No. 23-416 – *In re: D.H., M.H. & J.S.*

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OF WEST VIRGINIA

WOOTON, Justice, dissenting:

I respectfully dissent; I believe that the circuit court's refusal to allow the petitioner to present testimony from an expert witness, in a case where her constitutional right to custody and control of her children was at stake, denied her due process of law. *See* W. Va. Const., art. III, § 10. Additionally, I am far from convinced that what can most charitably be described as the Department of Human Services' ("DHS") belated acquiescence to the circuit court's order that it prosecute a case – a case it had declined to bring and to which it objected – somehow cured a clear violation of the separation of powers doctrine. *See* W. Va. Const., art. V, § 1. Finally, although I agree that the evidence was sufficient to support termination of the petitioner's parental rights to D.H. and M.H., the record does not support termination of her rights to baby J.S. The fact that he evidenced developmental delays while in the care of the petitioner does not suffice to prove that these delays were the result of any abuse or neglect on her part.

I begin with an observation that the majority seems keen to ignore: this case has a strong whiff of an ugly custody battle that is being waged by the petitioner's ex-husband in an abuse and neglect arena. The record shows that from July 6, 2021, through July 14, 2022, the respondent made six complaints of alleged maltreatment to DHS, all of

which were investigated and found not to merit intervention. Thereafter, as a result of a referral from the Family Court based on M.H.'s claim that she had been sexually assaulted while at the petitioner's home, the circuit court appointed a guardian ad litem ("GAL") for the children and ordered DHS to investigate and prepare a written report as to this latest allegation. The DHS complied, but again it was unable to substantiate the charges, and again it declined to file an abuse and neglect proceeding.

At this point the respondent ex-husband, joined by the GAL, filed an abuse and neglect petition as a "reputable person." *See* W. Va. Code 49-4-601(a).[1] Thereafter, the circuit court ordered DHS, over its objection, to join the prosecution of the case as a co-petitioner. The DHS did so – a court order, after all, must be obeyed until it expires by its own terms or is reversed[2] – but announced that it would defer to the respondent's counsel and the GAL to present the case in chief. And indeed, that is what happened at the trial; the respondent's counsel and the GAL clearly drove the train, with DHS playing a minor, supporting role.

[1] West Virginia Code section 49-4-601(a) provides in relevant part that "[i]f the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides[.]"

[2] *See, e.g.*, *E. Associated Coal Corp. v. Doe*, 159 W. Va. 200, 209, 220 S.E.2d 672, 679 (1975) ("an order issued by a court with jurisdiction over the person and colorable jurisdiction over the subject matter must be obeyed until it is reversed by orderly and proper proceedings[.]").

While the Legislature has seen fit to allow an abuse and neglect petition to be *filed* by either DHS or a reputable person, *see supra*, the ultimate decision whether to *prosecute* that case lies solely within the executive branch of government. *See* Syl. Pt. 5, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014) ("While a civil abuse and neglect action . . . may be initiated by either the [DHS] or 'a reputable person,' the action is pursued solely on behalf of the State of West Virginia in its role as *parens patriae*."); *cf.* Syl. Pt. 3, *State ex rel. Hamstead v. Dostert*, 173 W. Va. 133, 313 S.E.2d 409 (1984) ("Absent an abuse of discretion, judicial interference with the exercise of prosecutorial judgment as to what charge to bring in a criminal prosecution is impermissible.").

The majority finds that "[W]e have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government,"[3] and that because both the executive and judicial branches have "intersecting obligations" in abuse and neglect cases arising from their respective parens patriae responsibilities, the circuit court's authority to order DHS to prosecute a case falls within a narrow exception to the separation of powers doctrine. I acknowledge the force of this argument, and also its logic. Significantly, however, the majority does not so *hold*; there is no syllabus point in the majority's opinion for the guidance of circuit courts and the Bar. In my view, this issue is too fundamental to leave dangling – a concern that was heightened for me when counsel informed this Court at oral argument that it is common in

[3] *See Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982).

their geographical area of practice for DHS to proceed in abuse and neglect proceedings as "co-petitioners" with a "reputable person." What we were not told was whether this occurs even where DHS objects, as in the instant case; whether counsel for the reputable person takes primary responsibility for presenting evidence and argument, as in the instant case; and/or whether the reputable person/petitioner has been involved in bitter, protracted custody proceedings against the respondent parent, as in the instant case.

In short, I believe that this Court has an obligation to resolve this issue not by a wave of the hand and a reference to some squishy notion of "intersecting obligations," but by formulating a clear syllabus point for future guidance in abuse and neglect proceedings. The judicial erosion of the separation of powers doctrine, a fundamental component of our system of government, requires no less.

I turn now to the question of the circuit court's refusal to allow the petitioner to hire an expert to review the tapes or transcripts of the children's interviews, in order to determine whether there existed any indicia of unreliability, coaching, or other undue influence. This testimony would most certainly have been relevant in a case where, as noted *supra*, the "reputable person" who instituted the proceeding had engaged in a bitter, protracted custody dispute with the petitioner and had a long history of filing DHS complaints against her – complaints that were investigated by DHS and then closed.

The circuit court first denied the petitioner's request on the ground that having a witness examine the records of the children's interviews "would not be helpful to the court," which could be read to suggest that the court had prejudged the case. Additionally, the court found that because the individual who conducted the interviews was an "independent" and "unbiased" witness with "no skin in the game," the petitioner's counsel could bring out any information sought during cross examination of the witness. In my view, any trial lawyer in this State – and probably in the nation – would find this reasoning to be wholly unconvincing. Although there is no question that cross-examination is "the greatest legal engine ever invented for the discovery of truth," *Multiplex, Inc. v. Clay*, 231 W.Va. 728, 738, 749 S.E.2d 621, 631 (2013) (citation omitted), there is also no question that a party to an abuse and neglect proceeding is not relegated to cross examination of the opposition's witnesses, but is entitled to call witnesses on his or her own behalf. *See* W. Va. Code § 49-4-601(h) ("In any proceeding pursuant to this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses."). In short, a party is not relegated to relying on counsel's ability to wrest admissions from the other party's witnesses.

Interestingly, the majority omits any mention in its opinion of the circuit court's rationale for refusing to allow the petitioner to present expert witness testimony, and instead provides a rationale of its own creation: that the expert's testimony would have been nothing more than opinion testimony as to whether the children's disclosures were

credible. The majority bases this on its assertion that "it appears that much of the motivation for seeking expert testimony was to attack the credibility of the children's testimony[,]" an assertion with absolutely no support in the record – and a straw man at that. Although the ultimate determination of the children's credibility was a factual determination solely within the province of the circuit court, the petitioner's expert's testimony would have provided information *relevant* to that credibility determination. This is standard procedure in litigation, whether criminal or civil.[4] Nothing in the record suggests that the petitioner's purpose in retaining an expert witness was anything other than what her counsel said it was: to examine the interview records of the children to determine whether there existed any indicia of unreliability, coaching, or other undue influence.

Further, the majority fails to mention that the "independent" and "unbiased" expert witness who was allowed to testify was not called by DHS; rather, the witness was called by the petitioner's ex-husband.[5] The witness testified at length as to the credibility of the children's statements – testimony which the majority finds would have been totally inadmissible if coming from the petitioner's expert witness.

[4] For example, claimants in workers compensation proceedings are routinely required to submit to so-called independent medical examinations, after which the physician examiner gives his or her opinion as to whether the treating physician's opinions are reliable. This Court has never suggested that a Claims Examiner is relegated to whatever evidence or admissions the employer's counsel is able to wrest from the treating physician on cross examination.

[5] Tellingly, counsel for DHS never asked a single question of the witness because, as noted *supra*, counsel for the ex-husband was driving this train.

Finally, nothing in the expert's proffered testimony would have been unnecessary, cumulative, confusing, or misleading. Rather, assuming arguendo that the expert in fact found indicia of coaching or undue influence in the children's statements, the expert's testimony would have been nothing more than rebuttal to the ex-husband's expert's testimony. I am hard pressed to imagine any reasonable basis for concluding that the petitioner was not entitled to put on such rebuttal evidence.

In my view, the circuit court's refusal to allow the petitioner to adduce the testimony of an expert witness as to whether the interviews of the children evidence possible unreliability, coaching, or other undue influence, denied the petitioner due process of law. In a proceeding where the petitioner faced the loss of her parental rights to her children, she had a right – a fundamental right – to make her case.

Finally, I do not believe that the record before us supports termination of the petitioner's parental rights to J.S., who was an infant at the time the abuse and neglect petition was filed. The primary evidence adduced in this regard was that the baby had significant developmental delays while he was in the care of the petitioner, and that his markers are now all normal after two years in foster care – facts that means nothing in the absence of any evidence that J.S.'s early developmental delays were attributable to abuse and neglect on the part of his mother. The circuit court's order of termination with respect to J.S. seems to rest primarily on two foundations: testimony that J.S.'s older siblings were often asked to look after J.S., which the court apparently considered to be evidence of

neglect on the petitioner's part; and evidence that some unsavory adults were in the home at times when J.S. was present. Without some opportunity to make things right, an opportunity the petitioner never had because the court denied her an improvement period, I do not believe there was "clear and convincing proof" to support an order of termination of the petitioner's rights to J.S. *See* Syl. Pt. 3, in part, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

To summarize, I believe that the proceedings below were procedurally flawed and fundamentally unfair. At the least, there is an appearance of impropriety where a judicial officer orders that a case be prosecuted – over the objection of the executive officer whose duty it was to make that call – and then presides over the case. Likewise, it is a structural failing, and a stark departure from our procedural rules, to refuse to allow an accused parent to put on the testimony of an expert witness simply because the expert called by the "reputable party" (here, petitioner's ex-husband) is deemed to have no personal interest in the outcome of the case. This sets a dangerous precedent in any case, especially where, as here, fundamental constitutional rights are at stake. To the extent that this case can be read as putting this Court's judicial imprimatur on abuse and neglect proceedings not only instituted by but also prosecuted by a disgruntled former spouse, with DHS playing the role of passive "co-petitioner" pursuant to a circuit court's order that it prosecute a case it had declined to bring, it has the potential to do irreparable damage to how abuse and neglect cases may be handled going forward.

For the foregoing reasons, I respectfully dissent.