

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JANUARY 1995 Term

NO. 22084

STEPHEN L.H.,
Plaintiff Below, Appellee

V.

SHERRY L.H.,
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
Honorable John Hey, Judge
Civil Action No. 88-C-3301

REVERSED AND REMANDED

Submitted: January 18, 1995
Filed: March 6, 1995

Suzanne W. Daugherty
George A. Daugherty
Elkview, West Virginia
Attorneys for Appellee

Steven L. Miller
Miller & Reed, L.C.
Cross Lanes, West Virginia
Attorney for Appellant

JUSTICE CLECKLEY delivered the Opinion of the Court.
JUSTICE BROTHERTON did not participate.
JUDGE FOX sitting by temporary assignment.
CHIEF JUSTICE NEELY dissents and reserves the right to file a
dissenting opinion.
JUSTICE WORKMAN concurs and reserves the right to file a concurring
opinion.

SYLLABUS BY THE COURT

1. A circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard.

2. When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch.

By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. When the Legislature enacted W. Va. Code, 48A-4-20(c) (1993), it intended the phrases "abuse of discretion" and "unsupported by substantial evidence" as used in this section to encompass the entire panoply of definitions which the judicial branch had previously ascribed to those terms.

3. Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be

overturned even if a circuit court may be inclined to make different findings or draw contrary inferences.

4. If a circuit court believes a family law master failed to make findings of fact essential to the proper resolution of a legal question, it should remand the case to the family law master to make those findings. If it is of the view that the findings of fact of a family law master were clearly erroneous, the circuit court may set those findings aside on that basis. If it believes the findings of fact of the family law master are unassailable, but the proper rule of law was misapplied to those findings, the circuit court may reverse. However, a circuit court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings.

Cleckley, Justice:

The primary issue in this case is whether the circuit court employed the correct standard of review when it entered its own findings of fact and conclusions of law that were contrary to those of the family law master. The facts of the case provide the appropriate opportunity to discuss and develop more fully the standard of review a circuit court must apply in reviewing the findings and ultimate decision of a family law master.

I.

JURISDICTION

Because there are still aspects of this case pending in the circuit court, we first examine sua sponte whether we have jurisdiction over this appeal. Under W. Va. Code, 58-5-1 (1925), this Court has appellate jurisdiction over final decisions and judgment orders issued by a circuit court. We recently defined a "final judgment" as contemplated by this statute as a decision that ends the litigation on the merits and leaves nothing for the circuit court to do but execute the judgment. Syl. pt. 3, James M.B. v. Carolyn M., ___ W. Va. ___, ___ S.E.2d ___ (No. 22545 2/17/95).

The circuit court's decision to overturn the findings of the family law master was indeed a big part of the ongoing child visitation proceedings, but the court never addressed the issue of attorney fees that were also being sought by the plaintiff below and appellant herein, Sherry H. This context, however, does not automatically divest us of jurisdiction. Although this Court has strictly applied the "final judgment" rule, we have stated that if we can determine from the record what the circuit court meant to do and its reasons, the record may be sufficient to permit the appeal to proceed. In this context, the intention of the circuit court is controlling. See Vaughn v. Mobile Oil Exploration and Producing Southeast, Inc., 891 F.2d 1195 (5th Cir. 1990). In addressing the finality requirement, we said in Strahin v. Lantz, ___ W. Va. ___, ___ n.1, ___ S.E.2d ___, ___ n.1 (No. 22099 2/17/95) (Slip op. at 1), "we adopt a practical interpretation that looks to the intention of the circuit court."

It is obvious that the circuit court felt the attorney fee issue was moot when it set aside the family law master's findings

¹We follow our traditional practice in cases which involve sensitive facts and do not use the last names of the parties so as not to stigmatize them or their children. See, e.g., Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987); West Virginia Dept. of Human Services v. La Rea Ann C.L., 175 W. Va. 330, 332 S.E.2d 632 (1985).

and entered its own findings in favor of the plaintiff below and appellee herein, Stephen H. From this perspective, the ruling of the circuit court can be viewed as settling all issues of the proceedings. Specifically, we find review of the circuit court's order is appropriate, as it appears it intended to dispose of the entire case. Accordingly, the order in question is final, and this Court has appellate jurisdiction. Because we have decided to reverse the judgment of the circuit court and reinstate the family law master's findings, upon remand, the circuit court should reconsider the issue of attorney fees.

II.

BACKGROUND

We begin by noting that our review of this voluminous record developed before the family law master has been extensive.

This Court has examined the entire record, including videotapes containing portions of the family law master hearings and interviews of the child witnesses, and briefs of the parties.

The record reveals Stephen H. and Sherry H. were married in August of 1984. Their daughters Ashley and Chelsey were born in December of 1985 and March of 1988, respectively. Sherry H. moved

out of the marital home with her daughters in 1988, and the parties were divorced in June of 1989.

Sherry H., the primary caretaker, was granted custody of the children. It is undisputed that she allowed Stephen H. liberal visitation privileges beyond those granted in the divorce order.

Apparently, for vindictive reasons, Stephen H. on some occasions did not take advantage of the scheduled weekend visits with the children. Notwithstanding these incidents, it appears the visitation arrangements were amicable.

Numerous witnesses described the children as happy little girls who were intelligent for their ages. Ashley was characterized as truthful; no witness testified that she was prone to fabricate a lie.

During the summer of 1989, the girls spent a week with Stephen H. It was after this visit that Ashley first complained to Sherry H. that her daddy had pulled her underpants down and inappropriately touched her. Ashley demonstrated the touch to her mother by pointing to her vagina. Sherry H. talked with her daughter about what had happened, but did not act immediately. Sherry H. told her sister, Barbara B., that she was afraid Stephen H. had

sexually abused the girls. During this same time period, Ashley also relayed to Barbara B. what she told her mother.

Sherry H. planned to ask the girls' physician, Dr. John Kelly, about her suspicions during their next appointment. Dr. Kelly examined Ashley in June of 1989. No physical evidence of abuse was found, but Dr. Kelly informed Sherry H. that she should consult with a child psychologist if she suspected child abuse. Sherry H. failed to pursue the matter any further until the following summer.

In the summer of 1990, Ashley's behavior changed significantly. She was very reluctant to go with her father and began having nightmares. Sherry H. arranged for Ashley to talk to a clinical psychologist, Linda Workman. Ms. Workman met with Ashley on July 19, 1990; August 1, 1990; and September 19, 1990, and with Ashley and Chelsey together on August 22, 1990. After these interviews, Ms. Workman notified Sherry H. that she believed Ashley was being truthful and had been molested by her father. Based on this information, Sherry H. petitioned for modification of visitation.

At the September 20, 1990, hearing before the family law master, Stephen H.'s motion for the children to be examined by

independent experts was granted. He suggested the experts and arranged for the interviews with Dr. Kathleen Preville, Assistant Professor of Pediatrics, West Virginia University at the Charleston Division, and Pam Rockwell, a sexual abuse counselor.

Based upon a physical examination of the girls, Dr. Preville testified that Chelsey's examination was normal. The findings of Ashley's examination were basically inconclusive. Ashley's hymenal opening was larger by one standard deviation than the average size for her age. Dr. Preville testified that the evidence would be consistent with digitalization. However, on cross examination, she admitted the size was still within normal ranges.

Furthermore, Ashley's labial tissues were fused at birth and required treatment by medication to mature fully, and this treatment could not be ruled out as a factor causing the slight deviation.

Ms. Rockwell interviewed Ashley on October 10, 1990; October 22, 1990; and November 8, 1990; and videotaped an interview conducted on November 13, 1990. Anatomically correct dolls were used to help Ashley explain what she remembered. Ashley, pointing to the area between her legs, demonstrated to Ms. Rockwell where she was touched by her father. She indicated that no one other than her father had touched her in that area of her body. Ashley also said her father touched Chelsey the same way, and this event occurred

in the bedroom of his house. Ms. Rockwell testified that based on these interviews, she believed both Ashley and Chelsey were sexually abused by Stephen H. Ms. Rockwell further testified it was impossible to believe a four-year-old would fabricate these allegations.

Sherry H. testified that Ashley was particularly reluctant to go with her father during Thanksgiving visitation of 1990. Two day-care workers testified they were unaware of the abuse allegations at that time, but they noticed significant changes in both the girls' behavior after the Thanksgiving visit with Stephen H. Ashley was withdrawn from her peers, became uncharacteristically physically abusive, and wanted to be held by the day-care workers. Chelsey cried and wanted to be rocked and soothed by the day-care workers.

The girls exhibited unusual behavior up until the facility closed in December of 1990.

Stephen H. emphatically denied sexually abusing his daughters. He attributed their change in behavior to their examinations by Dr. Preville and Ms. Rockwell in November of 1990.

He believed it was abnormal for such young children to undergo a vaginal examination. Furthermore, he believed that Sherry H. and her sister, Barbara B., coached Ashley into saying the abuse

occurred. To illustrate this point, he described an event that took place in December of 1990 when he and his mother picked the girls up in his car to take them for a visit. Sherry H. and her sister met them at an Exxon Station in Cross Lanes. After the girls got into the car and they drove down the road a little ways, he playfully pinched Chelsey on the leg. (It was common for him to do this in a fun-loving way and call them little monsters). However, this time Chelsey got a funny look on her face and looked at Ashley and said "Daddy touched me." He stated that Sherry H. and her sister have somehow convinced the children that any time he touches them, it is a bad touch.

When questioned about his wife's motives, Stephen H. responded she was a very vindictive person. He admitted it would be against Sherry H.'s pecuniary interests to see him lose his license to practice dentistry or to be indicted on these charges. He also admitted that Sherry H. had already obtained full custody of the children before these allegations arose. However, he believed she brought these charges in hopes that he would drop the petition he filed in February of 1990 requesting a reduction in the amount of child support he had to pay.

²This matter was brought before a different family law master, and the record of those proceedings is not available for review.

Stephen H. called an expert witness on his behalf, Dr. Richard Gardner, a psychiatrist and professor at Columbia University College of Physicians and Surgeons, Division of Child Psychiatry.

Dr. Gardner has written textbooks and articles on the topic of child sexual abuse allegations. At the May 16, 1991, hearing, Dr. Gardner testified he interviewed Stephen H. at length, reviewed the transcripts of the witnesses who testified at the earlier hearings, analyzed the videotaped interview of the girls, reviewed the doctors' reports submitted in the case, and observed the testimony of Sherry H. on the day he testified. Dr. Gardner opined that based on his extensive review of the evidence in this case, Stephen H. did not sexually abuse Ashley or Chelsey. He also stated that Stephen H. did not possess any of the some twenty-five indicators of personality traits consistent with being a pedophile.

During his testimony, Dr. Gardner critiqued the videotaped interview of the children performed by Ms. Rockwell. Being highly critical of Ms. Rockwell's interview techniques, he stated the

It appears that Stephen H. was required to make monthly payments of \$900 for child support and he also paid approximately \$350 per month for a car payment to Sherry H. He petitioned for recalculation of his obligation because of a reduction in his income. Although relevant, the parties did not offer evidence on the final resolution of this matter.

leading nature of the questions implanted a visual image to Ashley that was not reality and that Ms. Rockwell's subsequent questioning reinforced the positive responses to familiar questions. He characterized her use of anatomically correct dolls in the interviews as sexual abuse in and of themselves. Dr. Gardner believed Ashley's testimony was contaminated by repeated and improper interview techniques to the point she was no longer a credible witness.

Dr. Gardner testified he would have preferred to have met with the children and their mother, but Sherry H. would not submit to an examination or allow her children to be interviewed. Dr. Gardner opined that Sherry H.'s "exclusionary maneuvers" in the way she left her husband and excluded the girls from seeing their paternal grandmother and other friends and the fact she had been sexually abused as a child would militate toward a false or delusional accusation.

III.

FAMILY LAW MASTER'S FINDINGS

After hearing the evidence above, the family law master issued 111 findings of fact. In addition to enumerating the findings of fact, factual conclusions and "ultimate facts" were included in

her findings. The family law master found Ashley's allegations were true:

"2. The Court finds that Ashley [H.] was telling the truth when she told, first her mother, Sherry [H.], Petitioner herein, then her mother's sister, Babs [B.], in the summer and fall of 1989, then continued complaining to her mother until July of 1990, and then later told psychologist Linda Workman in August 1990, and later to Pam Rockwell in October 1990, that her father, Stephen L.[H.], had sexually molested her. This finding is based not only upon the testimony and credibility of these witnesses as more fully described hereinbelow, but also upon the testimony of Petitioner's and Respondent's lay witnesses: particularly Respondent's mother, Edith [A.]; Respondent's friends, Steve and Nancy [F.]; Respondent's witnesses, former ex-babysitters Donna [H.] and Barbara [D.]; and Tom [M.], all of whom, having had ample opportunity to observe, described Ashley [H.] as intelligent, mature for her age, and truthful."

It was the determination of the family law master that Sherry H. was a credible witness and did not coach Ashley into making the allegations of abuse. While the family law master noted the evidence regarding the alleged financial motivation of Sherry H. to falsely accuse her former husband, she found the rehabilitation evidence more persuasive. Furthermore, the family law master found

³In assigning reasons for the finding that Sherry H. was credible, the family law master found the allegations that she had financial motivation to fabricate these charges against Stephen H. incredible because she was aware of the implications that these "allegations could result in the loss to her of a significant amount

of child support, not to mention extensive legal fees and the expense of this lengthy litigation which has caused her to miss several days of work." Also, the family law master found the other allegation that Sherry H. was motivated to lie in order to exclude her daughters from visitation with their father was also not credible because she already had sole custody of her daughters and could relocate them in another state if she wished without the approval of Stephen H.

Also as Stephen H. and his own witnesses, baby-sitter Donna [H.], and his mother Edith [A.], agreed, she had allowed more frequent visitation than their divorce order required and furthermore had voluntarily agreed to more extensive visitation than that recommended by the West Virginia Department of Human Services in its visitation guidelines with regard to children under three years old in order to give the father increased overnight visitation rights with Chelsey.

More significantly, the family law master found Sherry H.'s credibility was further enhanced because

"she at first did not want to believe her daughter, delayed for almost a year in taking any action until she began to worry because the child's behavior had changed sufficiently towards visitations with Respondent that Sherry [H.] began to believe that something must have happened. Only then on July 19, 1990 did she take her daughter who was then four and one half years old, to a clinical psychologist, Linda Workman, who was initially engaged according to both Ms. Workman and the Petitioner specifically to determine whether, in Ms. Workman's professional opinion, the events described by Ashley had actually occurred; furthermore, notwithstanding Petitioner's concerns, she still allowed her two daughters to accompany the Respondent and his mother Edith [A.] to the beach in August of 1990 because Ms. Workman's evaluation was incomplete; only after Ms. Workman's third session with Ashley and Chelsey on August 22 at which Ashley described in detail what had happened and Ms. Workman expressed her opinion that Ashley was telling the truth, did Petitioner file her Petition requesting Modification of Visitation[.]"

Sherry H. was not pursuing these allegations for improper motives.

The family law master found the expert testimony of Ms. Rockwell, Ms. Workman, and Dr. Preville to be credible and convincing. Dr. Gardner's opinions, however, were given little weight.

⁴The family law master observed that Stephen H. and all the other witnesses agreed that despite evidence of severed friendships and strained relationships with his family, Sherry H. did not exclude him from his children until after she finally came to believe Ashley's allegations of sexual abuse.

⁵In reviewing the testimony, the family law master noted that in Ms. Rockwell's professional opinion

"Ashley [H.] was telling the truth and that both Ashley and Chelsey [H.] had been sexually abused by their father, Stephen L. [H.,] . . . that children are incapable of this kind of fabrication at the age of four, and although suggestible, cannot sustain a series of lies without detection; that contact between an alleged perpetrator and child victim can be coercive and is not the best way to arrive at the truth; that the best test is to interview the child and rely upon the experience and training of the evaluator[.]"

Additionally, the family law master found Linda Workman to be "a qualified psychologist who had ample opportunity to observe Ashley [H.]" and that her expert testimony was "credible and convincing." The family law master made similar findings as to Pam Rockwell. While not expressly endorsing the methodology employed by Ms. Rockwell during her videotaped interview with the children, the family law master did

"not find the questions or methodology sufficiently leading or suggestive to invalidate the truthfulness of Ashley's answers which were basically consistent with the child's claims made for over a year prior thereto to other credible witnesses, therefore, the Court finds Ms. Rockwell's professional opinion credible and convincing, and the videotape to be convincing confirmation of Ashley [H.]'s prior allegations, and of the probability of Chelsey [H.]'s sexual abuse."

Finally, the family law master found that Dr. Preville "testified that Chelsey's physical examination was normal; that Ashley [H.]'s genitalia exam was abnormal, in that Ashley's hymenal opening was larger by one standard deviation than the average for her age of four years and eleven months old; that there was no evidence of penal penetration, but that this enlarged hymenal opening was consistent with digitalization (the insertion of a finger); and that therefore, it was her expert opinion to a reasonable degree of medical probability that Ashley [H.] had been sexually abused." The family law master found that Dr. Preville's testimony was "corroborative of Ashley [H.]'s allegations that . . . Stephen [H.] penetrated her with his fingers, especially in light of the evidence that Ashley [H.] is quite small for her age and therefore could be expected to have a smaller hymenal opening than average[.]"

⁶Although the family law master found Dr. Gardner to be "highly qualified, erudite, entertaining and profound, possessed of a healthy ego, and . . . many of his theories reasonable; some of his criticisms of 'the system' and common methodology used in cases of this sort seems well taken," the family law master accorded little weight to his opinions on the ultimate issues. It was found that most of Dr. Gardner's testimony concerning Sherry H., for example that she had engaged in exclusionary maneuvers, was based, not on the evidence of record, but upon what Stephen H.'s attorney had told him. Dr. Gardner admitted that "' . . . if I were to separate myself from what Mr. Daugherty is saying,' his opinion would change." After discussing several problems with his testimony, it was concluded that Dr. Gardner's opinion was entitled to little weight because his ultimate decision was based on a relatively brief interview with Stephen [H.] and it was a purely

The family law master outlined Stephen H.'s testimony and characterized it as not credible. The family law master stated "except for his firm denial that he molested his daughters, [his testimony was] evasive, argumentative, peculiar, and generally not credible; furthermore, his inartful attempts to plug incongruent evidence of Petitioner's motivations, and Ms. Rockwell's videotape into his expert's theories are obvious and further reduce his credibility." Stephen H.'s conduct during the hearings before the family law master was also criticized.

Accordingly, the family law master found Stephen H. sexually molested Ashley "on several occasions" and "probably" molested Chelsey between the summer of 1989 and 1990. She recommended that visitation with Stephen H. be terminated until he satisfactorily completes psychological treatment. The family law

subjective measure unlike the MMPI or similar standardized personality tests.

⁷The family law master found Stephen H's

"demeanor throughout these hearings surprisingly inappropriate and domineering considering the seriousness of Ashley's charges and the demonstrated competence and diligence of his several attorneys, during which the Respondent alternately glared or laughed at the Petitioner and her counsel and made sarcastic noises and rude, deprecatory gestures during the testimony of witnesses which behavior is not reflected on the

master also recommended that Stephen H. pay for the cost of the psychiatric treatment for the girls, the cost of the proceedings, and Sherry H.'s attorney fees.

IV.

CIRCUIT COURT'S FINDINGS

The circuit court reviewed the findings of fact submitted by the family law master, the transcripts of the hearings, and the videotapes of the proceedings and of the girls' interview. The circuit court specifically rejected "each and every finding of fact and conclusion of law" as presented by the family law master and issued its own findings.

Unlike the family law master, the circuit court was impressed by Dr. Gardner, and found his testimony persuasive. The

record[.]"

⁸The circuit court made the following finding as to Dr. Gardner:

"While the Law Master accorded little weight to the testimony and opinions of Dr. Gardner this Court was quite impressed with his training, experience, knowledge of this case and his opinions. In this vein the Law Master stated that she found 'it of no probative value that Respondent's expert, Dr. Gardner, is more impressively credentialed than psychologist Workman or Pamela Rockwell; the Court's

circuit court discussed articles written by experts in the area of child interview techniques, particularly in the context of child sexual abuse situations. Based on the literature reviewed, the circuit court determined the family law master's finding that the interview techniques used were not "sufficiently leading or suggestive to invalidate the truthfulness of Ashley's answers" was plainly wrong. The circuit court found that "[e]ven a cursory examination of the available literature reveals that the statements of Linda Workman concerning suggestibility and those of Pam Rockwell concerning fabrication are wrong."

decision is based upon the totality of the evidence and not merely upon expert opinion, otherwise the battle of credentials would reduce the fact finding of this Court to mere confirmation of the position of the litigant which could afford to find and hire the 'fastest gun' or the most impressive expert.

"Obviously, a Court must consider the totality of the evidence in reaching a decision but it cannot ignore the relative training and expertise levels of those experts providing the testimony. To do otherwise, as suggested by the Law Master, would obviate the need for expert testimony and would place one with a B.S. Degree and no further training on the same level with one who possessed a Doctorate and had years of research and practical training and experience."

The circuit court agreed with Dr. Gardner's criticisms of how Ashley was interviewed. It relied on these conclusions to find the reports of Ashley's abuse were not credible, Ms. Workman and Ms. Rockwell's opinions were not credible, and Dr. Preville's report illustrated a lack of physical evidence of abuse. Therefore, the circuit court found the allegations against Stephen H. were not substantiated.

The circuit court declined to address what factors lead to the motivation of Sherry H. to pursue what it believed to be fabricated charges:

⁹The circuit court made the following conclusion as to the allegations against Stephen H.:

"In light of the foregoing, the 'disclosures' to Pam Rockwell and her testimony thereon, are found by this Court to be unreliable, of no credibility and will not be used by this Court to make a finding of sexual abuse by Stephen [H.]

"Once Pam Rockwell's testimony is found lacking the testimony of Linda Workman and Dr. Kathleen Preville must also be found to lack credibility. Both Dr. Preville's and Workman's testimony as to abuse having been perpetrated by Stephen [H.] is predicated upon the 'disclosures' to Rockwell. The 'disclosures' having been found to lack credibility, the testimony of Dr. Preville and Linda Workman is also found to lack credibility and be unreliable."

"Much has been made by all parties to this action about the presence or absence of motivational factors on the part of Sherry [H.] That is not for this Court to determine. Even if such a determination were to be made it would be mere speculation and certainly could not be used as a basis for determining whether or not sexual abuse occurred. Therefore, this Court will not address the issues of motivation but rather leave them to be debated by the experts such as Dr. Gardner."

In response to the family law master's finding of fact No. 61, which concerned Stephen H.'s exhibition of certain pedophilic indicators, the circuit court discounted her findings. However, the circuit court did agree with the family law master that Stephen H.'s conduct during the hearing was less than ideal: "This Court must admit that Dr. [H] did not make the best of witnesses. His evasive, argumentative answers did nothing to help his case. Yet, this Court must not let that interfere with its consideration of Dr. [H.]'s firm, adamant denial of abusing his children."

Based on its conclusion that Stephen H. did not sexually abuse Ashley or Chelsey, the circuit court ordered Stephen H.'s visitation rights reinstated. The circuit court requested the parties to provide written proposals of how to best reunite Stephen H. with his daughters "with the least amount of emotional and psychological trauma to all parties involved in this action."

V.

STANDARD OF REVIEW

This case presents the question of whether the circuit court violated W. Va. Code, 48A-4-20(c) (1993), when it conducted a de novo review of the findings of fact made by the family law master.

We hold that the standard of review for a circuit court is controlled by the aforementioned statute and that a circuit court should review findings of fact made by a family law master only under a "clearly erroneous" standard, and it should review the application of law to the facts under an "abuse of discretion" standard.

In 1993, the Legislature amended and reenacted W. Va. Code, 48A-4-10, as W. Va. Code, 48A-4-20. W. Va. Code, 48A-4-20, is substantially similar to W. Va. Code, 48A-4-10 (1990). W. Va. Code, 48A-4-20(c), provides:

"(c) The circuit court shall examine the recommended order of the master, along with the findings and conclusions of the master, and may enter the recommended order, may recommit the case, with instructions, for further hearing before the master or may, in its discretion, enter an order upon different terms, as the ends of justice may require. The circuit court shall not follow the recommendation, findings and conclusions of a master found to be:

"(1) Arbitrary, capricious, an abuse of discretion or otherwise not in conformance with the law;

"(2) Contrary to constitutional right, power, privilege or immunity;

Our conclusion with regard to the appropriate standard of review that should be applied to findings of fact made by a family law master is supported by precedent and reasonable statutory construction. In State ex rel. Dillon v. Egnor, 188 W. Va. 221, 226, 423 S.E.2d 624, 629 (1992), quoting State ex rel. Sullivan v.

"(3) In excess of statutory jurisdiction, authority or limitations or short of statutory right;

"(4) Without observance of procedure required by law;

"(5) Unsupported by substantial evidence; or

"(6) Unwarranted by the facts."

The standards of review that we discuss in the text of this opinion as applying to the circuit court are the same standards for this Court. A court should review the record for errors of law; ensure the decision is supported by competent, material, and substantial evidence in the whole record; and ensure the findings and ultimate decision of a family law master are not clearly erroneous or an abuse of discretion. In reviewing the decisions of the circuit court, the scope of this Court's review is relatively narrow. Our role is limited to considering errors of law and making certain that the circuit court adhered to its statutory standard of review of factual determinations, that is, whether the family law master's findings are supported by substantial evidence and consistent with the law.

Where there is disagreement between the circuit court and the family law master, however, the substantial nature of the evidence supporting the circuit court's findings is further called into question, and this Court must examine the record with greater care. This is so even when that circuit court does not disagree with the family law master's factual findings, as such, but draws

Watt, 187 W. Va. 447, 453, 419 S.E.2d 708, 714 (1992), Justice Miller, writing for a unanimous Court, explicitly stated that "'the circuit court does not act de novo, but reviews the findings of fact and conclusions of law made by the family law master.'" Thus, this Court clearly has recognized the limited "appellate" role of a circuit court in reviewing the findings of fact of a family law master.

In both Dillon and Sullivan, this Court gave elaborate instructions regarding the role of a family law master in developing a record. Significantly, in Dillon, immediately after we remarked that a circuit court should not give de novo review to findings of fact, we detailed the fact-finding responsibilities of a family law master by stating: "Clearly, in order for the circuit court to fulfill its function, the recommended order must contain a concise and complete statement of findings of fact and conclusions of law, the reasons therefor, and the appropriate disposition of the case[.]" 188 W. Va. at 226, 423 S.E.2d at 629.

These fact-finding responsibilities of a family law master and the review of a circuit court are statutorily mandated.

different inferences from the facts.

We also stated in Sullivan, 187 W. Va. at 455, 419 S.E.2d at 716, "that one of the chief purposes of the legislative adoption of the family law master system was to expedite divorce, alimony, and child support procedures. See W. Va. Code, 48A-4-11 (1990)."

(Emphasis added). Thus, when the statutory mandates are coupled with the purposes of our family law master system, it hardly can be argued that the Legislature intended for the circuit courts of this State to have de novo reviewing authority.

Our cases implicitly have recognized the limitations on the standard of review for circuit courts. In Wharton v. Wharton, 188 W. Va. 399, 403, 424 S.E.2d 744, 748 (1992), we used the following language in reversing an order of the circuit court: "We find the

Three reasons exist for giving deference to a family law master's findings: (1) a family law master is an expert at determining the facts in family law cases; (2) duplication of a family law master's efforts by a circuit court would be costly and would contribute only negligibly to the accuracy of the determination of facts; and (3) the parties already have focused their energies and resources on the family law master's determination. See generally Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574-75, 105 S. Ct. 1504, 1512, 84 L.Ed.2d 518, 529 (1985).

The scope and standard of review also are limited by W. Va. Code, 48A-4-18 (1993). Subsection (a) of this statute provides for the formal requirements of review and, after discussing the contents of the petition, the following language appears: "Only the questions set forth in the petition or fairly included therein will be considered by the court. Parts of the master's report not excepted to are admitted to be correct, not only as regards the principles, but as to the evidence, upon which they are founded."

circuit court's order refusing to follow the family law master's recommendation to increase Mrs. Wharton's alimony to \$1300 per month was not required by the 'ends of justice' and was against the preponderance of the evidence." Similarly, both the language and purpose of W. Va. Code, 48A-4-20(c), indicate the scope of review accorded to circuit courts is limited.

When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch.

By borrowing "terms of art in which are accumulated the legal tradition and meaning of centuries of practice, [the Legislature] presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise

In Higginbotham v. Higginbotham, 189 W. Va. 519, 521-22, 432 S.E.2d 789, 791-92 (1993), this Court made explicit the standard of review under W. Va. Code, 48A-4-10(c) (now W. Va. Code, 48A-4-20), when we said:

"We recognize that under W. Va. Code, [48A-4-20(c) (1993)], a circuit court 'may, in its discretion, enter an order upon different terms, as the ends of justice may require.'

This section, however, limits a circuit judge's ability to overturn a family law master's findings and conclusions unless they fall within one of the six enumerated statutory criteria contained in this section." (Emphasis added; footnote omitted).

We believe the position of Steven H. is foreclosed by Higginbotham,

instructed." Evans v. United States, ___ U.S. ___, ___, 112 S.Ct. 1881, 1885, 119 L.Ed.2d 57, 67 (1992). See also Lorillard v. Pons, 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40, 47 (1978) ("'[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.' Standard Oil v. United States, 221 U.S. 1, 59, 31 S. Ct. 502, 515, 55 L.Ed. 619[, 646] (1911)"). When the Legislature enacted W. Va. Code, 48A-4-20(c), it intended the phrases "abuse of discretion" and "unsupported by substantial evidence" as used in this section to encompass the entire panoply of definitions which the judicial branch previously ascribed to those terms. The words used in W. Va. Code, 48A-4-20(c), are nearly identical to the language of the West Virginia Administrative Procedures Act, W. Va. Code, 29A-5-4(g) (1964). Specifically, subsection (g) of the Act uses such terms as "clearly wrong," "abuse of discretion," and "unwarranted exercise of discretion." Our cases have consistently held that judicial review under subsection (g) is deferential. See Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989); West Va. Human Rights Comm'n v. United Transp. Union, Local No. 655, 167 W. Va. 282, 280 S.E.2d 653 (1981).

and we are given no reason to depart from that ruling.

The Legislature's use of such phrases as "abuse of discretion," "[u]nsupported by substantial evidence," and "[u]nwarranted by the facts" are phrases of limitation for appellate review purposes. W. Va. Code, 48A-4-20(c). As a practical matter, many of these phrases are not susceptible to categorical definition.

However, circuit courts are well aware of such concepts as "clearly erroneous" and "abuse of discretion" and are in a position to determine which cases fall into these categories.

In addition to giving general guidance as to how the division of responsibility is to be exercised, the Legislature enacted this statute for the very purpose of allocating the various decision-making responsibilities between the family law master and the circuit courts. When a statutory provision's purpose is to

The distinction between "clearly erroneous" and "abuse of discretion" often is obscure. Judge Friendly suggests that a discretionary ruling may not be set aside by an appellate court "'unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" The Honorable Henry J. Friendly, Indiscretion about Discretion, 31 Emory L.J. 747, 763 (1982). (Citation omitted). Obviously, this is the same articulation this Court has adopted for the clearly erroneous standard of review for factual findings and, in many of our cases, we have used them interchangeably. Perhaps the most important difference is that the "clearly erroneous" standard is constant, while the "abuse of discretion" standard as to the specific degree of deference accorded very well may depend on the nature of the ruling being reviewed.

conserve judicial resources by preventing duplication of effort, it would be counterproductive to adopt an intensive standard of de novo appellate review. Indeed, it would defeat the purpose of W. Va. Code, 48A-4-20(c), to permit review of findings of fact without deference to the family law master. For this reason, we make it explicit that a circuit court must review findings of fact made by a family law master under the clearly erroneous standard.

Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences. See also Anderson v. City

Our decision to require deferential review of the family law master's findings of fact is consistent with Rule 52(a) of the West Virginia Rules of Civil Procedure, which adopts the following widely accepted formula: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Our cases indicate that Rule 52(a) is applicable to a circuit court's review of a family law master's findings. See Higginbotham v. Higginbotham, supra; Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990).

"A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Board of Educ. v. Wirt, ___ W. Va. ___, ___ n.14, ___ S.E.2d ___, ___ n.14 (No. 22117 12/21/94) (Slip op. at 23), quoting United States v. United States Gypsum Co., 333 U.S.

of Bessemer City, N.C., 470 U.S. 564, 577, 105 S. Ct. 1504, 1513, 84 L.Ed.2d 518, 530 (1985); Beck v. QuickTrip Corp., 708 F.2d 532, 535-36 (10th Cir. 1983) (findings of fact may be adequate even if they are not exhaustive when the record supports those findings of fact); Maxwell v. Mason, 668 F.2d 361, 362 (8th Cir. 1981).

There are many critical aspects of an evidentiary hearing which cannot be reduced to writing and placed in a record, e.g., the demeanor of witnesses. These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and the character and credibility of the witnesses. Thus, the importance of these factors should not be ignored by a reviewing court. Given a family law master's intimate familiarity with the proceedings, the family law master is in the best position to weigh evidence and assess credibility in making the ultimate ruling on disputed issues.

As we said in Board of Education v. Wirt, ____ W. Va. ___, ___, ____ S.E.2d ___, ____ (No. 22117 12/21/94) (Slip op. at 23): "Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not

364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746, 766 (1948).

reverse even if it would have weighed the evidence differently if it had been the trier of fact." (Citation omitted). This deference given to the lower tribunal in Wirt also is appropriate in the present case because the family law master "is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match." Weil v. Seltzer, 873 F.2d 1453, 1457 (D.C. Cir. 1989). (Citation omitted).

We do not mean to suggest by today's holding that a circuit court is prohibited from conducting a meaningful review of a family law master's findings of fact and conclusions of law. To the contrary, the very statutory provision in question compels appropriate review by limiting the grounds upon which a family law master's decision may be affirmed by a circuit court. We merely hold that a circuit court may not "improperly conduct[] . . . a de novo weighing of the evidence in the record." Anderson, 470 U.S. at 576, 105 S. Ct. at 1513, 84 L.Ed.2d at 530 (reversing the lower court because of that error). Similarly, although this deferential standard applies to all findings of fact, including those described as "ultimate facts" or "factual conclusions," this standard "does not inhibit [a circuit] court's power to correct errors of law,

See also Bloss & Dillard, Inc. v. West Va. Human Rights Comm'n, 183 W. Va. 702, 705, 398 S.E.2d 528, 531 (1990); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986).

including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501, 104 S. Ct. 1949, 1959-60, 80 L.Ed.2d 502, 517 (1984). (Citations omitted).

In addition, the foregoing discussion should not be interpreted as stripping a circuit court of its primary function as an expositor of the law. Questions of law are reviewed de novo. Committee on Legal Ethics v. McCorkle, ____ W. Va. ____, ____ S.E.2d ____ (No. 22315 11/18/94). The identifying features of questions of law are: (1) they are general; (2) they do not normally rest on the existence or nonexistence of specific facts; and (3) they result in consistent governing legal rules. Questions of law should be standardized regardless of the facts. Therefore, we review alleged errors with regard to applying the law to findings of fact under an abuse of discretion standard.

We caution circuit courts to limit de novo review to questions of law. W. Va. Code, 48A-4-20(c), as interpreted by this Court, requires that no finding of fact may be set aside unless it is clearly erroneous. We do not make exceptions or purport to exclude certain categories of findings nor do we divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts. Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789, 72 L.Ed.2d 66, 78-79 (1982). Our reference to mixed questions of law and fact is limited to "questions in which the historical facts are admitted or established, the rule of law is

In summary, we hold if a circuit court believes a family law master failed to make findings of fact essential to the proper resolution of a legal question, it should remand the case to the family law master to make those findings. If it is of the view that the findings of fact of a family law master were "clearly erroneous," the circuit court may set those findings aside on that basis. If it believes the findings of fact of the family law master are unassailable, but the proper rule of law was misapplied to those findings, the circuit court may reverse. However, a circuit court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings. See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 106 S. Ct. 1527,

undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." 456 U.S. at 289 n.19, 102 S. Ct. at 1790 n.19, 72 L.Ed.2d at 80 n.19.

If a family law master's fact-finding function is at issue, the standard of review is the clearly erroneous standard. If the challenge is to a family law master's application of the law to the facts, the abuse of discretion standard is appropriate. If the ruling more closely resembles a question of law, it may be reviewed de novo.

Under W. Va. Code, 48A-4-20(d), the circuit court has another option. Where necessary to develop an adequate record, the circuit court may hear additional evidence and make its own factual findings.

In this capacity, the circuit court becomes, for this limited purpose, the "trier of fact" and the deferential review discussed earlier does not apply. It is contemplated that this option would be the exception and not the rule. Otherwise, the circuit court would usurp the very function committed to the family law master

89 L.Ed.2d 739 (1986). Thus, it is by these aforementioned standards that a circuit court must review the findings of fact and the application of law of a family law master.

Any reasonable review of the record demonstrates that the circuit court afforded no deference to the findings of the family law master and instead improperly substituted its own judgment. The circuit court found Dr. Gardner's testimony to be credible and adopted his analysis of the facts. While it is clear that the circuit court disagreed with the findings of the family law master, the court failed to demonstrate how those findings could be characterized as clearly erroneous. At no time did the circuit court make a determination whether there was substantial evidence supporting the factual findings of the law master or whether the inferences reached were plausible under the facts. To the contrary, the circuit court conducted a de novo review of the evidence and made his own credibility determinations.

by the Legislature.

¹⁰This case is unique in that portions of the hearings before the family law master were videotaped and reviewed by the circuit court and this Court. However, the entire proceedings were not available on videotape. Therefore, because the family law master was present during every phase of the proceedings, she was in the better position to assess credibility and weigh the evidence.

The family law master not only relied upon three expert witnesses, Dr. Preville, Ms. Workman, and Ms. Rockwell, but also upon the testimony of Sherry H. and Barbara B. Even if we concede that Ms. Rockwell's interview techniques contaminated the credibility of Ashley's subsequent statements, the family law master could still consider the fact that Ashley complained to her mother and to her mother's sister that her father sexually abused her. These complaints began a year before she was subjected to the interview by Ms. Rockwell. Sherry H. was not quick to respond to these charges and did not file the petition for visitation modification until after she received Ms. Workman's opinion. It is also clear that these allegations of abuse were not raised during the heat of a custody battle. In fact, substantial evidence supports the finding that Sherry H. was more than accommodating to Stephen H.'s visitation rights.

It should also be noted that Ashley met with Ms. Workman in July and August of 1990. She met with Ms. Rockwell in October and November of 1990. Therefore, it is plausible to infer that Ms. Workman's initial findings were not tainted by the improper interview techniques of Ms. Rockwell.

VII.

CONCLUSION

Based on the foregoing, we find the findings of the family law master are supported by substantial evidence in the record and the circuit court erred in overturning each and every finding of fact of the family law master when such findings are substantially supported by record evidence. Accordingly, we reverse the decision of the circuit court and remand this case with instructions to reinstate the findings of fact of the family law master and her recommended decision.

Reversed and Remanded.

¹¹Because we agree with the plaintiff that the circuit court committed reversible error on this issue, we decline to address the plaintiff's remaining assignments of error.