court pursuant to a motion filed by Father. (Cavender circuit court pp.38-39).

Around March, 18, 2007, Mother complained to the Guardian *ad Litem* that the visits with Father were not being supervised properly because CMT told Mother that her daddy was still touching her inappropriately and Mother contacted the state police again.

On March, 23, 2007, DHHR filed an abuse and neglect petition against both parents. Just two months later, DHHR and the prosecuting attorney announced that it was not proceeding against Father, and the circuit court dismissed him from the petition. The evidence had not changed. For the next two years, Father continued to act as if he was still a party in the petition, taking the role of prosecutor, not respondent, presenting evidence against his ex-wife, cross examining witness, filing motions, and making arguments over the objection of Mother. In essence, he took over the prosecution. Although Father had been provided court appointed counsel in the abuse and neglect proceeding, Father chose to employ his private divorce counsel and to proceed in the prosecution of his ex-wife, even after he had been dismissed as a party.

On April 4, 2007, the court gave legal custody of CMT to DHHR and physical custody to the same friends of Father who were supposed to be supervising visitation. Father was allowed to visit CMT supposedly supervised only on Friday nights at the home of the foster family.

The adjudication hearing was held on May 21-22, 2007, and the parties submitted their proposed orders of adjudication as ordered by the court. Three months later, in August, 2007, Mother filed a motion urging a decision by the court. Instead, the court sent the parties for more evaluations. Mother filed a Petition for Writ of Mandamus with this Court in December, 2007, seven months after the completion of the adjudication hearing and proposed findings of fact and conclusions of law were ordered by the court and submitted. CMT had been in foster care for nine months. In October, 2007, Father visited CMT in her school gymnasium and the foster family was not present to supervise which Father never denied.

On December 4, 2007, CMT disclosed sexual abuse by Father again to a DHHR worker during one of Mother's supervised visits. (DHHR Contact Report 12-4-07). The court found that the abuse could not have happened because Father had no opportunity to do so and, therefore, Mother put CMT up to make the disclosure. Her visitation with CMT was terminated. However, unknown to Mother until months later, even though Father's visitation was supposed to be restricted to a few hours on Friday evenings Father did have an opportunity in that he, by his own admission, visited CMT every night at the home of the foster family and put her to bed. (Michael Joseph T Jr. Psychological Evaluation p.2,6)(Fitness to Parent/Custody Recommendations p.6). (Michael Joseph T forensic psychological evaluation p:2). Father came every night and he "would read her bedtime stories and tuck her in." (Fitness to parent/custody recommendations p.6).

Inexplicably the circuit court *re-opened* the adjudication hearing in May, 2008, for more testimony even though the parties had submitted their proposed orders of adjudication one year previously as ordered by the court.

After more hearings, the court entered an adjudication order in June, 2008, fifteen months after the petition was filed. The disposition hearing did not commence until September 10, 2008, and was not completed until April, 2009, over two years after the petition was filed.

On May 11, 2009, the court entered an order and granted Father's Motions for Attorney Fees and Costs of \$72,493.40 in the this abuse and neglect proceeding without a hearing. Many of the documented charges included in the \$72,493.40 were unclear, vague and only partially visible. Many of the charges had nothing to do with the abuse and neglect petition, but were as a result of proceedings in family court and various appeals from family court to circuit court and this Court.<sup>1</sup>

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footnote1

The following is a *partial* list provided only as an example of some of the dates wherein attorney fees were incurred by Father pursuant to the equitable distribution of property issues that had nothing to do with the abuse and neglect proceedings, but were part of Father's Motion for Attorney Fees and Costs and corresponding order:

04-03-07 Equitable distribution  
08-13-07 Equitable distribution  
02-11-08 Equitable distribution  
02-12-08 Equitable distribution  
02-13-08 Equitable distribution  
02-15-08 Equitable distribution  
02-18-08 Equitable distribution  
03-03-08 Equitable distribution  
03-04-08 Equitable distribution  
03-19-08 Equitable distribution  
03-31-08 Equitable distribution  
09-23-08 Equitable distribution  
11-03-08 Equitable distribution  
11-04-08 Equitable distribution

The disposition order was not entered until July, 2009, nearly 2½ years after the petition for abuse and neglect was filed.

### **III. ASSIGNMENTS OF ERROR**

The circuit court erred when it ordered Mother to pay Father's fees and costs because:

- (1) Mother's conduct was the sole reason that the abuse and neglect petition was filed;
- (2) Mother's conduct was why the case took over 2½ years to reach disposition;
- (3) Mother's sexual abuse allegations against Father were baseless;
- (4) Mother's reports of sexual abuse were initiated only by her;
- (5) Mother's sexual abuse allegations against Father were fraudulent;
- (6) Father voluntarily incurred fees and costs after he had been dismissed as a party to the abuse and neglect petition; and
- (7) Due process requires a hearing.

The evidence failed to support any of the first five findings, was clearly and convincingly wrong and an abuse of discretion.

### **IV. POINTS AND AUTHORITIES RELIED UPON**

Adams v. Carlson, 521 F.2d 168 (1975)  
Anlytica, Inc. v. NPD Research, Inc., 708 F.2d 1262 (7<sup>th</sup> Cir.1983)  
Baker v. Health Management Systems, Inc., 264 F.3d 144 (2d Cir.2001)  
Bergman v. United States, 844 F.2d 353 (6<sup>th</sup> Cir.1988)  
Bradley v. School Board, 472 F.2d 318 (4th Cir. 1972)  
Chicago Title & Trust Co. v. Fox Theaters Corp., (DCNY1959)  
Czaja v. Czaja, 557 S.E.2d 908 (W.Va.2000)  
Daily Gazette Co. v. Canady, 332 S.E.2d 2662 (W.Va.1985)  
Diamond Shamrock Corp. v. Lumbermen's Mutual Casualty Co., 466 F.2d 722 (7<sup>th</sup> Cir.1972)  
In re: Carlita B., 408 S.E.2d 365 (W.Va.1991)  
Kanawha Valley Radiologists v. One Valley Bank N.A., 557 S.E.2d 277 (W.Va.2001)  
Mullane v. Chamber, 333 F.3d 322 (1<sup>st</sup> Cir.2003)  
Murray v. Playmaker Services, 548 F.Supp.2d 1378 (S.D. Fla.2008)  
Quint v. A.E. Staley Manufacturing Co., 245 F.Supp.2d 162 (D.Me.2003)  
Re: Rubin Brothers Footwear, Inc., 119 BR 416 (SDNY1999)  
Rolax v. Atlantic C.L.C., 186 F.2d 473 (4<sup>th</sup> Cir.1951)

Satoskar v. Indiana Real Estate Commission, 517 F.2d 696, (7<sup>th</sup> Cir.1975)  
Sauer v. Xerox Corporation, 95 F.Supp.2d 125 (W.D.N.Y.2000)  
Sterling Energy, Ltd. v. Friendly National Bank, 744 F.2d 1433 (10<sup>th</sup> Cir.1984)  
U.S. Industries v. Touche Ross & Co., 854 F.2d 1223 (10<sup>th</sup> Cir.1988)

West Virginia Code, §49-6-1

Rules of Procedure for Child Abuse and Neglect, Rules 25,27,32,36

## **V. LAW**

Courts shall give abuse and neglect cases the highest priority to ensure their prompt resolution. In re: Carlita B., 408 S.E.2d 365 (W.Va.1991).

Rules of Procedure for Child Abuse and Neglect, Rule 25 mandates that the final adjudication hearing shall commence within thirty (30) days of the filing of the petition. Rule 27 mandates that upon completion of the adjudication hearing the court shall enter an order with findings of fact and conclusions of law within ten (10) days. Rule 32 mandates that the disposition hearing commence within forty-five (45) days of the entry of the final adjudicatory order. Rule 36 mandates that at the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law on disposition within ten (10) days of the conclusion of the disposition hearing.

For DHHR to file a petition against any parent it must have a reasonable belief that the parent was abusive. West Virginia Code, §49-6-1.

The West Virginia Rules of Civil Procedure, Rule 11 provides that the signature of the attorney first signing a pleading constitutes a certificate that he or she has read it and that there is good ground to support it.

Under the inherent power to supervise and control its own proceedings, the court may award reasonable attorney fees to prevailing party if there is clear evidence that challenged actions were entirely without color. Baker v. Health Management Systems, Inc., 264 F.3d 144 (2d Cir.2001); Sauer v. Xerox Corporation, 95 F.Supp.2d 125 (W.D.N.Y.2000). A party acts in bad faith only when a claim brought is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons and the standard for bad faith awards is stringent, and generally require finding of subjective bad faith. Sterling Energy, Ltd. v. Friendly National Bank, 744 F.2d 1433 (10<sup>th</sup> Cir.1984). Attorney fees may be awarded under the court's inherent power if there is clear evidence that the challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes. Re: Rubin Brothers Footwear, Inc., 119 BR 416 (SDNY1999).

"Without bad faith" means without at least colorable basis in law - what, in an action for malicious prosecution, would be called "probable cause." Anlytica, Inc. v. NPD Research, Inc., 708 F.2d 1262 (7<sup>th</sup> Cir.1983).

Permitting an award of counsel fees based on the opponents bad faith or vexatious or oppressive conduct is justified only in extraordinary circumstances or, as otherwise stated, in exceptional cases. Bradley v. School Board, 472 F.2d 318 (4th Cir. 1972); Rolax v. Atlantic C.L.C., 186 F.2d 473 (4<sup>th</sup> Cir.1951); Bergman v. United States, 844 F2d 353 (6<sup>th</sup> Cir.1988). The standards with regard to whether there was bad faith is necessarily stringent. Satoskar v. Indiana Real Estate Commission, 517 F.2d 696, (7<sup>th</sup> Cir.1975); U.S. Industries v. Touche Ross & Co., 854 F.2d 1223 (10<sup>th</sup> Cir.1988); Adams

v. Carlson, 521 F.2d 168 (1975). Vigorous litigation should not be equated with wantonness, vexatiousness, or oppression. Adams, *Id.*

Bad faith, for purposes of determining whether an award of attorney fees is warranted, is a stringent standard that makes it difficult to prevail. Even when the law or facts appear questionable or unfavorable at the outset, there may be an entirely reasonable ground for bringing suit. Murray v. Playmaker Services, 548 F.Supp.2d 1378 (S.D. Fla.2008); Chicago Title & Trust Co. v. Fox Theaters Corp., (DCNY1959).

When employing its supervisory power to award fees for bad faith or vexatious conduct, a court should award fees with great circumspection and restraint, and only in compelling and egregious circumstances. Quint v. A.E. Staley Manufacturing Co., 245 F.Supp.2d 162 (D.Me.2003). The mere fact that a party is unsuccessful will not justify the award of attorney fees. Diamond Shamrock Corp. v. Lumbermen's Mutual Casualty Co., 466 F.2d 722 (7<sup>th</sup> Cir.1972); Mullane v. Chamber, 333 F.3d 322 (1<sup>st</sup> Cir.2003).

Attorney fees like other sanctions should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. Daily Gazette Co. v. Canady, 332 S.E.2d 2662 (W.Va.1985). A circuit court errs by failing to afford a party notice and the opportunity to be heard prior to awarding attorney's fees. In failing to afford Mother's counsel an opportunity to respond to the basis for assessing fees and costs and their reasonableness, the most basic of all protections inherent to our judicial system has been violated. Czaja v. Czaja, 557 S.E.2d 908 (W.Va.2000). See also: Kanawha Valley Radiologists v. One Valley Bank N.A., 557 S.E.2d 277 (W.Va.2001).

## VI. DISCUSSION

The circuit court granted Father's motion for attorney fees and costs because:

- (1) Mother's conduct was the sole reason that the abuse and neglect proceeding was filed;
- (2) Mother's conduct was why the case took over 2½ years to reach disposition;
- (3) Mother's sexual abuse allegations against Father were baseless;
- (4) Mother's reports of sexual abuse were initiated only by her; and
- (5) Mother's sexual abuse allegations against Father were fraudulent.

None of the above was supported by the evidence, was clearly wrong, and an abuse of discretion.

### **A. Mother's conduct was *not* the sole reason that the abuse and neglect petition was filed.**

The abuse and neglect petition was initially filed against both parents in March, 2007, by the prosecuting attorney's office and DHHR. It was not filed by Mother. Before DHHR can file a petition it must have a belief that the parent named was abusive. By signing said petition the prosecutor represented there were good grounds to support the petition against Father.

What evidence was available at the time of the filing of the petition? There was uncontradicted medical and forensic evidence from professionals in the community who had no reason to misrepresent the truth that CMT was sexually abused by Father. There were disclosures by CMT to multiple people including CPS, Dr. Cavender, and one of the state's leading child forensic interviewers. Why would anyone not believe and act upon information from medical and forensic experts who had all interviewed and/or examined CMT? It was not Mother's conduct that caused these professionals to

believe that CMT was sexually abused by Father. It was their examinations and interviews with CMT that resulted in their professional opinions. These professionals were highly trained and when the petition was filed they had opined that Father had sexually abused CMT.

**B. Mother's conduct was *not* why the case took over 2½ years to reach disposition.**

The circuit court alleged in its order that Mother should pay Father's attorney fees and costs because it was her actions that caused the case to linger in the courts for 2½ years. The case lingered in the courts because the rules of procedure for child abuse and neglect were not followed by the court. Not one person involved in this case, other than Mother, including the Guardian *ad Litem*, prosecuting attorney, DHHR, or the court ever seemed cognizant of this issue.

1. Rules of Procedure for Child Abuse and Neglect, Rule 25

Rule 25 mandates that the final adjudication hearing shall commence within *thirty (30) days* of the filing of the petition. The petition was filed on March 23, 2007, and the adjudication hearing was commenced on May 21, 2007, *over sixty (60) days* after the petition.

2. Rules of Procedure for Child Abuse and Neglect, Rule 27

Rule 27 mandates that upon completion of the adjudication hearing the court shall enter an order with findings of fact and conclusions of law within *ten (10) days*. The adjudication hearing was completed on May 22, 2007, and the parties submitted their proposed orders of adjudication as ordered by the court. Mother urged the court in writing for an order and in August, 2007, *three months* after the adjudication hearings

Mother filed a motion urging a decision by the court. Instead, the court sent the parties for more evaluations.

After urging the court again by letter for an adjudication order, Mother filed a Petition for Writ of Mandamus with this Court in December, 2007, *seven months* after the completion of the adjudication hearing and proposed findings of fact and conclusions of law were ordered by the court and submitted. CMT had been in foster care for *nine months*. In response to the Mandamus the circuit court reported to this Court that the order of adjudication was "forthcoming." Instead of an order, the circuit court inexplicably *re-opened* the adjudication hearing for more testimony in May, 2008, even though the parties submitted their proposed orders of adjudication *one year* previously as ordered by the court. After more hearings, the court finally entered an adjudication order in June, 2008, *four months* after the circuit court represented to this Court that its order of adjudication was forthcoming and *fifteen months* after the petition was filed instead of *10 days* as required by the rules. None of this delay was caused by any actions of Mother.

### 3. Rules of Procedure for Child Abuse and Neglect, Rule 32

Rule 32 mandates that the disposition hearing commence *within forty-five (45) days* of the entry of the final adjudicatory order. The disposition hearing did not commence until September 10, 2008, *over ninety (90) days* after the adjudication order. The disposition hearings were not completed until April 22, 2009, *nine months* after the adjudication order was entered and *over two years* after the petition was filed.

#### 4. Rules of Procedure for Child Abuse and Neglect, Rule 36

Rule 36 mandates that at the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law on disposition *within ten (10) days* of the conclusion of the disposition hearing. The disposition hearing was completed on April 22, 2009, and in June, 2009, Mother urged the court in writing for a disposition order. The disposition order was not entered until July 17, 2009, *ninety (90) days* after the conclusion of the disposition hearing. It was nearly *2½ years* after the petition for abuse and neglect was filed. For the circuit court to find that it was Mother who was responsible for the inexcusable delays is just blatantly wrong. Mother did everything possible to expedite this case because she wanted her daughter returned to her.

#### **C. Mother's sexual abuse allegations against Father were *not* baseless**

For DHHR and the prosecuting attorney to bring this petition against Father they were required to have cause to believe Father abused his children or they acted in bad faith in filing the petition naming Father. How could the allegations against Father be baseless when the prosecuting attorney's office and the DHHR filed against Father?

Moreover, Mother based her belief that Father had sexually abused their daughter on what she was told by trained professionals who examined CMT. Why would she not rely upon this information? Had she not, the possibility existed that she could have been charged with failure to protect. Mother continued to pursue protection for her daughter based on the expert opinions of professionals who had no motivation to misrepresent the truth.

**D. Mother was told by various people in authority to file reports of sexual abuse**

The following is a description of each of the reports that Father alleged were baseless, fraudulent, and maliciously made.

**1. Mother's First Report**

Mother's first report that Father alleged was malicious and contrived occurred on March 23, 2006, when Mother filed for her first order of protection.

What lead up to this report? After having been with her father, CMT told her mother that her daddy gave her "candle baths." The next day CMT reported that her daddy put candles around the bathtub, closed the door, turned the lights off, and put his finger in her "wee." Father never denied this. Causing Mother concern, she phoned the family doctor who told her to call CAMC. Mother spoke with the social worker at CAMC who told her to contact CPS, seek a protective order, and have CMT examined by a physician.

She contacted Dr. Cavender who examined CMT and noted that there was a nonspecific vaginal odor and white discharge around her labia which was unusual. Additionally, Dr. Cavender noted that since September, 2005, she had seen CMT several times for genital irritation and complaints of soreness that did not preexist the parties' separation. Based on the advice from the family physician and CAMC, not Mother's contrived fantasy, Mother reported the abuse, sought a protective order, and had CMT examined.

## 2. Mother's Second Report

The second report made by Mother occurred almost one year later on February, 10, 2007, when she applied for another protective order.

What lead up to this report? On February 4, 2007, after being returned to Mother that afternoon by Father, who had custody for several days, CMT disclosed that her daddy licked her "wee." Mother noticed that CMT's vaginal area was red with discharge in her panties. She immediately contacted CAMC who advised her to bring CMT in for an examination. CAMC observed redness around the vaginal and perirectal area. Mother was instructed to report to CPS and follow up with Dr. Cavender.

As instructed by CAMC and because CMT's vaginal area had become inflamed and swollen, less than 24 hours after receiving CMT from Father, Mother took her to Dr. Cavender on February 5, 2007. CMT's panties had a lot of yellowish vaginal discharge, her vaginal tissues were swollen, bulging out of the introitus, very tender, red, and the minora was irritated and inflamed. On February 10, 2007, Mother spoke with Trooper Link who told her to seek a protective order. The state laboratory tested the panties CMT was wearing when Father brought her to Mother and were positive for male DNA.

CMT's symptoms became worse and Mother contacted Dr. Cavender on February 10, 2007. Dr. Cavender examined CMT at CAMC and the proper procedures were followed. Upon examination, CMT's vaginal area was markedly worse, had a curdy white discharge, was substantially swollen, had a fissure on the perineal body, and irritation to her anus. Spontaneously, the young four year old drew a picture of her father that included three circles that looked like a snowman with arms and legs with an elongated thing and CMT identified it as her daddy's "wee." She described what came

out of his "wee" as gray yellow and watery, it had to be cleaned up, and there was a noise associated with it. CMT explained that her daddy put his fingers in her wee, and licked and bit her wee. During the examination CMT played with a stuffed dog that had a tail protruding between the legs as the dog was viewed from his abdomen. She spontaneously stated that the tail looked "like daddy's wee" and pointed to the area between the legs of the dog as where daddy touched his "wee" when touching and biting her "wee." Dr. Ewing, medical supervisor at CAMC, reviewed Dr. Cavender's report and concluded that the examination was completed correctly and the information obtained was accurate. Dr. Cavender was convinced that CMT was sexually abused.

The results of one of the cultures taken by Dr. Cavender tested positive for streptococcus pyogenes which was a rare infection to have in the vaginal area and Dr. Cavender had never seen it in the vaginal area. Additionally, CMT had a vaginal and urinary tract infection. There was no other explanation for the clinical findings. Dr. Cavender, was one of *Father's* witnesses and opined that the streptococcus pyogenes was transmitted orally from Father through oral sex that CMT had described to her.

Streptococcus pyogenes takes at least 48 hours to incubate and the corresponding inflammation to appear, putting CMT in the custody of Father, not Mother, when she was infected. Dr. Piayon Kobbah agreed. Dr. Ewing agreed. No other testimony refuted this medical testimony. The Prosecuting Attorney's office, DHHR, and the state police referred CMT for a forensic interview. CMT was interviewed on February 20, 2007. She described and demonstrated sexual abuse by her father.

As a result of the advice given to her by Trooper Link and Dr. Cavender, Mother filed another protective order and reported the sexual abuse. To characterize a report

as contrived and malicious based upon information received from well-trained professionals and upon their direction is an abuse of discretion.

### 3. Mother's Third Report

In March 2007, before the petition was filed CMT was visiting Father in his home with friends of Father's supervising. After a visit, CMT reported to Mother that her daddy was still sexually touching her in her bedroom. Mother contacted State Trooper Divita who spoke with CMT and advised Mother to discuss the situation with a magistrate.

### 4. Mother's Fourth Report

Mother's fourth alleged false and malicious report was when she reported that Father was in contempt of the April 4, 2007, order of court. What led up to this report?

On April 4, 2007, the court gave legal custody of CMT to DHHR and physical custody of CMT to a foster family ordering:

I'm going to order that she [CMT] remain with the [foster family]. I'm also going to order that ... the father, have supervised visitations with the [foster family].

In October, 2007, Father visited CMT in her school gymnasium and the foster family was not present which was never denied by Father. Furthermore, the school was not aware that Father's visitation with CMT was restricted. Mother reported this violation of visitation and Father never denied it.

### 5. Mother's Fifth Report

Two months later the fifth alleged false and malicious report was made by Mother as a result of a visit with CMT in December, 2007. What led up to this report?

For the previous nine months everything that Mother did and said to CMT was strictly supervised by DHHR. According to DHHR on a visit in December, 2007:

[Mother] and I [DHHR worker] took [CMT] in the restroom because she had to use the bathroom. [Mother] asked [CMT] if anyone was bothering her and she shook her head no. So [Mother] asked [CMT] if she left if she would talk to me [Jaclynn] and [CMT] said yes. So I'm stuck in the stall with [CMT] and I bent down and asked her if anyone had been messing with her and I pointed to her pants and she told me yes, I asked her who and she said Daddy, I said how does Daddy bother you and she said with his hands, and she said he kisses her, after that [CMT] got quiet and we *went back outside to the picnic area where [Mother] was waiting for us.* Me being a mother myself I told [Mother] that [CMT] told me yes. (Emphasis added).

Mother did not examine her daughter nor was she in the stall when the DHHR worker questioned CMT. Mother was waiting in the picnic area. The worker reported the abuse to Mother not visa versa and Mother reported this incident to the court. The court found that Father would have had no opportunity to abuse CMT because at the time his visits were restricted and supervised. Father's visitation with CMT was supposed to be supervised on Friday nights for a few hours only. Unknown to Mother until months later, and documented in Father's psychological and parenting reports, he admitted in Dr. Clayman's evaluation that he visited CMT every night and "would read her bedtime stories and tuck her in."

**E. Mother's sexual abuse allegations against Father were *not* fraudulent**

Mother believed Father was abusive because of the uncontraverted medical and forensic evidence at the time the petition was filed by DHHR. The evidence of abuse by Father that existed at the time the DHHR filed the petition against Father still exists today. The evidence was *never* contradicted, challenged, or denied. Not only were Mother's reports not fraudulent, the only evidence was that Father sexually abused MT, not Mother. There was no evidence that Mother sexually abused CMT. Most importantly, CMT has never made an allegation of sexual abuse to anyone against her

mother or any other person. She has only and repeatedly made allegations against her father.

How can Mother's sexual abuse allegation against Father be fraudulently made when they were based upon uncontraverted medical and forensic evidence? It is one thing for a court not to believe the professionals that courts have relied upon in the past in determining whether a child was sexually abused, but it is quite another thing to then turn around and accuse the other parent based on no evidence whatsoever. Evidence should matter.

Clearly, Mother's reports were not fraudulent in that they were based on the opinions of professionals who believed that CMT was sexually abused by Father. The medical opinions, all of which were not challenged by Father, were that CMT was sexually abused. Of the approximately twenty witnesses who testified over 2½ years, not one stated or opined that Mother sexually abused CMT.<sup>2</sup>

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footnote 2

Susan Cavender, M.D., family physician, examined CMT and opined that Father sexually abused CMT, not Mother.

Kimberly Ewing, M.D., medical director at CAMC, did not testify that Mother abused CMT.

P.E. Kobbah, M.D., examined CMT and provided no evidence that Mother abused her.

Brittany Akers was with CMT when examined at CAMC and did not testify that Mother abused CMT.

Tracey Powell, R.N., sexual assault nurse at CAMC, did not testify that Mother abused CMT.

Nurse Elswick, R.N., examined CMT at CAMC and she did not testify that Mother abused CMT.

Lawrence Kelly, M.D., Mother's treating psychiatrist in 2005-06, did not testify that Mother abused her children.

Maureen Runyon, M.S.W., expert forensic evaluator, opined that Father, not Mother, sexually abused CMT.

Jean Cavalier, principal at Sacred Heart Elementary School, did not testify that Mother abused her children.

Cherie Cowder, M.A., interviewed the parties and children and did not testify that Mother abused her children.

Regina Confere, social worker with the DHHR, provided no evidence that Mother sexually abused her children.

Shawna Bowles, M.S.W., CMT's counselor, did not testify that Mother abused her children.

Nikole Kurten, who was CMT's teacher, did not testify that Mother abused CMT.

Jaclynn Caudill, DHHR worker did not testify that Mother abused CMT.

Lindsey Fleming, CPS case worker, offered no testimony that Mother sexually abused CMT.

Scott Bresler, Ph.D. did not testify that Mother abused her children. He did testify that Mother suffered from no mental illness and was not delusional in her belief that Father sexually abused CMT.

Ryan Peirson, M.D., testified to the same.

David Clayman, Ph.D., did not testify that Mother sexually abused CMT and on September 10, 2008, testified that Mother suffered from no mental illness nor was she delusional in her belief that Father sexually abused CMT.

Timothy Saar, Ph.D., provided no evidence that Mother abused CMT.

There were no other witnesses including Father.

There were reports from multiple credible sources, other than Mother, that Father did. Mother's reports were based on medical and forensic evidence and, therefore, were not a figment of her imagination or fraudulent. On the other hand, the fraudulent claim was that Mother sexually abused CMT because no evidence was produced at all substantiating this claim. Surely if Mother is accused of sexual abuse with no evidence whatsoever to support it, the party being fraudulent is someone other than Mother.

**F. Mother's actions were not baseless, malicious, or fraudulent, but for the sake of argument, even if they were she is entitled due to process and a hearing before an award of attorney fees and costs.**

The circuit court erred in finding that Mother's claims were malicious, fraudulent, and baseless and she requests that this Court reverse the court's findings that Mother's actions were malicious and fraudulent in that there was no evidence presented that Mother sexually abused CMT, however there was uncontradicted medical and forensic evidence that Father did. For the sake of argument, even if this Court found Mother was malicious and fraudulent, before awarding attorney fees Mother is entitled to a hearing on the issue of reasonableness of fees.

**VII. RELIEF PRAYED FOR**

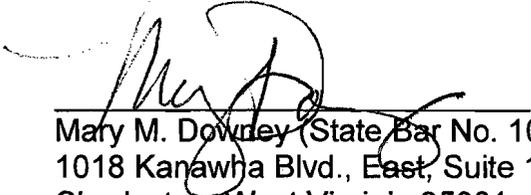
WHEREFORE, Respondent Mother respectfully requests of this Honorable Court to reverse the finding of the circuit court finding that:

- (1) Mother's conduct was not the sole reason that the abuse and neglect proceeding was filed;
- (2) Mother's conduct was not why the case took over 2½ years to reach disposition;
- (3) Mother's sexual abuse allegations against Father were not baseless;
- (4) Mother's sexual abuse allegations against Father were not fraudulent in that they were based on clear and convincing evidence; and

- (5) With no evidence of sexual abuse by Mother, Father's claim that Mother sexually abused CMT lacked credibility, was not clear and convincing, and was, therefore, fraudulent;
- (6) There being no wrong doing on Mother's part, Mother should not be assessed attorney fees and costs or, in the alternative, she should not be assessed fees and costs after Father voluntarily chose to prosecute the case even after his dismissal as a party; and
- (7) If this Court finds that Mother was malicious and fraudulent, Mother is entitled to a hearing on the reasonableness of the fees and costs.

**JEAN**

By Counsel



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