No. 11-0789 – In Re: Robert W., Jr., Ariel W., and Oceana W.

Workman, Justice, dissenting:

This case required the Court to determine whether the circuit court erred by terminating the parental rights of the petitioner father to his three children. The majority's decision reversed the circuit court's order because it found that the "underlying order establishing sexual abuse as the basis for terminating parental rights is flawed." The majority focused on the "weakness of the presentation of the case by the State," but failed to give proper recognition to the overwhelmingly damaging evidence that was presented which led to the circuit court's finding by clear and convincing evidence that the respondent father has sexually abused the infant child. It is for this, and other reasons outlined below, that I believe this Court erred in reversing the circuit court's order.

This Court has explained that: "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syllabus Point 1, *In re: Tonjia M.*, 212 W.Va. 443, 573 S.E.2d 354 (2002). Moreover, "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1,

State ex rel. Cash v. Lively, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995).

In this case, the majority ignores existing law by relegating it to a footnote instead of sending a clear and strong message that an individual's silence during an abuse and neglect proceeding can be used as affirmative evidence of that individual's culpability. Here, the alleged perpetrator was the victim's father. During the adjudication proceedings on March 4, 2011, testimony was presented that the father said: "When I get horny and my wife doesn't want to do anything, I take my boy out and get him to s*ck my d*ck, and if that doesn't work, I f*ck him in the a**." This was not the only reason that the DHHR filed its original child abuse and neglect petition. Within its October 21, 2010, petition, the DHHR explained:

> An investigative interview was conducted with [R.W, Jr.] at [his elementary school]. [R.W. Jr.] disclosed to Worker Karey Hedlund that, "His daddy puts his penis on his face and lips" and that his daddy has "stabbed him in the butt, and it hurt really bad." [R.W. Jr.] also stated that his "daddy rammed me through the wall and choked me."

Thereafter, in its order granting the DHHR's application for ratifying emergency custody of the petitioner's children, the circuit court explained that the petitioner's son had disclosed sexual abuse by the petitioner and noted that: "The child's safety can not be guaranteed for the children. Father is still in the home."

Despite all of the allegations against the petitioner, in addition to the fact that his children had been removed from his custody, the petitioner chose to remain silent at the adjudication hearing. He kept silent even though it was explained during the hearing that "[s]ilence in these cases can be used against a respondent, unlike in criminal court."

This Court made it clear in Syllabus Point 1 of *W. Va. Dept. of Health & Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996), that "implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." This Court has explained:

> There is no basis in law for requiring that a court be disallowed from considering a parent's or guardian's choice to remain silent as evidence of civil culpability. Moreover, the invocation of silence by a parent or guardian in an abuse and neglect proceeding goes to the heart of the treatability question which is essential in these cases, as the nature of the proceedings is remedial and not punitive. Thus, in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

197 W.Va. at 498, 475 S.E.2d at 874. In Syllabus Point 2 in *Doris S.*, we further held:

> Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

The petitioner father made horrific statements about raping his five-year-old son, but sat silently when given the opportunity to explain himself. In consideration of all of the above, the circuit court had no other choice but to find that the petitioner sexually abused his son. "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." *Mary Ann P. v. William R.P., Jr.*, 197 W.Va. 1, 10, 475 S.E.2d 1, 10 (1996) (emphasis added). Moreover, this Court "may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, in part, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). In this case, it would have been incomprehensible to have placed these children back into the care of the father. As Syllabus Point 2 of *Doris S.* makes clear, the father's "silence [was] affirmative evidence of [his] culpability." These children need to be placed in a safe, secure, and stable environment.

Upon remand, the circuit court will hopefully fashion an order acceptable to the majority which will continue to protect these children. Therefore, for the reasons set forth above, I respectfully dissent.