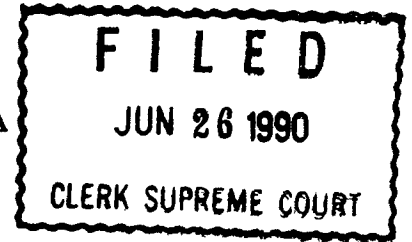


IN THE COURT OF APPEALS OF IOWA

No. 0-291 / 89-1694



IN THE INTEREST OF B.C.I., A Child,
B.I., Father,
Appellant.

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Appeal from the Iowa District Court for Polk County,
William Joy, Judge.

Father of a child appeals a CINA adjudication and subsequent dispositional order. He challenges the sufficiency of the evidence to establish that he had sexually abused the child. He also contends the juvenile court should have allowed his attorney to interview the child. **REVERSED AND REMANDED.**

Peter W. Berger, Des Moines, for the appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Judy Sheirbon, Assistant Attorney General, for the appellee.

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

SACKETT, J.

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We address a father's rights to pretrial discovery in a child in need of assistance proceedings. We remand to the trial court to allow the father the requested discovery.

The child, a male, born on June 25, 1985, allegedly was sexually abused by his father. At the time of the abuse, the child's parents' marriage had been dissolved for about two and one-half years. The mother was the physical custodian. The father had substantial visitation, which he exercised. The mother testified the matter came to her attention when following his bath, the child

spread his legs and pushed his penis up towards her. When asked "Who wants to see something like that?" the child responded "Daddy does." When asked further what Daddy likes to do, the child made statements such as "[Daddy] likes me to stick my finger in my po-po," and "He licks my nuts and sucks my weinie."

The child was then examined at The Sexual Abuse Diagnostic Clinic at Broadlawns Hospital. The clinic determined there was no physical evidence of sexual abuse. The child was subsequently interviewed by a police detective, a sexual abuse worker with the Department of Human Services, and a psychologist. At trial, each interviewer testified. Each interviewer's prepared reports were introduced into evidence. Additionally, audio and video tapes of interviews were entered as exhibits at trial. The mother, also, testified. The child was not called as a witness.

At trial, the father testified denying the abuse. The father also produced several witnesses who had close relationships with him and his son. The witnesses were supportive of the father. They testified they did not believe he had abused his child. The trial court found the father had sexually abused the child and entered appropriate orders.

The father, several times prior to trial, asked that his attorney be allowed to question the child. The father contends on appeal he should not have been denied this opportunity. The father also contends on appeal there is no clear and convincing evidence he sexually abused his child. We agree the father should have had the right to interview the child prior to trial. We find his suggested interview technique to be one that adequately protects the child. We remand for that purpose. We do not address the father's second issue.

The father's request that his attorney should have had the right to interview the child was denied because the trial court determined an additional interview would be detrimental to the child. The father contends an independent interview is necessary because he did not abuse his child. He contends, following his making a complaint, the child had sustained some bruises. The mother threatened to get even with him. The father argues the child may have identified the wrong perpetrator, and the

mother may have misconstrued some things the child picked up from magazines and a talk his father had with him about sexual matters.

The father also contends there are a series of things that happened during the interviews which makes the reliability of the interviews questionable. We find the following facts true. At times during the interviews, the child clearly talked about daddy licking his nuts and daddy sucking his doo-doo. The child identified nuts and doo-doo as part of the male sex organs. The mother was present during all or at least some of every interview. The child sat on the mother's lap during one interview. The mother indicated to the child during one interview the successful completion of the interview would result in his getting some gum and being able to play with a friend. The mother did some coaching during interviews. The mother had input into the history given the psychologist. The psychologist with reference to that history testified:

Then I asked his mother to tell me about the problem and then had her more or less set the scene for what the child had told her, at which point the child picked up the story and told me about sexual behavior that had occurred between himself and his father.

The child's interviews at times were disjointed and inconsistent, and at one point, he appeared to identify the perpetrator as a "she."

We recognize the difficulties in interviewing child victims and are aware that parental assurance and

interventions may be necessary to get a child to talk to a strange interviewer. It is not our purpose on this issue to determine whether or not the child's testimony was credible. Nothing we say on this issue should be construed as our opinion the child was truthful or not truthful. This is solely an issue of discovery.

The right to pretrial discovery does exist in child in need of assistance proceedings. The Rules of Juvenile Procedure contain three rules on discovery. Two of these rules are applicable here:

Rule 1.1 Scope of Discovery In order to provide adequate information for informed decision making and to expedite trials, minimize surprise, afford opportunity for effective cross-examination and meet the requirements of due process, discovery prior to trial and other judicial hearings should be as full and free as possible consistent with protection of persons and effectuation of the goals of the juvenile justice system.

* * *

Rule 1.3 Child in Need of Assistance and Termination Proceedings Although informal discovery methods are preferred, the rules of civil procedure, divisions V and VII, governing discovery, depositions and perpetuation of testimony in civil proceedings shall apply to proceedings under Iowa Code chapter 232, divisions III and IV where not inconsistent with these rules or with statutes.

Was the protection of the child so compelling that the father should have been denied any access to him prior to trial? All of the child's testimony came in either as hearsay evidence or taped testimony of witnesses as to what the boy said and reports of witnesses as to what the boy

said. No courtroom safeguards were employed in the taping processes. There was no opportunity for the judge to observe the child. There was no cross-examination of the child.

We all carry a serious and difficult responsibility to assure that correct diagnoses of sexual abuse are made, and if there is sexual abuse, the perpetrator is correctly identified. See Chadwick, Interdisciplinary Guidelines for the Evaluation of Suspected Child Abuse Cases, 1 The Advisor 7 (Newsletter of the Am. Prof. Soc'y on the Abuse of Children, August 1988). Dr. Chadwick discusses the importance of accurate decision-making in all child abuse cases:

Mistakes made in assessment of child abuse cases are costly. Failure to recognize and document abuse allows it to continue, often with serious, occasionally with fatal results for the child. Erroneously concluding that a child has been abused may result in the unnecessary removal of a child from a family or the unjust conviction of a person for a crime. Making or missing this diagnosis is comparable, in medicine, to making or missing a diagnosis of cancer.

Authorities suggest generally children do not fabricate false allegations of sexual abuse. See Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues 125, 127 (1984); Jones & McGraw, Reliable and Fictitious Accounts of Sexual Abuse to Children, 2 J. Interpersonal Violence 27, 28 (1987).

However, there appears to be some support for the contention the fabricated report rates of sexual abuse are higher when the child or children involved are a part of a custody or visitation dispute. See Myers, Expert Testimony in Child Sexual Abuse Litigation, 68 Nebr. L. Rev. 1, 113 (1989); Green, True and False Allegations of Sexual Abuse in Child Custody Disputes, 25, J. Am. Acad. Child Psychiatry 449, 449-50 (1986). But while there is need for concern about fabricated allegations of child sexual abuse in the visitation and custody context and care should be exercised, our concern should not turn to exaggeration. See Myers at 113-15.

Because in this case the most critical evidence is the child's description of what occurred, it is vital to assess the validity of the child's statements. We recognize most young children lack the experience to manufacture details of sexual abuse, but this does not mean children's allegations of sexual abuse must always be accepted at face value. And it may be necessary to look behind the statements to determine whether an adult planted the event in the child's mind. Myers at 116-17.

To adequately do so, it may be necessary to assess whether the child or an adult may have a motive to fabricate allegations of abuse. Myers at 119. While experienced professionals have abilities to detect fabrication, no foolproof techniques exist to detect

fabricated charges of sexual abuse, and experts on child abuse are not human lie detectors. Myers at 119-21.

There were factors surrounding the interview process here which raise legitimate questions. Additionally, the trial court had no opportunity for an independent observation of the witness. The father had no opportunity for cross-examination.

While there was testimony another interview would cause the child stress and anxiety and might have an impact on his treatment, no explanation was given as to why another interview would have an impact on the treatment. Obviously any interview is going to cause any child some anxiety and stress.

The father, in asking for the interview, proposed he not be present; that the guardian ad litem, the mother, and the psychologist be present; the interview be at the psychologist's office; the psychologist review the questions beforehand; and the interview be stopped at any time by representatives of the State.¹

We find the request made by the father to be reasonable and to offer sufficient protections for the child. We

1. Such a role may best be assigned to the guardian ad litem lest there be any question of a conflict if the attorney for the state speaks both for the State and the child. See IJA/ABA Juvenile Justice Standards, Standards Related to Counsel for Private Parties Standard 3.2. See also, In re Patricia E., 206 Cal. Rptr. 684 (1984).

remand to the trial court to fashion an appropriate interview. The child shall remain a child in need of assistance. The parties may petition the trial court to hear further evidence following the order. We do not retain jurisdiction.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

I concur in the result only.