

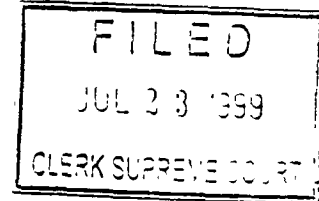
IN THE COURT OF APPEALS OF IOWA

No. 1999-122 (9-338) / 98-1141

Filed July 23, 1999

**IN THE INTEREST OF A.S.A,
Minor Child,**

**M.A.M., Father,
Appellant.**



Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott,
Associate Juvenile Judge.

Father appeals a district court order adjudicating his daughter a child in need
of assistance and finding that he had sexually abused her. **AFFIRMED.**

Harold K. Widdison of Richard Rhinehart & Associates, Sioux City, for
appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Stacy L. Dillard, Assistant County Attorney, for appellee-State.

Carol Chase, Sioux City, guardian ad litem for minor child.

Heard by Sackett, C.J., and Mahan and Zimmer, JJ.

SACKETT, C.J.

Appellant Marco, the father of Ashley, born in 1990, challenges the finding by the juvenile court that Ashley is a child in need of assistance and he should not visit with her. We affirm.

Ashley's mother, Tammy, and Marco never married. Ashley originally lived with her mother, though Marco exercised visitation. Twice while in Tammy's home, Ashley was sexually abused by child care providers of Tammy's choosing. Additionally, Tammy struck her with a coat hanger, cutting her leg.

On or about June 13, 1996, Marco was granted custody of Ashley. In June of 1997, Tammy, who had visitation with Ashley, took her to St. Luke's Hospital and Ashley made certain statements indicating her father sexually abused her. The allegations first were allegedly made to Tammy and repeated in the hospital emergency room. Ashley said, "Dad puts his private part in my private part." Ashley has a stepfather. Marco contends there is no clear evidence which dad she made reference to.

A petition was filed seeking to have Ashley found a child in need of assistance under Iowa Code sections 232.2(6)(b), (c), (d), (i), and (n) (1997).¹

¹ Iowa Code section 232.2(6) provides, in part:

6. "Child in need of assistance" means an unmarried child:

....

b. Whose parent, guardian, other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:

Marco was given court-appointed counsel and requested on three occasions to be allowed funds to employ a specific expert to evaluate the evidence of sexual abuse. His application to appoint the specific expert he wanted was denied.

After a hearing, Ashley was found to be a child in need of assistance and a finding was made she was sexually abused by Marco. Ashley was placed in foster care and Marco was denied visitation.

Marco first contends Ashley is not a child in need of assistance and the State failed to prove the allegations by clear and convincing evidence.

We review de novo. *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984). We give weight to the fact findings of the juvenile court who observed the witnesses testifying. *See In re S.V.*, 395 N.W.2d 666, 668 (Iowa App. 1986). Precedent is of little value

(1) Mental injury caused by the acts of the child's parent, guardian, or custodian.

(2) The failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

d. Who has been, or is imminently likely to be, sexually abused by the child's parent, guardian, custodian or other member of the household in which the child resides.

....

i. Who has been the subject of or a party to sexual activities for hire or who poses for live display or for photographic or other means of pictorial reproduction or display which is designed to appeal to the prurient interest and is patently offensive; and taken as a whole, lacks serious literary, scientific, political or artistic value.

....

n. Whose parent's or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care.

Iowa Code § 232.2(6)(b), (c), (d), (i), and (n).

in deciding this issue and each case must ultimately turn on its own particular facts. *In re Leehey*, 317 N.W.2d 513, 516 (Iowa App. 1982).

We can look to current evidence and past performance of the parents in assessing the evidence. *See In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981); *In re E.W.*, 434 N.W.2d 898, 901 (Iowa App. 1988).

Tammy is not able to care for Ashley. Ashley has admittedly been sexually abused twice while in her care. Tammy's husband has an extensive criminal history, including violent acts. Even if the allegations of sexual abuse against Marco are not proven, he admitted factors in his life got in the way of her care. There is clear and convincing evidence from which we find Ashley to be a child in need of assistance. We affirm that finding.

The more difficult question is whether there was clear and convincing evidence Marco sexually abused Ashley. Marco contends there is not, and he denies he did.

We recognize we carry a serious and difficult responsibility to assure correct diagnoses of sexual abuse are made, and if there is sexual abuse, the perpetrator is correctly identified. *In re A.W.*, 464 N.W.2d 475, 477 (Iowa App. 1990).

The issue has serious implications for the child. A child who is sexually abused by a parent is put at serious risk. A child coached to make allegations of sexual abuse against a parent is also put at serious risk. *See In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa App. 1992).

The evidence introduced supporting the State's position Marco abused Ashley included a videotape of an interview Ashley gave and evidence of statements she made. There also were opinions advanced by persons claimed by the State to be experts.

Marco contends the district court erred in not granting his request to have the videotape transcribed and entered in evidence. The videotape was introduced in evidence. It is available to us for review. We have reviewed the videotape. There is no showing that by the lack of a transcription of the videotape Marco was prejudiced. We affirm the district court on this issue.

Marco next contends he should have been allowed to employ a particular expert. He was allowed to employ an expert, though not the one of his choosing. The expert testified.

Much has been written and said about sexual abuse of children in the past decade. The focus on this serious offense has spawned a horde of experts ready to testify with certainty a child is telling the truth he or she was abused and/or there are signs to support a child's testimony. Yet, as many believe they can give credible expert testimony on the issue and give the court guidance, there are many who caution courts to use care in accepting such opinions. *See Horner & Guyer, Expertise in Sexual Abuse Allegations*, 25 Fam. L.Q. 381 n.3 (Fall 1991). It has been advanced experts adopt an activist stance in testimony seeking to maneuver courts to a frame of mind that overestimates the likelihood child sexual abuse has occurred in cases

where there are ambiguities or contradictions. Guyer & Horner, *The Activist Expert in Custody Cases: A Challenge to Psychiatry*, 6 Proceedings of the American Academy of Child & Adolescent Psychiatry 22 (1990).

The juvenile court did not give much weight to expert opinions, but rather drew its own conclusions from the evidence. Under this record, we do not find Marco was prejudiced and find no basis to reverse on these grounds.

The basic question is who is telling the truth. The State contends Ashley is. Marco contends he is telling the truth. He advances Ashley was coached and her testimony, taken on its face, is full of such contradictions and inconsistencies that it cannot be believed.

The juvenile court entered the following finding in making a determination Marco sexually abused Ashley:

There is circumstantial evidence to suggest that Marco did not sexually abuse Ashley: the timing of the allegations (two days after starting a visit with Tammy); [Tammy's husband's] abusive behavior towards Tammy at least raises the possibility that he may have been abusive to Ashley; the prior abuse suffered by Ashley. However, the Court does find Ashley's testimony given in her interview to be credible in light of all the circumstances. She was descriptive of the incident; for the most part her story was consistent through the various people she gave information to; while the timing of her disclosure can be seen as suspect, it also makes sense since she had been with Marco up until just a few days before and she may have been fearful of disclosing while still with him.

In addition there is also several items of circumstantial evidence that would suggest that Marco did commit the sexual abuse: he clearly has a drinking problem; at the time of the abuse he was going through a very difficult separation from his wife; he has minimized and tried to hide parts of his history to various providers.

The Court does not accept the father's arguments. The court does not believe that Ashley is simply confusing the prior abuse with her baby-sitters; Ashley has simply given too much detail that differentiates the different incidents to suggest that she is confused. In addition, while the court cannot completely discount the possibility of coaching by the mother in this case, the court is not convinced that it happened. The bulk of Ashley's story has remained unchanged from the beginning. The Court does not believe that a seven year old would be capable of maintaining the degree of detail which Ashley has over the period of time in question if it was the result of coaching.

The juvenile court made a credibility assessment and accepted Ashley's version of the events. Giving the required deference to this credibility assessment, we affirm.

AFFIRMED.