No. 22959 - Mary Ann P. v. William R. P., Jr.

Workman, Justice, concurring:

I concur with the ultimate conclusion of the majority. Furthermore, I endorse and commend Justice Cleckley for incorporating into the law an immensely important concept:

> When family problems involving children are of sufficient depth and duration that professional counseling is needed to heal the relationships of the child or children with the parent or parents, or to assist the child or children in dealing with such emotional estrangement, a circuit court may direct participation in such counseling and may in its discretion determine how the cost of such counseling shall be paid.

The majority makes clear that such counselling can be ordered as a condition of visitation. In fact, this concept is so important that it

should have been a syllabus point. Circuit courts should be aware that they have this discretion, and should exercise it liberally in appropriate situations.

In addition to emphasizing this point, I write separately to disagree in one area and to amplify in another.

First, in reviewing the family law master's finding, which was adopted by the circuit court and upheld by this Court, that there was no sexual abuse in this case, I would look to Justice Cleckley's explanation of our standard of review in In the Interest of Tiffany Marie S., __ W.Va. __, 470 S.E.2d 177 (1996):

> 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.

Id., Syl. Pt. 1, in part. Using that standard, I for one am left with the "definite and firm conviction" that sexual abuse did occur, and I believe the case should have been reversed as to that finding. The six-year-old confided to his mother that his father touched and kissed

his penis, and asked the child to touch his. Dr. McCallum's explanation that this was innocent touching associated with toilet training is not credible. A report compiled by Duke University after examining the boys over the course of a few days notes that pediatric textbooks generally state that children typically need no assistance in urinating by age four. Further, I cannot imagine what part kissing the penis of a six-year-old boy would play in his toilet training.

In addition to this incident, both children made statements to therapists and counsellors that indicated a knowledge of sexual

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I cannot leave this concurring opinion without commenting on the fact that the family law master below cast aspersions on the qualifications of counsellor Pamela Rockwell. Similarly, Justice Neely in several concurring and dissenting opinions, cast aspersions on Ms. Rockwell's abilities, indeed characterizing sexual abuse of children as a

specifics beyond their tender years. Susan Barrows McQuade, a psychologist who had counseled the boys for over two years, noted in her report that statements such as "He did something with his tongue that felt both good and bad," "He said 'I love you' when he touched

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crime of fashion subject to mass hysteria. See Wilt v. Buracker, 191 W.Va. 39, 55, 443 S.E.2d 196, 212 (1993) (Neely, J., concurring); State v. Delaney, 187 W.Va. 212, 218, 417 S.E.2d 909 (1992) (Neely, J., dissenting); State ex rel. Spaulding v. Watt, 188 W.Va. 124, 128, 423 S.E.2d 217, 221 (1992) (Neely, J., dissenting); State v. Walter, 188 W.Va. 129, 132, 423 S.E.2d 222, 225 (1992) (Neely, J., concurring). The family law master has a duty and a right to determine who he finds credible, and Justice Neely had that right as well. However, after having had the opportunity as a circuit court judge for seven years to hear Ms. Rockwell testify on numerous occasions, I want the law books to reflect that this opinion as to her qualifications in judicial quarters is not unanimous. I have found Ms. Rockwell to have demonstrated extensive knowledge and training in the area of child sexual abuse. Frequently, counsellors and therapists, though not possessing a degree in psychology or psychiatry may have specialized training or experience in child sexual abuse which may render them even more knowledgeable and competent in that area

my pee-pee," and "It makes me feel scared," made it difficult to think that anything but child sexual abuse had occurred. Billy told at least two interviewers that his father touched his private area or "did awful things" and told him not to tell because they would get into trouble. Dr. Christina Arco, a therapist treating the children, testified that Billy presented particularly violent behavior directed toward his father, including building traps and barricades, and even planning to kill his father. Numerous witnesses testified to how frightened the boys were of their father and how they would hide or lock themselves in the car when he came to pick them up for visitation. One woman who supervised visitation testified that the boys displayed a tremendous amount of hostility to their father, several times

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that psychiatrists.

attempting to punch him in the penis, and emphasized that this was serious hostility, not mere horseplay. This information about specific incidents of sexually inappropriate activity, together with the behavioral indicators of sexual abuse noted by various counsellors and therapists, lead me to the conclusion that the circuit court's finding of no sexual abuse was clearly wrong.

The reason that such a finding is important in the long run is that it impacts quiet significantly on the next issue - - - supervised visitation.

SUPERVISED VISITATION

The opinion sets forth the important concept which we established in Mary D. that supervised visitation must be fashioned in a manner designed not only to actually protect the child, but also to make the child feel he is protected.

> Where supervised visitation is ordered pursuant to W.Va. Code, 48-2-15(b)(1)[1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Syl. Pt. 3, Mary D. v. Watt, 190 W.Va. 341, 438 S.E.2d 521 (1992) (quoted in syllabus point 3 of the majority opinion). Furthermore, should the issue of supervision arise again in the future, the lower

court should look to the standard established in Carter v. Carter:

> Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

__W.Va. __, 470 S.E.2d 193 (1996). When, as in the case before us, there is credible evidence of sexual abuse, the risk of harm to the child weighs heavily in this balance, and courts should err on the side of caution if necessary to protect children at risk of possible abuse.