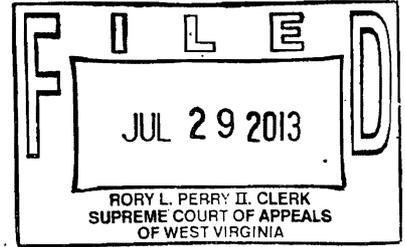


Docket No. 13-0486



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: H.S.

Kanawha County Abuse and Neglect Case No. 12-JA-159
The Honorable Judge James C. Stucky

**BRIEF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN
RESOURCES**

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RESPONSE TO ASSIGNMENTS OF ERROR

The Circuit Court was not clearly erroneous and did not commit reversible error when it terminated the parental rights of the respondent father, C.S., based upon clear and convincing findings of fact and conclusions of law.

STATEMENT OF THE CASE

On July 3, 2012, the West Virginia Department of Health and Human Resources ("the Department") filed a child abuse and neglect petition in Kanawha County Circuit Court. (Appendix pg. 1) The petition alleged that the respondent father, C.S., had sexually abused and neglected his five-year-old daughter, H.S. (Appendix pg. 5) The petition alleged that H.S. had disclosed to a therapist that her father had touched her "pee pee" in a manner that she did not like, and that she did not like going to her father's house. (Appendix pg. 5) The Kanawha County Circuit Court subsequently entered an order placing the child in the temporary legal and physical custody of the Department and setting a preliminary hearing. (Appendix pg. 1)

On July 9, 2012, the Circuit Court held a preliminary hearing and heard the testimony of Timinica Tolliver, the Department case manager assigned to the family, as well as the testimony of Marta Gillespie, the therapist who received the disclosure of sexual abuse from H.S. (Appendix pg. 54-59) Ms. Tolliver testified that the child had disclosed being touched on her "pee pee" by her father, C.S., to her therapist, Marta Gillespie and that was the reason a petition had been filed. (Appendix pg. 59) Ms. Tolliver testified that she did not witness the disclosure and that the child would not discuss anything at all with Ms. Tolliver about the disclosure. (Appendix pg. 60) Ms.

Tolliver testified that she had received several prior referrals on the family and that each of her attempts to interview the child about the different allegations ended similarly; the child would speak very little and often would look away without responding at all. (Appendix pg. 60-61) Ms. Tolliver testified that H.S. had recently been referred to a therapist to address behavioral problems that H.S. had been exhibiting to Ms. Tolliver and others. (Appendix pg. 64)

After Ms. Tolliver concluded her testimony, the Department called Marta Gillespie as a witness. (Appendix pg. 83-99) Marta Gillespie testified that she had a Master's degree in counseling, was currently employed by NECCO providing in-home services, currently worked at providing mental health therapy to sexually abused children, was working at becoming certified in play therapy, and had testified on two occasions as an expert in Kanawha County court. (Appendix pg. 83-86) Ms. Gillespie testified that she had started therapy with H.S. in May 2012 and that the child was very open and communicable with her. (Appendix pg. 87) Ms. Gillespie testified that the child disclosed to her that her father had touched her "pee pee". (Appendix pg. 87-88) Ms. Gillespie testified that the disclosures occurred twice: once at school and once at the child's home while engaged in play therapy. (Appendix pg. 88) Ms. Gillespie testified that the child told her that her father would take her out of her grandparent's bed at night after they had all gone to sleep and that she did not know why her dad would take her out of the room and touch her pee pee, whereupon she motioned to her privates and then said she wished her dad would not do that. (Appendix pg. 88-90) Ms. Gillespie testified that she reported the child's disclosures to the Department. (Appendix pg. 90) Ms. Gillespie also testified that the last time she had met with the child at school, the

child begged her not to send her back to her father's house. (Appendix pg. 91) Ms. Gillespie testified that when she would speak with the child she did so alone and in private away from the parents. (Appendix pg. 93-96) Ms. Gillespie testified that she had no indication in her meetings with the child that led her to think the child was being prompted or induced to tell her anything. (Appendix pg. 96)

At the conclusion of the hearing, the Circuit Court found probable cause that H.S. had been abused and neglected by C.S. and continued her legal and physical custody with the Department. H.S. remained in the physical care of her mother, V.S.

On August 9, 2012, the Circuit Court held an adjudicatory hearing and heard the further testimony of the child's behavioral therapist, Marta Gillespie. (Appendix pg. 119-148) Ms. Gillespie testified again to her credentials and was certified as an expert in the field of mental health therapy. (Appendix pg. 121-123) Ms. Gillespie also testified that she had continued to meet regularly for therapy with the child and that at their most recent meeting a week before the adjudicatory hearing the child had told her that her father had not touched her privates but that she did not want to go to her father's house or stay the night in his home. (Appendix pg. 125-127) The child then declined to discuss the matter further with the therapist and would answer further query with "I don't know". (Appendix pg. 127) At the conclusion of the hearing, the Circuit Court found there was clear and convincing evidence that H.S. had been abused and neglected by C.S.

On October 15, 2012, the Circuit Court held a disposition hearing and concluded that there was no reasonable likelihood that the conditions of abuse and neglect with respect to the home of C.S. could be substantially corrected in the near future, that

reasonable efforts were not necessary given the nature of the abuse, and that it was in the best interests of H.S. that the parental rights of C.S. be terminated.

SUMMARY OF ARGUMENT

The Circuit Court was correct in terminating the parental rights of C.S. to H.S. because there was no reasonable likelihood that he could substantially correct the conditions of abuse and neglect in the near future, nor were such efforts necessary insofar as the Circuit Court found that C.S. sexually abused H.S. and would not be in her best interests to return to the care of C.S.

STATUS OF CHILDREN AND PARENTAL RIGHTS

H.S. currently resides in the permanent legal and physical custody of her biological mother, V.S.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe oral argument is necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal. However, if the Court determines that oral argument is necessary, then this case is appropriate for disposition by memorandum decision under Rule 19 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

The standard of review in cases of abuse and neglect is as follows:

"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 the determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such a child is abused and 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 must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." In re: Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1995)

ARGUMENT

The Circuit Court was correct and not clearly erroneous in its decision to terminate the parental rights of C.S. The court's decision is supported by clear and convincing findings of fact and conclusions of law contained in the record below.

The Circuit Court may terminate parental rights "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected." W.Va. Code § 49-6-3(a)(6) (2010). The young child in this case, H.S., disclosed to her therapist, Maria Gillespie, during play therapy and on two occasions that her father, C.S. had sexually abused her by taking her out of her grandparents' bed after everyone had gone asleep and touching her "pee pee" in a manner that she did not like. During the disclosures, H.S. also indicated with gestures she was talking about her privates. H.S. also told her therapist she wished her father would stop touching her there. Although H.S. later gave statements to her therapist that her father had not touched her privates, H.S. continued to maintain that she did not want to go to her father's home to live or visit. When her therapist attempted to discuss the matter with her further, H.S. shut down and would only respond to questions about whether the

abuse happened or not with the statement "I don't know." Based upon the testimony surrounding the child's disclosures to her therapist the Circuit Court correctly found by clear and convincing evidence that the child had been sexually abused by C.S. and subsequently found that reasonable efforts to reunite the child were not necessary and that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future and terminated the parental rights of C.S. to H.S.

CONCLUSION

Wherefore, the West Virginia Department of Health and Human Resources requests that the findings of fact and conclusions of law made by the Circuit Court in this case be AFFIRMED

Respectfully,
West Virginia Department of
Health and Human Resources,
By counsel,

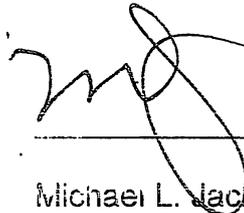
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CERTIFICATE OF SERVICE

I, Michael L. Jackson, counsel for the West Virginia Department of Health and Human Resources do hereby certify that on July 29, 2013, the above "Brief of the West Virginia Department of Health and Human Resources" was served on all parties by mailing a true copy to each.



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