IN THE COURT OF APPEALS OF IOWA

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No. 7-488 / 97-0055

FILED
DEC 29 1997
CLERK SUPREME COURT

IN THE INTEREST OF E.H. III, H.H., S.H., R.H., and J.H., Minor Children,

E.H. II, Father,
Appellant.

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, District Associate Judge.

A father appeals from a decision of the juvenile court finding he physically and sexually abused his daughter, ordering him to vacate the family residence, and imposing a no-contact order. **REMANDED.**

D. Bradley Kiesey, Washington, for appellant.

Thomas J. Miller, Attorney General, and Gordon E. Allen, Deputy Attorney General, for appellee State.

Robert Schlegel, Washington, for minor children.

Heard by Cady, C.J., and Sackett and Huitink, JJ.

SACKETT, J.

Earl II, the father of five children found to be children in need of assistance, appeals a finding he physically and sexually abused Sarah, his daughter born in 1987. He contends (1) he should have been able to interview or call as a witness Sarah, whose videotaped testimony was considered by the juvenile court; (2) he should have been able to call as a witness his son Earl III; (3) the juvenile court should not have denied admission of an exhibit, namely a report indicating Sarah had another sexual experience; (4) there was not clear and convincing evidence he physically and sexually abused Sarah; and (5) he should not have been ordered to participate in a sexual offenders program requiring him to admit sexual abuse. We remand.

Earl II's five children, then living with him and his wife, were found to be children in need of assistance in June 1995. Certain dysfunctions in the home were noted.[1] Two of the children, Earl III and an older seriously handicapped daughter, were placed in the custody of the Department of Human Services. The remaining three children, including Sarah, remained in their parents' custody. The family members were ordered to participate in a number of programs. Earl II does not challenge the finding the children are in need of assistance.

Early reports indicate considerable blame for the family problems was attributed to Earl II. Additionally, Earl II resented the State's intrusion in his family

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[1] The finding followed allegations the home where the family lived was not clean, the children's living conditions affected them negatively, and Earl III had sexually abused Sarah.

affairs and failed to develop a good relationship with service providers. On September 1, 1995, Earl II was ordered out of the home after it was found he did not support a therapist.

The issues that are the subject of this appeal began on October 25, 1995, when the State filed an application requesting Earl II be precluded from contacting the family because he had physically abused Sarah in giving her two enemas as a form of punishment.

At the time of the initial State intervention, Sarah contended she and her brother, Earl III, had engaged in inappropriate sexual conduct from the time Sarah was four or five years old and Earl III was between the age of eleven and fourteen. The conduct consisted of Earl III fondling Sarah, rubbing his penis on her genital area, performing cunnilingus, and having Sarah lick his penis. These children were involved in sexual abuse counseling -- Earl III as the perpetrator and Sarah as the victim. Initially, though questioned specifically about touches, neither Sarah nor Earl III claimed Earl II engaged in any type of sexual abuse. A report of a medical examination of Sarah on May 16, 1995, said, "No physical evidence of sexual abuse noted today."

Christine Sigworth testified during a therapy session she and Sarah were using a workbook titled, "My Body is Private." They got to the end of a page and Sarah said, "That happened to me." On further questioning, Sarah took two stuffed animals

and identified one as Sarah and one as her father. She placed the paw of the animal identified as her father between the legs of the animal identified as Sarah.

Sarah was interviewed on videotape in November 1995 concerning the allegations of abuse by her father. The court, over Earl II's objection, received the videotapes in evidence but refused Earl II's application to call Sarah as a witness or have her interviewed by a psychologist, the court, or Earl II's attorney.

We first look at challenges to evidence admitted and not admitted. Earl II contends the court should have admitted in evidence a polygraph report that relates Earl III and Sarah rubbed penis to vaginal area and engaged in cunnilingus and oral sex three times a week for three years. Earl II contends this is the behavior with which he is being charged and the report shows evidence of Sarah's knowledge of sexual behavior relied on in part by the juvenile court in finding Earl II inflicted sexual abuse. The question is whether these out-of-court statements by Earl III should have been admitted.

The State argues, and we agree, current holdings direct polygraph evidence is generally inadmissible in the absence of a stipulation by all parties that it should be admitted as evidence. *In re S.J.M.*, 539 N.W.2d 496, 499 (Iowa App. 1995); *In re A.D.L.*, 497 N.W.2d 178, 180 (Iowa App. 1992).

We agree with Earl II the issue is not the admission of the polygraph finding but the admission of the hearsay statement made by Earl III telling of his abuse of Sarah. The same evidence is a part of an early report entered as an exhibit by the

State. On our de novo review, we consider the evidence from the report finding Sarah reported sexual experiences with Earl III that involved activities similar to those she later reported having with her father.

We next address Earl II's challenge to the admission of the videotapes as well as his challenges to the juvenile court's refusal to allow him cross-examination of Sarah or the ability to have Sarah interviewed by someone else.

The State correctly advances Iowa courts have held the Sixth Amendment right to confrontation does not apply to Child in Need of Assistance proceedings. *See In re D.J.R.*, 454 N.W.2d 838, 846 (Iowa 1990); *In re L.K.S.*, 451 N.W.2d 819, 822 (Iowa 1990); *A.D.L.*, 497 N.W.2d at 181. A review of the videotape shows Sarah, a bright child, announcing she knew the purpose of the tape was to talk about what her father had done. It also showed confusion by Sarah concerning the manner of the alleged sexual abuse. Sarah referred to each body part by correct terms and tended to repeat certain dialogue concerning her father's direction not to tell after the alleged sexual abuse and after she reported about the enemas. Furthermore, Sarah said her mother went limp and fell on the floor on learning of the enemas.

Two videotapes of Sarah's interviews were introduced in evidence. In the first, taken shortly after State intervention, Sarah was reserved and unwilling to identify body parts. In the second videotape, Sarah showed exceptional knowledge of sexual terms and talked about them easily. She had been in sexual abuse counseling and

group therapy. Her change in demeanor and increased knowledge of sexual terms can be attributed to this counseling and therapy.

The juvenile court did not abuse its discretion in admitting the videotape and not requiring cross-examination of Sarah. However, our inquiry as to Sarah being called as a witness does not end there.

Freedom of choice in family matters is a fundamental liberty interest protected by the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982). Consequently, a parent challenging State intervention into his or her family is not without certain procedural safeguards. *See generally Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662, 668 (1986). These due process rights may be less in a situation where the State has a compelling interest to protect a child from future harm. *See D.J.R.*, 454 N.W.2d at 844-45. There is difficulty in defining those rights. *See id.*

The juvenile judge in denying the father's request to have the child interviewed by another said:

> Father's counsel further requests the right to have Sarah re-interviewed by the Child Protection Center or by another psychologist, psychiatrist or professional counselor. The Court has reviewed the videotape prepared at the Child Protection Center on November 8, 1995, and introduced as Petitioner's Exhibit 2B. In this videotape, Sarah describes sexual abuse by her father, who she refers to as "daddy" in a clear, forthright and direct manner. There is nothing vague or fuzzy about her statements to interviewer Shannon Cooper. Ms. Cooper's questioning of Sarah is skillful and without apparent bias. She asked Sarah open-ended, non-leading questions. Sarah gave a detailed description of the sexual abuse, revealing knowledge of sexual

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> matters far beyond what would be expected of a normal nine year old. Sarah specifically referred to her brother, Earl III, being in another room playing Nintendo when "daddy" sexually abused her. The Court finds that to have Sarah re-interviewed by either the CPC or another psychologist, psychiatrist or other professional counselor would serve no useful purpose. Said requests of father's counsel are denied.

The allegations against Earl II allegedly surfaced in a controlled situation after Sarah had been in counseling for several months. Sarah's videotaped testimony was gathered in the same controlled setting, unlike *D.J.R.*, 454 N.W.2d at 839-40 (child initially reported alleged abuse to school teacher, and attorney for parent allowed to participate in taking child's testimony) and *L.K.S.*, 451 N.W.2d at 820 (child initially reported abuse to mother). The juvenile court found there was nothing vague about Sarah's descriptions. We do not agree. Our comparison of the two videotapes shows Sarah's knowledge of sexual terms came after she was in counseling, though the abuse by her father is alleged to have occurred before either videotape was made.

We recognize, as the State advances, child sexual abuse is difficult to detect and prosecute because generally the only evidence is the testimony of the victim and the perpetrator. Yet, the vulnerability of children can unintentionally be utilized by an adult whose ulterior purpose may be cloaked in seductive and suggestive tones and lead a child to do and say things that fit an adult's concept of reality. Thomas M. Horner and Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made*, XXV Family Law Quarterly, No. 3, 381, 389 (1991) (citing *Perspectives on Children's*

Testimony, S. J. Ceci, M. P. Togha, and D. F. Russ, eds. (1989)). One commentator cautioned:

> The clinical expert constitutes the . . . phantom judge in any tried case of child sexual abuse. . . . [E]xperts give free-ranging and often unreasoned opinions based on biases, prejudices and assessment heuristics that are idiosyncratic. Frequently, they present their data selectively so as to make their opinions inevitable, when in fact they are not.

Id. at 406.

There is a question of Earl II's ability to perform in the manner Sarah alleged he performed. Earl II testified hypertension, diabetes, sleep apnea, depression, and medication have made it impossible for him to have an erection or ejaculate for five years. His family physician testified since 1988 erection and ejaculation were not possible for Earl II. A report from the University of Iowa further supports this conclusion. The mother testified Earl II has been sexually incapable since their last child was born in 1990. The abuse of which Sarah complains occurred after the birth of her last sibling.

Sarah's testimony was not so reliable that Earl II should have been prevented from questioning Sarah in some form. In making this determination, we consider the following: (1) an initial questioning of Sarah elicited a denial of bad touches; (2) the allegations of abuse came after counseling; (3) Sarah's paternal grandmother testified Sarah said she did not say anything about her father; Christine, the therapist, did; (4) there is evidence Sarah suffered sexual abuse from her brother similar to that she

now claims was perpetrated by her father; (5) a review of the second videotape makes it clear Sarah was prepared for her testimony; and (6) Sarah had no problem discussing the matters with the interviewer.

We make no finding as to whether the abuse occurred. We remand to the juvenile court to reconsider Earl II's application to have Sarah interviewed. The juvenile court shall order the interview with such person included in the father's request it deems most appropriate.

The next issue is whether the juvenile court was correct in refusing to allow Earl III to be called as a witness. In making the ruling, the juvenile court said:

> Father's counsel next requests that he be allowed to call [Earl III] as a witness in these court proceedings. Earl III's counsel and guardian ad litem, Robert G. Schlegel, his mother's counsel, James W. Carey, his therapist, Ms. Luann Aster, and the Petitioner all resist this request. Ms. Aster testified that Earl III himself has clearly stated to her that he does not wish to testify in these proceedings as he does not want to "take sides." Father's counsel suggested to Ms. Aster that Earl would not, in fact, be "taking sides," but would simply be providing information to the Court which again could be useful in ascertaining the truth. The Court finds, however, that whatever Earl III would have to say would inevitably be construed as either supporting his sister's statements that her father sexually and physically abused her, or his father's position that he did not so abuse her.
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> Earl III's statement that he does not wish to testify in court seems to this Court to be a very sensible act of psychological self-preservation. If Earl III were called to testify, this Court and counsel would consider his testimony and then move on to the next case. Earl III, however, would have to live with the implications of his testimony within the context of his family for the rest of his life. It is undoubtedly in Earl III's best interest not to be forced to testify against members of his family when he chooses not to do so.

> The Court further considers the proposed subject matter of Earl III's testimony. Father's counsel's theory is that acts of sexual abuse attributed to Earl II were actually perpetrated by Earl III. If called, father's counsel would request Earl III to describe how he himself had sexually abused Sarah . . . . Earl III has previously extensively discussed these matters with his therapist, and has also taken a polygraph concerning them. His therapist, Ms. Aster, testified that he has made a great deal of progress in dealing with the sexual abuse issues. She further testified that being required to reiterate the sexual abuse could trigger resentment in Earl III which could cause him to re-offend. The Court finds the value of Earl III's testimony in the search for the "truth" is not worth the risk of psychological trauma to Earl III or the risk of his re-commencing his sexual offender cycle. For all of the above reasons, the Court therefore denies father's counsel's request to have Earl III testify in these proceedings.
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> The Court further finds that having Earl III re-interviewed by the Child Protection Center or another psychologist, psychiatrist or other professional counselor is not in Earl III's best interests. He has had extensive therapy at Tanager Place, both inpatient and outpatient. His therapist testified that Earl III is done with two-thirds of his work and his remaining work will probably not take another year. Earl III should be allowed to complete his therapy without having painful issues re-opened by persons who are strangers to him, even if those strangers are professional child psychologists.

Earl III was born December 18, 1980. The ruling on his testimony was made July 18, 1996, at a time he was nearly sixteen years old. We consider a report in evidence that Earl III sexually abused Sarah in a manner similar to the sexual abuse charged against Earl II. There is no claim Earl III's testimony is probative on any other issue and we affirm the juvenile court on this basis.

Earl II next contends the fact he gave Sarah two enemas does not support a finding he physically abused her. The juvenile court found it did because Sarah testified (1) her father said once he gave her the enemas because she was bad; (2) he

told her not to tell anyone; (3) he said he was sorry afterwards; and (4) her mother said he told her he did it for punishment. A letter from Dennis G. Miller, D.O., the family physician stated he advised Earl II one night to give Sarah an enema. Sarah said it hurt when the water went in, but did not make further complaints about the comfort level of the enema.

We agree with Earl II that giving a child an enema to correct a problem, particularly when advised by a family physician, is not physical abuse. The issue of whether the enema may have been given for an improper purpose hinges on credibility assessments of Sarah's testimony. This issue is best readdressed after the hearing ordered on remand.

We remand to the juvenile court to reconsider the application to have Sarah interviewed by such person in the father's request the court deems appropriate and to take further evidence after the interview, and after receiving further evidence, to reconsider its finding Earl II physically and sexually abused Sarah.

We do not address Earl II's claim objecting to participation in a sexual offenders program.

We do not retain jurisdiction.

REMANDED.