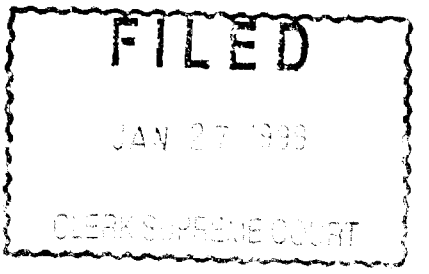
IN THE COURT OF APPEALS OF IOWA

No. 8-638 / 97-2192
Filed January 27, 1999



IN THE INTEREST OF E.M., C.M., and M.G.,
Minor Children,

P.G., Mother,
Appellant,
T.S.G., Father/Step-father,
Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, District Associate Judge.

The mother and father/step-father appeal a district court's dispositional order requiring the child, E.M., be placed in foster care and two other children be adjudicated in need of assistance. **AFFIRMED.**

Bruce D. Goddard of Tindal, Erdahl, Goddard & Nestor, Iowa City, for appellant P.G.

Stephen N. Greenleaf of Lynch, Greenleaf & Michael, L.L.P., Iowa City, for appellant T.S.G.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Debra Farmer Minot, Assistant County Attorney, for appellee State.

Catherine A. Pugh of Stein, Russell & Pugh, L.L.P., Iowa City, guardian ad litem for minor children.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

STREIT, J.

A mother and step-father appeal the juvenile court's rulings finding their three daughters children in need of assistance (CINA) based on the eldest daughter's allegations of sexual abuse by the step-father. Because clear and convincing evidence exists that the sexual abuse occurred, we affirm the child in need of assistance finding for the eldest daughter, Elizabeth. Because Elizabeth's siblings are imminently likely to be victims of similar abuse, we affirm the trial court's adjudication of them as children in need of assistance.

I. Background Facts & Proceedings.

Pam is the mother of three children: Elizabeth, born in 1983; Catherine, born in 1985; and Melissa, born in 1987. Stevin is the step-father of Elizabeth and Catherine and the biological father of Melissa. Stevin and Elizabeth have never gotten along well due to Stevin's strict disciplinary style which caused confrontations with Elizabeth.

In March 1995, Catherine told her maternal grandmother Elizabeth told her Stevin had "messed" with her. Elizabeth later elaborated to the grandmother that Stevin came into her room, fondled her breasts, and inserted his finger into her vagina. She stated this occurred over a period of several months and happened when Pam was taking Catherine to tutoring sessions. The grandmother believed Elizabeth, and confronted Pam and Stevin. Stevin denied the allegations. Pam ultimately concluded the allegations were false.

In February of 1996, Catherine reported to a school counselor that Stevin raped Elizabeth. She was unsure if actual intercourse had occurred, but believed there was much fondling. Catherine also reported Elizabeth was afraid to stay home alone with Stevin. As a result, a child abuse investigation was conducted by the Department of Human Services (DHS). Elizabeth told investigators Stevin had sexually abused her from the fall of one year until the following summer. She stated Stevin inserted his finger into her vagina until it caused her to yell and scream. A physical examination indicated no physical manifestations of sexual abuse. DHS concluded the child abuse allegations were founded, but no CINA petitions were filed at that time and no criminal charges were filed due to the lack of evidence. The family agreed to attend family therapy sessions.

On Christmas Eve 1996, Elizabeth told her mother Stevin was making inappropriate sexual comments to her. She stated Stevin discussed his younger sexual exploits while helping her with her paper route and massaged her thigh numerous times while in the car. At another time, he repeatedly requested to see her breasts. Elizabeth told the therapist she was scared to stay in the home for fear Stevin's advances would get worse. The therapist contacted DHS and Elizabeth was placed in shelter care.

Elizabeth informed social workers no one in her family believed her story and they blamed her for the family's breakup. Pam and Stevin repeatedly told the family therapist they thought Elizabeth was lying.

The State filed a CINA petition on behalf of all three girls on January 24, 1997, alleging the children in need of assistance pursuant to Iowa Code section 232.2(6)(d) (1997). A no-contact order was issued the same day preventing Stevin from having any contact with the minor children.

After the initial legal proceedings had begun, social workers interviewed Catherine and Melissa regarding the family problems. Catherine undermined Elizabeth's allegations at that juncture, stating she did not believe her sister and did not want Elizabeth to return home because she created too many problems. Both girls stated Elizabeth was mean to them. The investigators believed the girls were coached.

On April 24, 1997, the juvenile court issued an order finding Elizabeth a child in need of assistance and placed her, temporarily, in her grandmother's custody. An adjudicatory hearing was held in July 1997 and the district court adjudicated all three children CINA pursuant to section 232.2(6)(d). A dispositional order was entered on November 6, 1997, placing Elizabeth in family foster care and continuing the custody of Melissa and Catherine with Pam under the protective supervision of DHS. The juvenile court refused to lift the no-contact order, but granted Stevin supervised visitation. Pam and Stevin appeal all rulings.

II. Standard of Review.

Appellate review of a juvenile court's finding of a child in need of assistance is de novo. *In re L.K.S.*, 451 N.W.2d 819 (Iowa 1990). Evidentiary rulings are reviewed for abuse of discretion. *In re E.H. III*, 578 N.W.2d 243 (Iowa 1998).

III. Adjudication of Elizabeth as a Child in Need of Assistance.

Pam and Stevin appeal the trial court's finding Elizabeth is a child in need of assistance arguing the accusations of sexual abuse by Stevin are not supported by substantial evidence. The trial court adjudicated Elizabeth as in need of assistance pursuant to Iowa Code section 232.2(6)(d). That section states: A child is in need of assistance when "[she] 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."

The parents' argument centers around the fact that Catherine, who was the person who brought the issue of sexual abuse of Elizabeth to the attention of adult family members and authorities, recanted her version of the facts. Catherine's position at trial was Elizabeth was lying, Elizabeth was bad, mean, and causing family problems. She hoped Elizabeth would stay away from the family home forever.

The credibility of Elizabeth's allegations do not hinge on Catherine's testimony alone. The credibility or truthfulness of a witness is a determination solely for the trier of fact. *State v. Taylor*, 516 N.W.2d 38, 40 (Iowa App. 1994). In

determining whether Elizabeth's allegations were true, the court considered that Elizabeth had been questioned by numerous people including her grandmother, her mother, her step-father, child protection investigators and a law enforcement officer. She testified by deposition at trial. On each occasion her allegations were consistent, logical, detailed, and spontaneous.

In contrast, Catherine has changed her story. She stated she believed Elizabeth when Elizabeth first told her of the abuse, but by the time of trial stated she did not know why she believed her. If the credibility of one of these girls is in doubt, it is Catherine's. Catherine has expressed feelings of jealousy toward Elizabeth for the attention Elizabeth has gotten from authorities because of the abuse allegations. Catherine believes people are "sucking up" to Elizabeth and Elizabeth is getting "a lot of stuff." Catherine has also expressed resentment toward Elizabeth for breaking up the family.

Review of the record indicates substantial evidence supports the finding that Stevin sexually abused Elizabeth. The trial court's finding that Elizabeth's allegations were truthful and its adjudication of her as a child in need of assistance pursuant to Iowa Code section 232.2(6)(d) are affirmed.

IV. Adjudication of Catherine and Melissa as Children in Need of Assistance.

Pam and Stevin appeal the trial court's adjudication of Elizabeth's siblings as children in need of assistance, arguing there is no evidence either of the girls has been sexually abused.

Iowa Code section 232.6(d) provides for the protection of children who have not been abused, but are imminently likely to suffer sexual abuse. The State has the burden of showing the children are imminently likely to be abused by clear and convincing evidence.

Child in need of assistance statutes are preventive as well as remedial. The State need not sit idly by until children have actually been harmed. *See In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We hold that when it has been proven to the satisfaction that one child has been sexually abused by a parent, other children in the household are imminently likely to suffer similar abuse and can be adjudicated children in need of assistance pursuant to Iowa Code section 232.6(d). The trial court's ruling is affirmed.

V. Denial of Application for Substitute Attorney/Guardian Ad Litem.

Pam and Stevin argue the juvenile court erred in refusing to appoint an attorney separate from the guardian ad litem when it became apparent the attorney believed Elizabeth's accusations and had differing views from Catherine and Melissa. The mother argues the guardian ad litem was not able to advocate the positions of Catherine and Melissa because of this conflict of interest.

Iowa Code section 232.89(4) allows the same person to serve both as the child's counsel and as guardian ad litem. However, the court, in its discretion, may appoint an attorney and a guardian ad litem if the same person cannot properly

represent the legal interests of the child as legal counsel and the best interests of the child as guardian ad litem. *See* Iowa Code § 232.89(4).

In discussing the dual role an attorney serves who is appointed guardian ad litem/attorney, our supreme court has recognized the difficulty in determining a child's best interests and expressed concern about the child's right to an advocate. *In re J.P.B.*, 419 N.W.2d 387, 392 (Iowa 1988). A child's wishes deserve serious consideration. *Id.* In a situation where the court-appointed guardian ad litem/attorney's conclusions of what are in a child's best interests differ from the child's wishes, withdrawal and appointment of separate counsel is not required. *In re G.Y.*, 486 N.W.2d 288, 289 (Iowa 1992). Rather, the attorney must disclose the disagreement to the court and ensure the court is clearly informed of the child's wishes. *Id.* This approach gives priority to the paramount goal of discerning the child's best interests while enabling the lawyer to advocate an opposing viewpoint without fear of ethical violation. *See In re J.P.B.*, 419 N.W.2d at 392. Such an approach obviates the expensive and burdensome practice of appointing both a guardian ad litem and attorney for each child in a family to ensure the child's expressed wishes as well as best interests are advocated. *Id.* This is the approach we take toward this issue unless the guardian ad litem/attorney's conflict is so magnificent it warrants withdrawal and appointment of separate counsel. *See In re G.Y.*, 486 N.W.2d at 289.

This is not a case where the guardian ad litem/attorney's conflict was so great it required her to withdraw. The children's guardian ad litem brought to the court's attention the difference in her and Catherine and Melissa's opinions about the veracity of Elizabeth's allegations. Catherine and Melissa's wishes were clearly presented to the court. The court knew Catherine would like Elizabeth to stay out of the home and for Stevin to return. The guardian's conflict was remedied by bringing the differences to the court's attention. For this reason, it was not error for the juvenile court to deny the parents' petition for withdrawal and appointment of separate counsel.

VI. Exclusion of Expert of Testimony.

The mother and Stevin argue the trial court erred in refusing to hear the testimony of Dr. Hartson regarding the criteria used to assess reliability of allegations of sexual abuse by children.[1] After Dr. Hartson had testified regarding the evaluation he had done of Elizabeth, the parents' attorney sought to have Dr. Hartson testify regarding the criteria used to assess reliability of allegations of sexual abuse by children generally. The attorney for the State objected to such testimony. Rather than allow the testimony over objection as is done in equity cases, *see Keith v. Community Sch. Dist.*, 262 N.W.2d 249, 255 (Iowa 1978), the trial court limited Hartson's

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[1] The type of testimony Dr. Hartson intended to give was admissible. It was not an opinion on Elizabeth's credibility, but, rather, the criteria which one could assess truthfulness in sexual abuse of children cases. It was meant as an aid to the fact finder in assessing credibility. Such testimony has been found admissible by our supreme court. *See State v. Griffin*, 564 N.W.2d at 374-75 (holding expert testimony admissible when expert witness did not testify on credibility of domestic abuse victim, but instead concerning the medical and psychological syndrome present in battered women generally).

testimony to the evaluation and Hartson's opinions regarding the evaluation. No one objected when the trial court refused to admit the attachments. The parties had the burden to object to and demonstrate the substance of the proposed testimony by an offer of proof. *See Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa App. 1994). An offer of proof serves both to give the trial court a more adequate basis for its evidentiary ruling and to make a record for appellate review. *Id.* Because no objection was made to the procedure of the trial court and no offer of proof was made, the record is not sufficient for us to address the claimed error and we find it was not preserved on this issue and we do not address it. *Id.*

AFFIRMED.

Huitink and Mahan, JJ., concur; Sackett, C.J., and Vogel, J., partially dissent.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I do not agree with the majority that under this record the three children who gave conflicting testimony and had different wishes could properly be represented by a single guardian ad litem. I believe the failure to allow for separate representation prevented all sides from being presented. I would reverse and remand for the appointment of one attorney to represent the two younger children. The guardian ad litem accepted the testimony of the older child and basically advocated her wishes; consequently, I find no reason to appoint an attorney to represent her interests.

This case involves girls born in 1983, 1985, and 1987. Stevin, the stepfather of the older two girls and the birth father of the younger child, has been accused by the oldest child, Elizabeth, of sexually abusing her.

One guardian ad litem was appointed for all three children. An application was made to have an attorney represent the two younger children who (1) as did their mother and Stevin, disagreed with Elizabeth's rendition of events, and (2) did not want Elizabeth at home contending she created too many problems and was mean to them. The juvenile court denied the request and the majority has affirmed. I cannot agree with this conclusion and believe an attorney should have been appointed as requested.

The position of the two younger girls clearly conflicts with the position of their older sister. In *In re G.Y.*, 486 N.W.2d 288 (Iowa 1992), the court said, "When

conflict threatens, so that separate counsel become appropriate, the court can appoint them." *Id.* at 289 (emphasis added). In this case, conflict not only threatens, but is real.

The majority has relied heavily on *In re J.P.B.*, 419 N.W.2d 387 (Iowa 1988). I find the facts of *J.P.B.* sufficiently distinguishable, so I fail to find it instructive on the specific issue before us. In *J.P.B.*, the juvenile court terminated parental rights. The mother challenged the guardian ad litem's dual representation of her two children. The matter was not raised in the juvenile court so was considered as an ineffective assistance of counsel claim. One child wanted parental rights terminated; the other did not want parental rights terminated.

However, in *J.P.B.*, unlike the case at bar, there was no claim by either appellant mother or child the record was not sufficient to support terminating parental rights by the requisite standard of proof. The court found in *J.P.B.* there was overwhelming evidence the grounds for termination were met. *Id.* at 392.

This is not a case where the evidence Stevin sexually abused Elizabeth is overwhelming. In fact, it is the opposite. The direct evidence Elizabeth was abused comes exclusively from Elizabeth's statements. There was no physical evidence the abuse occurred. The only support for her testimony comes through testimony of claims she was to have made.

I have given deference to the findings of the juvenile court. Yet, in my de novo review of the record, I see this as less than a clear-cut case as to whether Elizabeth

should be believed. Elizabeth testified Stevin abused her. Stevin contends he did not. In assessing Elizabeth's testimony, it is necessary to consider the evidence Elizabeth and Stevin do not get along, as well as testimony of other members of the family, including Elizabeth's mother and the other two children, who testified to events leading them to believe Elizabeth is not telling the truth. In considering Stevin's testimony, it is necessary to consider his self-interest.

Those people who believe Elizabeth contend the other children were coached and Elizabeth's testimony is credible. Others are of the opinion Elizabeth's testimony is the result of her dislike for her stepfather and not because of any abuse. The fact there was no physical evidence supporting Elizabeth's allegations of abuse does not necessarily negate it happening, but it makes a determination of who is telling the truth the most critical issue in this case.

I recognize, as the majority advances, the guardian ad litem brought to the juvenile court's attention the differences in opinion she, as the guardian ad litem, had with the younger girls with reference to Elizabeth's allegation. However, unlike the majority, I do not find the guardian ad litem's conflict was remedied by bringing this to the court's attention. The guardian ad litem based her position on an assessment as to which of the persons she was representing were telling the truth in this case where the evidence of abuse was seriously challenged. The younger children's interests were not represented.

I concur with the majority on its assessment the testimony of Dr. Hartson was, in fact, an aid to the fact finder in assessing credibility, and such evidence has been held admissible. The rule of evidence in equity cases is the trial judge, while noting objections, may not exclude offered evidence. *Keith v. Community Sch. Dist.*, 262 N.W.2d 249, 255 (Iowa 1978); *O'Dell v. O'Dell*, 238 Iowa 434, 465, 26 N.W.2d 401, 417 (1947). The purpose of this practice is to preserve a complete record for the trial and appellate courts, leaving to them the rejection of inadmissible evidence when deciding an issue, *O'Dell*, 238 Iowa at 465, 26 N.W.2d at 417, and upon the appellate court's de novo review, it thus may decide the case without remand. *Id.*; *United Properties, Inc. v. Walsmith*, 312 N.W.2d 66, 74 (Iowa App. 1981).

I would remand for the purpose of ordering the juvenile court to appoint separate representation for the younger two children and to accept the testimony of Dr. Hartson.

Vogel, J., joins in this partial dissent.