

Benjamin, Chief Justice, dissenting:

I dissent on procedural grounds from the majority decision in this matter that affirmed the termination of the custodial rights of a mother and father to their two children, T.R. and C.R., and to a third child who is the son of the petitioner mother and the stepchild of the petitioner father. The parents of these children were entitled to a hearing under our Rules of Procedure for Child Abuse and Neglect (hereinafter “Rules”) prior to the termination of their custodial rights.

The long history of the present case has its start in 2003, when the petitioner parents were named in a prior abuse and neglect proceeding regarding these children. At the time of the filing of the first petition, the petitioners were accused of failing to protect their children from sexual abuse at the hands of two people, one of whom was the children’s uncle. The children’s uncle was convicted of sexually abusing T.S. The 2003 proceeding culminated in the reunification of T.R. and C.R. with their parents. T.S. was placed in the custody of his biological father.

The present abuse and neglect proceeding is again related to the failure of the petitioner parents to protect their children from sexual abuse. In February, 2012, the Department of Health and Human Resources averred in a new petition that T.R. and C.R. were being allowed to spend weekends with the very uncle who was convicted in 2003 of sexually abusing their sibling T.S. The petitioners admitted that the children were allowed to stay overnight with their uncle, and the children were adjudicated abused and/or neglected because of this. After a dispositional hearing was held, but prior to the court’s ruling on the disposition of this matter, the petitioner mother and petitioner father each moved to set aside the adjudication and disposition based upon the assertion that there was exculpatory evidence in the hands of the State that would prove that the children’s uncle did not engage in sexual abuse of T.S. Without having a hearing on that motion, the court entered a dispositional order which terminated the petitioners’ custodial rights to the children.

Rule 46 of the Rules of Procedure for Abuse and Neglect addresses the modification or supplementation of an abuse and neglect order. The rule states, in applicable part, that

A child, a child’s parent (whose parental rights have not been terminated). . . shall file a motion in the circuit court of original jurisdiction in order to modify or supplement an order of the court at any time. . .The court shall conduct a hearing and, upon a showing of a material change of circumstances, may modify or supplement the order. . .

The court should have held a hearing on the motions filed by the petitioners seeking to utilize this exculpatory evidence about the underlying sexual abuse allegations on the part the children's uncle. The court erred by summarily denying these motions, without giving the parents the opportunity to be heard. I would reverse the order, and remand this case to the Circuit Court of Braxton County for a hearing on the motions for exculpatory evidence filed by the petitioner parents.