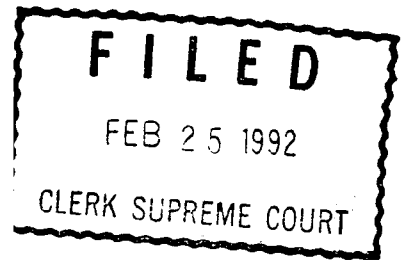


IN THE COURT OF APPEALS OF IOWA

No. 1-461 / 91-327



IN THE INTEREST OF

E.C.,

A Child.

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G.C.,

Father-Appellant.

Appeal from the Iowa District Court for Dubuque County,
Lawrence H. Fautsch, Judge.

Father appeals the district court's dispositional order placing custody of the parties' minor child with the mother, based on the court's finding the child is a child in need of assistance because she had been sexually abused by her father. **REVERSED AND REMANDED.**

David A. Lemanski, Dubuque, for appellant father.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

On September 30, 1990, the Dubuque County Attorney's Office filed a petition to determine whether E.C. was a child in need of assistance based on allegations the child's father, G.C., had sexually abused her. G.C. is thirty years old and is a surgical room assistant. The mother, J.C., is forty-one years old and is an office manager. J.C. has two children from a previous marriage, S.S., age seventeen, and C.S., age thirteen. E.C. was approximately three years old at the time of the dispositional hearing.

The parties were married in 1987 and separated on March 31, 1989. The months prior to the dissolution trial were acrimonious. The dissolution was tried to the court, and the court issued two different decrees. Under the first decree, custody was placed with J.C.; G.C. had visitation one night a week and on alternate weekends. The second decree, issued a few days later, revoked the first decree and provided for E.C.'s physical care to alternate on a day-by-day basis. J.C. made special application to the supreme court requesting immediate change in visitation and custody. In May 1990 the supreme court revoked the second decree and reinstated the physical custody and visitation arrangements that had been ordered under the first decree, providing J.C. with physical custody of E.C.

In August 1990 E.C. stopped going to day care, and her half sister began watching her on a full-time basis.

During this period E.C. allegedly told S.S. that she was sore in her crotch and that "Daddy sticks his finger in there and shakes it." S.S. called her grandmother and had E.C. repeat what she had told her. Later that same day E.C. again repeated what she had stated earlier to three friends of S.S. None of the three can recall exactly or similarly what was said, who else was present, or what E.C. was wearing, but they remember that E.C. stated her father touched her in her genitals and made her sore. J.C. arrived home some time later, and E.C. repeated the earlier statements and further stated that "daddy bites my nu nu." Later when E.C. observed a banana, E.C. stated that it was a penis. J.C. subsequently contacted the Department of Human Services.

Numerous persons were assigned to examine E.C. to determine if her statements alluding to sexual abuse were founded. Leta Hosier, a DHS social worker, was assigned to the case. One day E.C. told Hosier "daddy sticks his finger there and don't tell" while putting her hand into her pants. Hosier made an appointment for E.C. to see a doctor. Dr. Kathleen Opdebeeck determined after the examination that there were no clear physical signs of child abuse, although she did notice some dilation of the hymen.

Other interviews offered mixed results, with E.C. at times stating that G.C. had bit her genitals and other times not being able to identify various areas of

anatomically correct dolls. Julie Weideman, a social worker, interviewed J.C. and E.C. During these interviews, Weideman noticed that E.C. began to regress when in her mother's custody. E.C. also used foul language and gestures. Kathleen Chara, a counselor, also observed E.C. and diagnosed E.C. as suffering from posttraumatic stress disorder. Without seeing any DHS reports, Chara determined that E.C. had not been coached by J.C. or others in the family when relaying her stories as to what G.C. had done to her.

On November 28, 1990, the district court adjudicated E.C. as a child in need of assistance pursuant to Iowa Code section 232.2(6)(d). The court entered a dispositional order on February 8, 1991. Pursuant to the order, custody of E.C. was to remain with J.C. The court further ordered that G.C. have no further visitation with E.C. until a psychologist agreed it would be prudent. The court ordered G.C. to submit to a psychological evaluation and counseling. G.C. has appealed.

In CINA proceedings, we review the evidence de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interest of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). We must review the record to determine whether the finding of a child in need of assistance is supported by clear and convincing evidence. Iowa Code § 232.96(2) (1991). Although we are not bound by the findings of the juvenile

court, we give weight to the juvenile court's findings of fact because that court had the opportunity to hear and observe the witnesses first hand. In re S.V., 395 N.W.2d 666, 668 (Iowa App. 1986).

Iowa Code section 232.2(6)(d) (1991) defines a child in need of assistance as a child: "[w]ho 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." We must determine here whether the finding that G.C. has sexually abused E.C. is supported by clear and convincing evidence. We conclude that it is not.

Dr. Opdebeeck examined E.C. with both a physical and a colposcopic examination. She noted that there was some minimal enlargement of the hymenal orifice. She determined E.C. "is the victim of a rather prolonged severe custody battle who had no clear physical evidence of sexual abuse noted today."

A videotaped interview of E.C. was also conducted. After viewing this videotape, we do not find it supports a finding of sexual abuse committed by G.C. When presented with an anatomically correct doll that was disrobed before her, E.C. identified the doll's vagina variously as her "owi," "poopi," and "big butt." When asked where her father bites her, E.C. pointed to the doll's hand and mouth. In response to this same question, E.C. put her own finger in her mouth and then put her finger in front of the

interviewer. On only one occasion during the interview did E.C. point to her crotch area in response to this question. On at least five occasions during the interview the interviewer displayed various anatomically correct dolls' genital areas. E.C. never mentioned the words she used originally, "nu nu" or "penis."

According to one social worker involved and a teacher at E.C.'s day care, J.C. frequently told E.C. that her father was a liar and a monster. S.S.'s relationship with G.C. is also very poor, and they fought often when living in the same house.

The trial court noted:

It is true that Dr. Kathleen Opdebeeck, who conducted a physical examination of [E.C.] on September 7, 1990, concluded that there was "no clear physical evidence of sexual abuse." It is also true that the videotaped interview of [E.C.] that was conducted on September 7, 1990, is of poor quality and standing by itself would be insufficient to prove the State's case. It is also true that [E.C.] was only two and a half years old when she made these accusations. Nevertheless, the statements made by [E.C.] accusing her father of sexual abuse are credible for a number of reasons.

We disagree with the trial court and find E.C.'s testimony, in addition to the testimony of others and the physical evidence, does not support by clear and convincing evidence a finding that G.C. sexually abused her. See In re L.K.S., 451 N.W.2d 819, 823 (Iowa 1990); In re E.W., 434 N.W.2d 898, 901 (Iowa App. 1988).

G.C. also argues the trial court incorrectly sustained a hearsay objection. Because we reverse the CINA determination, we do not address this issue.

We reverse the trial court's order adjudicating E.C. to be a child in need of assistance because of sexual abuse by her father. Physical custody should remain with J.C., and G.C. should be allowed visitation pursuant to the custody arrangement made by the supreme court in May 1990. G.C.'s visitation shall be supervised for his own protection. We remand this matter to the trial court for the entry of orders consistent with this opinion. The trial court shall determine the appropriate supervisor for G.C.'s visitation. Costs associated with such supervision shall be borne by G.C. The trial court shall monitor visitation to determine the need for supervision in the future and for such further proceedings as shall be appropriate.

REVERSED AND REMANDED.

Sackett, J., specially concurs; Habhab, J., dissents.

SACKETT, J. (specially concurring)

I concur with the majority. This is one of those extremely difficult cases where we are asked to find a father sexually abused his two-and-one-half-year-old child. To do so, we must accept as reports of sexual abuse certain statements made by the child. There is no physical evidence supporting a finding of sexual abuse.

Because our first charge in these proceedings is to protect the child, it is frequently easiest to assume we protect the child by construing his or her testimony to support a finding of abuse. The problem is, if the child has not been abused, but an alleged abuse has been perceived or manufactured by someone else, then we may be inflicting serious harm on the child by finding he or she was sexually abused, eliminating the alleged abuser from his or her life, and giving the alleged accuser unrestricted access to the child.

This child has been a victim of a prolonged and bitter custody battle. While this fact does not mean the allegations of abuse were fabricated, it does charge us to examine very carefully the abuse allegations. Fabricated allegations of abuse do occur in custody and visitation litigation and, while concerns should not turn to exaggeration, there is reason to proceed very cautiously in these cases. See Myers, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L.Rev. 1, 113-15 (1989); Green,

True and False Allegations of Sexual Abuse in Child Custody Disputes, 23 J. Am. Acad. Child Psychiatry 449, 449-50 (1986); Yates & Musty, Preschool Children's Erroneous Allegations of Sexual Molestation, 145 Am. J. Psychiatry 989, 991 (1988).

The child allegedly reported the abuse at age two-and-one-half to a half sister. The half sister had shown considerable animosity toward the father. The child's statements to neutral persons did not correspond to the statements allegedly made to the mother and the mother's family. There is disturbing evidence about the mother's attempts to discount the father, including statements in front of a child care provider where the mother was trying to convince the child her father was a liar. Julie Weideman, while interviewing the child and mother, noted the child regressed when in her mother's custody and used foul language and gestures.

The dissenter, in finding the child's statements should be construed as evidence the father sexually abused her, has relied in part on the testimony of a counselor, Kathleen Chara, that the child was telling the truth. What bothers me is that Chara arrived at her conclusion without seeing any of the reports. Because of the extremely serious consequences of false allegations of sexual abuse, professional judgments should not be made without a thorough evaluation of all relevant facts and

circumstances. See Myers, 68 Neb. L.Rev. at 116. Because of the failure of Chara to do a complete valuation of the case, I give less weight to her testimony than does the dissenter.

This child, as the majority has determined, needs to remain under court supervision and both parents should submit to psychological evaluation and counseling.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court. As the majority points out, although we are not bound by the juvenile court's findings, we do give them weight, as that court has the opportunity to hear and observe the witnesses first hand.

To a great extent this case hinges on the credibility of witnesses. The statements of E.C. as they relate to the behavioral patterns of her father concern me. It is so detailed and graphic that it is difficult for me to believe she could have made these up on her own.

I recognize that there are some discrepancies in her statements. However, she was but three years of age at the time of the alleged abuses. These irregularities do not concern me as much as the manner in which she detailed her statements.

As the majority points out in its opinion, E.C. not only told S.S., but three other persons that "Daddy sticks his finger in there and shakes it." E.C. also complained of soreness in the genital area. In addition, again as the majority points out, E.C. told her mother that "Daddy bites my nunu." Later, when E.C. observed a banana, E.C. stated it was a penis.

There is also testimony that E.C. told a DHS social worker that "Daddy sticks his finger there and don't tell" while putting her hand into her pants. Although Dr. Opdebeeck determined there was no clear physical sign of

child abuse, she did notice some dilation of the hymen. We have nothing before us but the cold record. The trial judge had the opportunity to view the witnesses and weigh their credibility first-hand. When I couple the specificity of E.C.'s statements with Kathy Chara's testimony that she was not coached along with the testimony of the other witnesses, I find there is sufficient evidence of child abuse. I would affirm.