

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-01/08-47
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate sexual abuse of a child. The issue is whether the Department has shown by a preponderance of evidence that the petitioner sexually abused a child within the meaning of the pertinent statutes.

Procedural History

Petitioner filed for fair hearing on January 30, 2008. The first telephone status conference occurred on April 15, 2008 at which time deadlines were set for the Department to provide petitioner with discovery. The case was reset for status conference on June 3, 2008. At that point, the Department indicated that the putative victim may be unavailable to testify. The petitioner was agreeable to a series of continuances to allow the Department to determine witness availability and whether the case would be dismissed if the putative victim was not available.

On or about August 8, 2008, the Department indicated that the putative victim would testify and they were proceeding with their case. A status conference was held on September 4, 2008 in which the petitioner indicated he wanted to introduce polygraph testimony. The Department opposed the entry of polygraph materials. The parties were asked to brief the matter.

The parties were informed at a status conference on November 3, 2008 that the polygraph tests would be excluded due to unreliability. As the United States Supreme Court stated in United States v. Scheffer, 522 U.S. 303 (1998):

Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams.

Pending hearing, the petitioner filed a Motion to introduce expert testimony including a psychological report. This motion was not opposed and the psychological report was entered into evidence. The petitioner resubmitted his Motion to introduce polygraph evidence. This motion was denied. The Department requested an accommodation for the putative victim's testimony that petitioner did not oppose.

The case was originally scheduled for hearing on January 20, 2009. Based on uncontested requests by petitioner to continue the hearing, the hearing did not take place until March 24, 2009.

FINDINGS OF FACT

1. The petitioner is the father of T.M. The petitioner was not married to T.M.'s mother. T.M. is presently sixteen years old and in ninth grade.

2. The incidents occurred when T.M. was in the 5th or 6th grade. The incidents were disclosed during October 2007 when T.M. was fourteen years old.

3. When the incidents occurred, T.M. was under the supervision of the Department and had been removed from her mother's home. During this time, T.M. lived with the petitioner. Petitioner was then married to J. (he has subsequently divorced J. and married E.M.).

4. On or about Friday, October 8, 2007, T.M.'s school made a report to the Department. The case was assigned to J.K. after the Department determined that the report merited investigation.

5. J.K. has worked for the Department for more than twenty years. She is now part of the central intake unit.

During 2007, she was an investigator in the local Department office. She testified that she has received ongoing training including how to interview children, how to conduct interviews in cases of alleged sexual abuse and how to deal with children's developmental levels.

6. J.K. explained the Department received a report from school staff that T.M. wrote in her life book (a school project) that the petitioner (her dad) had repeatedly slapped her butt and touched her butt and that her dad touched areas that he should not have touched. J.K. consulted with the Northwest Unit for Special Investigations (NUSI) to determine whether NUSI would be involved in the interview based on their criteria. J.K. stated that there was past history involving petitioner slapping and touching T.M.'s butt. They decided J.K. would interview T.M. alone to determine whether the situation was more than butt slapping and touching.

7. On Monday, October 11, 2007, J.K. interviewed T.M. at her school in the presence of a school staff member. J.K. stated she spoke to T.M. about general topics first and then asked T.M. if she knew why J.K. was there. T.M. told her yes, that it had to do with her dad slapping her butt, grabbing her butt and touching places he should not. J.K. felt these allegations were more than petitioner slapping and

touching T.M.'s butt and she did not question T.M. further about the allegations because she wanted to consult with NUSI to see if there was going to be police involvement and to minimize the number of interviews for T.M.

8. J.K. and NUSI were not able to arrange to interview T.M. jointly until October 15, 2007. The interview took place at NUSI. J.K. said they first questioned T.M. to determine whether T.M. could differentiate between truth and lying and that they were satisfied that T.M. could distinguish between the two. T.M. disclosed that her dad had been slapping and grabbing her butt for years with the open palm of his hand. T.M. disclosed that during the time she lived with her dad that her dad not only slapped and grabbed her butt but that he slid his hand down over her clothes and touched her private parts. T.M. disclosed that this happened in the evenings when petitioner's wife J. was at work and that it often happened in the kitchen while T.M. was washing the dishes. T.M. told them that neither the petitioner nor she said anything.

9. J.K. stated that T.M. was fourteen when the interviews took place. J.K. stated that T.M. is on an IEP for learning disabilities and has global language difficulties including the processing and understanding of

language. J.K. said that T.M. processed information correctly but at the level of a much younger child. J.K. used simple, concrete and clear questions when questioning T.M.

10. J.K. believes that these particular events occurred over a six month period when T.M. lived with petitioner. J.K. explained that T.M.'s life was chaotic during the period T.M. was in the custody of the Department because she was placed at various times with her mom, with her dad, and in foster care and that the moving and her educational difficulties made it harder for T.M. to determine time frames. J.K. stated that T.M.'s parents were involved in a custody dispute and that she explored with T.M. whether T.M. was angry at her dad. J.K. had no sense from T.M. that she was mad at petitioner.

11. J.K. explained that late reports are common in child sexual abuse cases.

12. J.K. testified that she found T.M. to be straightforward and consistent in how she communicated with J.K. and to others. J.K. found T.M. to be a credible reporter.

13. Based on her review of the case, J.K. determined that the petitioner had fondled T.M. J.K. looked at the

history of petitioner slapping and touching T.M.'s butt and found that the particular incidents T.M. disclosed were of a different type of touch. J.K. presented credible evidence at hearing.

14. When T.M. testified, she was questioned by both attorneys in a room with a one-way mirror. The petitioner and petitioner's expert witness viewed the questioning from another room.

15. T.M. stated that the Department came to see her because of what she wrote in her life story during 7th or 8th grade; the life story was for her counselor. She said she wrote that her dad was doing "stuff" and told her counselor what stuff her dad was doing. T.M. testified that the petitioner would walk past her when she was doing dishes and he would touch her privates, her crotch. T.M. stated this happened during the evenings her step-mother was at work or about three to four times per week. T.M. said she would try to move. She did not say anything to petitioner. T.M. said it started in the 4th or 5th grade and ended in the 6th or 7th grade. Afterwards, T.M. went to the dining room. Sometimes, she would play with her younger step-sister when her step-sister came back from her grandmother's house. T.M. has seen petitioner infrequently since she returned to her mother.

Her visits coincided with picking up child support and a Christmas visit.

16. T.M. was soft-spoken during her testimony. She answered the questions based on her understanding of the questions. Upon the Department's request, T.M. drew a picture of the kitchen area showing where she stood in front of the double sinks. At the end of the sink area, there is a wall that goes a few inches past the counter. Based on the initial questioning, T.M. left the impression of a wall enclosing the side of the room. Her answers in regard to the kitchen space highlight some of the difficulties T.M. has with language based on the specific questions asked her, and the resulting difficulty her listeners have with then processing her answers.

17. The petitioner testified. T.M. lived with him about three and a half years ago. He stated that he did not touch T.M.'s vaginal area. The petitioner testified that he did grab T.M.'s butt. He testified that grabbing butts is something that is done by his household. According to petitioner, his relationship with T.M.'s mother is acrimonious. He stated that T.M. was unhappy with him when the Department moved her back with her mother in January 2006 and that T.M. was mad at him when he split with his wife.

18. Dr. W.N. testified. Dr. W.N. is a licensed psychologist-doctorate who does forensic and evaluative psychology as part of his practice. He examined petitioner at the request of petitioner's counsel who wanted to know whether petitioner fit the profile of a person engaged in incestual abuse.

19. Dr. W.N. interviewed petitioner. His interview included a psychosexual history and a psychosocial history. He administered the following tests: Wechsler Adult Intelligence Scale 3rd (WAIS), Sex Offender Risk Appraisal Guide (SORAG), Minnesota Multiphasic Personality Inventory 2nd (MMPI), and Hare Psychopathology Checklist revised.

20. In the written report, Dr. W.N. explained the limitations of his evaluation as follows:

No psychological evaluation can make a determination of what did, or did not occur...[petitioner] has denied any wrongdoing,...this evaluation is not attempting to determine the validity or veracity of his statements to this effect. Any assumption that this evaluation is attempting to determine his guilt or innocence is erroneous.

Instead, this evaluation will use well-known, published and validated actuarial assessments to determine the relative risk of [petitioner] engaging in any sexual offense.

21. Dr. W.N. found that the petitioner was low risk of sexual offense based on petitioner's test scores.

22. Dr. W.N. found the results of the WAIS significant. The test results include a full scale IQ of seventy-nine. However, petitioner's performance IQ was ninety-two and petitioner's verbal IQ was seventy-two (low end of low average for language skills). Dr. W.N. testified that a person with low verbal skills is not able to lie successfully. This means that petitioner does not have the verbal skills to lie successfully. He has a corollary theory that it is easier to inoculate a person with low verbal skills with false information that the person will believe is true.¹

23. Dr. W.N. observed T.M.'s testimony. He was questioned whether there was another explanation to T.M.'s testimony that her father touched her inappropriately. He noted that T.M.'s verbal deficits make it hard for her to explain what is going on and for us to understand everything she said. Dr. W.N. testified that she believes she is telling truth. Dr. W.N. testified that he believes T.M. is susceptible to inoculation, perhaps from her mother. It should be noted that petitioner told Dr. W.N. information about his relationship with T.M.'s mother during the

¹Both these theories can equally apply to petitioner and to T.M. given their language difficulties.

evaluation which was noted in the evaluation report. Dr. W.N. has not interviewed T.M. and does not have family background supplied by T.M.'s mother. His testimony about whether T.M.'s testimony is the result of inoculation is conjecture.

24. L.V., petitioner's friend for the past two years, testified and stated she is comfortable with petitioner around her eleven year old daughter. She has no first hand information about T.M. or her relationship with petitioner.

25. E.M., petitioner's current wife, testified that she has no concerns for petitioner with children.

ORDER

The Department's decision is affirmed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the

individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse and risk of harm as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

The Department bears the burden of proof to show by a preponderance of evidence that the petitioner's actions are sexual abuse under the statute. The question is whether the petitioner's actions rise to the level of sexual abuse.

There is no dispute that petitioner regularly slapped and touched T.M.'s butt. Petitioner belongs to a family that

habitually slaps and touches butts. Although the behavior is unusual and raises questions about personal boundaries, it is not abuse under the statute.

This case started with a report from T.M.'s school on October 8, 2007 to the Department. As part of an assignment, T.M. was writing a life book and wrote that her dad not only slapped and touched her butt but that he touched her where he should not touch her. T.M. was describing events from when she was in the 5th or 6th grade. Life books provide students with a safe way to open up about their lives and families.

When the Department decided to investigate the report of sexual abuse, they assigned the case to J.K. J.K. was aware that petitioner had a history of grabbing T.M.'s butt. J.K. was aware that T.M. had language deficits and processed information like a much younger child. J.K. was aware that T.M.'s parents were embroiled in a family dispute. T.M. was under the Department's supervision, and J.K. was aware of her familial history.

J.K. structured her investigation to determine whether something more than butt grabbing was going on. J.K. has been trained to interview children of varying developmental levels and to interview children in sexual abuse cases. She

applied those skills to learn from T.M. what happened and to see whether T.M. was acting out of anger.

J.K. determined that petitioner should be substantiated for fondling. Based on her interactions with T.M. and her training, she found T.M. credible.

The petitioner offered the testimony of an expert to say that he does not fit the profile of a sex offender. But, the expert's own disclaimer is that he cannot make any findings about what actually occurred between petitioner and T.M.

Only T.M. and the petitioner were present when the incidents occurred. Both of them have language difficulties. Both of them testified based on their belief of what they experienced.

Looking at the evidence as a whole, a few factors stand out. The incidents occurred when T.M.'s step-mother was not home. The incidents concerned T.M. because she experienced his actions as different than the butt slapping and touching of the past. Many times, people who experience uncomfortable sexual touching do not disclose until several years after the fact. The use of a life book gave T.M. a vehicle to write about what was bothering her. The Department's investigator made accommodations for T.M.'s language difficulties. The investigator also ruled out other possibilities.

The Department has shown by a preponderance of evidence that the petitioner is substantiated for abuse.

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