

IN THE COURT OF APPEALS OF IOWA

No. 9-568 / 89-857

IN THE INTEREST OF B.F. and E.F., Children.

T.D., Mother,

Appellant.

FILED

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Delaware County
Charles H. Jacobs, Juvenile Referee.

Appellant appeals the CHINA adjudication and the
resulting dispositional order. **AFFIRMED.**

Jon M. Kinnamon, Cedar Rapids, for the appellant
mother.

Thomas J. Miller, Attorney General, Gordon E. Allen,
Deputy Attorney General, and Valencia Voyd McCown,
Assistant Attorney General, for the appellee State.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

The mother appeals from the adjudication of her two daughters, B.F. and E.F., as children in need of assistance (CHINA) due to sexual abuse by R.D., the stepfather. She also appeals the resulting dispositional order. She contends the juvenile court erred in: (1) admitting and considering a social worker's child abuse report over her objections; (2) concluding the State proved by clear and convincing evidence that the children were in need of assistance, and finding sufficient evidence to establish that sexual abuse occurred. In the alternative, she contends the stepfather should be allowed to visit the home when the children are away in order to perform household maintenance tasks. We affirm the decision of the juvenile court.

Our review of termination proceedings is de novo. In Interest of D.T., 418 N.W.2d 355, 355-56 (Iowa App. 1987). We give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses the court has heard and observed firsthand, but we are not bound by them. Id.; Iowa R. App. P. 14(f)(7).

The children in question are girls born in 1973 and 1975. Until 1988 they resided with their mother and stepfather.

In 1988, social service authorities accused the stepfather of sexually abusing one of the girls, plus a third stepdaughter who had since reached adulthood. The other minor child was determined to be at risk for sexual abuse. The stepfather denies all accusations of sexual abuse, asserting that any physical contact occurred accidentally during horseplay. The mother supports the stepfather.

In April 1989, the two girls were adjudicated to be children in need of assistance due to sexual abuse by the stepfather, or the risk thereof. The children were placed with their mother, subject to continuing supervision and subject also to a requirement that the stepfather stay away from the home and have no contact with the children.

The mother has appealed from the CHINA adjudication and the resulting dispositional order.

I. Admission of Evidence.

First, the mother contends the juvenile court erred by admitting into evidence the child abuse report of Ms. Diane Neuhaus over her objections. She objected to the admitting of the report on grounds that the report was not the best evidence, the report contained hearsay, and that she had no opportunity to review the report and prepare before the hearing. She contends the juvenile court abused its discretion in admitting the report over her objections. We disagree.

In CHINA proceedings, "the best interest of the children dictate that the rules of procedure be liberally applied in order that all probative evidence might be admitted." In re J.R.H., 358 N.W.2d 311, 318 (Iowa 1984). Iowa Code section 232.96(6) (1989) provides:

A report, study, record, or other writing . . . made by the department of human services, . . . relating to a child in a proceeding under this division is admissible notwithstanding any objection to hearsay statements contained in it provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or custodian. The circumstances of the making of the report, study, record or other writing . . . including the maker's lack of personal knowledge, may be proved to affect its weight.

Consequently, evidence that otherwise constitutes hearsay or not the best evidence in an ordinary civil proceeding is admissible in CHINA proceedings. The nature of such evidence is to be considered as it affects its probative value rather than its admissibility. See Harter v. State, 149 N.W.2d 827, 829 (Iowa 1967).

We find no error by the juvenile court in admitting Ms. Neuhaus' child abuse report. The record reveals that the mother received a copy of Ms. Neuhaus' petition and affidavit dated October 3, 1988. The mother testified that both she and her daughters read the affidavit. E.F. testified that her mother was upset with her as she accused E.F. of saying things contained in the affidavit. She

further testified that her mother showed her the affidavit and that she read it after her mother became upset and accusatory.

The affidavit is a brief summary of the facts and information contained in Ms. Neuhaus' report. We believe the affidavit sufficiently apprises the mother of the basic content of the allegations contained in Ms. Neuhaus' report. We find no merit in the mother's claim that she was unable to prepare or review the report before the adjudicatory hearing. In addition, the information and statements contained in the report were both relevant and material. Upon our review of the record, we find the probative value of the report outweighed the danger of unfair prejudice to the parents. We find no abuse of discretion by the juvenile court in admitting Ms. Neuhaus' child abuse report.

II. Sufficiency of Evidence.

Next, the mother challenges the sufficiency of the evidence to establish that sexual abuse occurred or that the children are children in need of assistance.

In resolving the issue presented in this case, we exercise our de novo review keeping in mind our paramount concern is the welfare and best interest of the children. In re D.L., 401 N.W.2d 201, 202 (Iowa 1986). The State carries the burden of presenting clear and convincing evidence that B.F. and E.F. are children in need of

assistance as defined by Iowa Code section ¹³³232.2(6) (1989). Iowa Code section 232.2(6) provides:

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

(d) Who has been sexually abused by the child's parent, guardian, or custodian or other member of the household in which the child resides.

The juvenile court found there was clear and convincing evidence that B.F. and E.F. were children in need of assistance. The court determined that each child has suffered or is imminently likely to suffer harmful effects as a result of conditions created by the child's parent or who had been sexually abused by the child's parent or other member of the household in which the child resides.

Prior to the incident presently at issue, the Department of Human Services (DHS) was involved with this family on a similar child abuse report finding sexual abuse by the stepfather. On April 20, 1987, a child abuse report concluded that indecent contact occurred between the stepfather and E.F. as he touched her groin and breast, and that he had touched the breast of D.F., the oldest sister, while wrestling with them. The mother testified that her son and her sister-in-law made the reports that resulted in this child abuse investigation. The "Narrative Summary of Investigation" indicated the mother was unaware that R.D.

was doing anything more than wrestling with the girls and that she would be cooperative to assure that it doesn't occur in the future. The summary further states:

On 4-17-87 this worker and Deputy Hermes returned to the [family] . . . home for the purpose of interviewing [R.D.] . . . He stated that he did wrestle with the girls but then he neither admitted to fondling the girls nor denied it. He did state that "no woman and no child are worth going to jail over" and that he would move out if any charges were going to be filed. He further alluded to having a "bad reputation in another state" but he elaborated no further and no additional information was discovered about this. Finally . . . [R.D.] did agree to discontinue his practice of wrestling with the girls. He also agreed not to touch them on the breast or in the pubic area. The . . . [family] also agreed to accept an ongoing Departmental Service Worker.

This first-founded abuse report resulted in family counseling sessions conducted by DHS. These sessions dealt with family stress due to the child abuse report and investigation and with appropriate and inappropriate contact between parent and child. The family services were discontinued by mutual consent of the family and the social worker as all initial goals and objectives were met.

On September 30, 1988, the second report of abuse came by referral from the girls' aunt and uncle. The investigation summary indicates that E.F. stated that R.D. has laid on top of E.F. and D.F. when he awakens them in the morning. Further, the summary states that E.F. stated that he still wrestles with her and has attempted to put

his hands on her breasts. In addition, the summary notes E.F.'s concern that R.D. will attempt further sexual activity with her and that he may start doing things to the younger B.F. E.F. also expressed her concern about how her mother would react and appeared to want to protect her mother.

On October 18, 1988, during the investigation of the second report, D.F. began denying that R.D. has ever touched her breast or vaginal areas. This is directly contrary to information D.F. provided in the previously-founded sexual abuse investigation. She further recanted her allegations at the adjudication hearing.

At the adjudicatory hearing E.F. also recanted her statements and allegations she made to both Social Workers Peggy Berg, while investigating the first report of abuse, and Diane Neuhaus, while investigating the second report of abuse. We note that E.F. does not deny all of the statements and comments that the social workers included in their reports. Most importantly, E.F. does not deny telling Ms. Neuhaus that R.D. has laid on top of her and D.F. in the mornings when he comes upstairs to wake them.

Additionally, E.F. confirms the following statements contained in Ms. Neuhaus' report: telling Ms. Neuhaus that she was uncomfortable with R.D.; that she wanted to protect her mother; that she did have a conversation with her aunt and uncle, and that afterwards R.D. expressed concern that

E.F. and her sisters might have talked to their aunt and uncle about him; asking Ms. Neuhaus if B.F. would be allowed to talk to her about the incidents; and that the girls weren't allowed to attend school-sponsored events. E.F.'s explanation on how or why Ms. Neuhaus' report contains statements and allegations that she now claims she did not make is that Ms. Neuhaus somehow probably got the information from Peggy Berg's first abuse report in 1987.

As noted, E.F. further recants or claims that she did not make some statements included in Peggy Berg's report. E.F. denies Ms. Berg's statement that E.F. told her school counselor, David Malausky, that she was afraid of R.D. because he was touching her on the breast and in the pubic area. Additionally, E.F. denies making the following statements to Ms. Berg: that R.D. touched her breast under her shirt; that he put his hand down inside her pants and panties and touched her pubic area; that she had belt marks on her buttocks from a beating by R.D.; that R.D. had a drinking problem.

The real issue here is who was telling the truth and when. Unfortunately, as the appellate court, we did not have the opportunity to hear and observe the testimony of the witnesses. As noted earlier, we give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses that court has heard and observed firsthand. See In Interest of D.T., 418 N.W.2d at 356.

The juvenile court obtained E.F.'s testimony in chambers out of the presence of R.D. and her mother. Both her mother's counsel and R.D.'s counsel were present in chambers to secure E.F.'s testimony. After E.F.'s testimony the court stated:

[R.D.'s] demeanor out there today indicates he has a real stake in what you're going to say. The reason you're here [E.F.] is because of the reaction that I saw when you did start to talk. And he was visibly shaken up by what you were going to say. And I guess, you know, guys don't do that when they're sure of what's going to happen, but you made him unsure and you scared him. All right.

After viewing and listening to E.F.'s and D.F.'s testimony, the court stated that it believed the alleged abuse occurred. After the hearing resumed in the courtroom the court stated that it had great concern about the testimony it had observed and heard throughout the hearing. The court further stated it did not believe E.F.'s testimony.

The State contends that E.F. and D.F. have been pressured into denying that they had been sexually abused. In support of their claim they point out that the mother has never been open to the daughters' allegations and automatically accused them of lying and trying to get attention. The "Case Permanency Plan" dated December 1, 1988, indicates that the mother continues to "den[y] any abuse and believes that [E.F.] is at fault for attention seeking allegations as well as for inviting [R.D.'s] sexual

advances." Further, that the mother "believes that [E.F.] was angry because she does not get her way and does not participate in family chores and rules."

The mother testified that she did hear E.F. and D.F. answer yes to Diane Neuhaus' question whether R.D. had been laying on top of the girls in the morning to wake them up. She further states that the girls did not have an opportunity to explain what they meant in answering Ms. Neuhaus' question about improper conduct. She further testified that when she heard her daughters answer to Ms. Neuhaus' question, she was "a little upset because I know those things aren't true."

Upon our review of the record, we do not find E.F.'s or D.F.'s recantations to be reliable or credible. We agree with the juvenile court's reasoning. The juvenile court stated:

And what has happened to you [E.F.] is not your fault, and unfortunately, you think it is, and I think your mom probably thinks it might be, too. But you don't go into a school counselor and concern him enough about these allegations so that he calls somebody, and it's a mistake, all right. You said something to the counselor that -- and he repeated it, and it's been repeated more than one occasion, more than -- different people, and in more than one year, okay.

These people in these investigations don't know anything about each other, okay. And yet they say that you repeated those allegations in almost exactly the same -- almost exactly the same.

The court further stated:

The only way that I can believe what you've all told me today is to accept that Ms. Neuhaus' report is almost -- almost one hundred percent

inaccurate. We're never, never that wrong. I read these reports by the hundreds every year. We never miss by as far as you want me to believe we've missed.

* * *

These investigations took several days, several people that were interviewed, and they all said the same thing. And that's -- it's too remarkable; it's too coincidental, that in April of '87, we get exactly the same thing as we get today, with only people who are the same involved as you all. The only people who were the same. Everybody else is different. Nobody else knows what's going on, and I haven't heard an explanation as to why we missed twice by as far as we've missed. And the answer is we don't miss that far.

Ms. Berg didn't miss that far, okay. She didn't go to a school and interview people and then write about it. These people told her exactly what's in these reports. And that's because they were only relaying what was told to them. Okay. And so I guess, the other thing that kind of gives me some credence here is that there is some inappropriate behavior here. There is -- there is at least one that is not disputed, one that you'll all concede at least was heard: [that E.F. said R.D. has laid on top of her].

* * *

So something has happened and something is going on. What I see here is probably something that's very protective. And ma'am, I guess I think your daughters are looking out for you. I think they know what's at stake here, and they know that [R.D.] here may get really angry, okay, and that the marriage may have some difficulties. But if you trust these young ladies, they've got some real difficulties. When you heard your daughter say, Yeah, he laid on top of me, you should have reacted, immediately.

We find there is sufficient evidence in the record to support the juvenile court's finding that E.F. has been sexually abused by the stepfather and that B.F. is imminently likely to be sexually abused by him. We find it

especially troubling that R.D. continued wrestling with the girls after he agreed not to in light of the first abuse report containing allegations that he was fondling them while wrestling with them. Therefore, we find no error by the juvenile court in concluding that there was clear and convincing evidence that the children were in need of assistance and that the court's aid was needed.

III. Visitation.

Finally, the mother contends the stepfather should at least be allowed to visit the home while the children are away at school in order to perform household repairs and household maintenance tasks. Counsel for E.F. and B.F. stated that the girls have no objection to R.D. returning home in their absence. The mother argues that such an arrangement would be in the best interests of the children.

The mother states she can assure that no abuse occurs in the future if R.D. is allowed to return home in the daughters' absence. R.D.'s counsel stated that R.D. was willing to agree to discontinue any wrestling with the girls. These promises are the same types of promises made at the time of the first sexual abuse investigation.

The State maintains that the girls will be at greater risk for future abuse if R.D. is allowed to re-enter the household since he continues to deny the abuse without the benefit of treatment. We agree. Contrary to the mother's assertion, the proposed visitation arrangement does not

remove any concern about the children's welfare. The record reveals no evidence that R.D. is currently receiving any counseling or treatment to address the problems that resulted in the abuse investigations. We find it in the best interests of E.F. and B.F. that R.D. not be allowed to return to the family home at this time.

We affirm the juvenile court's adjudication of E.F. and B.F. as children in need of assistance and its subsequent dispositional order in all respects.

AFFIRMED.