

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 8837
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) "founding" a report that the petitioner sexually abused two small children, and seeks to have this report "expunged" from the SRS registry.

SUMMARY OF THE EVIDENCE

The "finding" in this matter arose from a report of alleged abuse against a then five year old brother and three year old sister made in 1986 by the children's mother. The report named the children's father as the perpetrator of the abuse, but during the course of the investigation of the report SRS determined that others had abused the children as well including their cousin, (the son of their father's sister) who was then sixteen. The petitioner in this matter is the teen-aged cousin J.Y. who alleges that the "finding" as to him is groundless.

The Department's case was based on the testimony of its social worker and a consulting psychologist both of whom had interviewed the children but not the cousin, J.Y.

The testimony of the social worker was that on April 12, 1986, she received a telephone call from the mother of two small children alleging that her estranged husband was

abusing the children during visits with them. At the time of the call, the social worker had been an employee of SRS for seven months. Although she had a Bachelor's degree in education and three years' experience working with teenagers in foster care and emotionally disturbed children, she had no formal training regarding interviewing victims of child sexual abuse prior to coming to SRS. Her training with SRS at that time consisted of six days of basic training and two to three extra days' training in investigation of child abuse cases. This matter was her third or fourth sexual abuse investigation.

Pursuant to SRS protocol, the social worker testified that she telephoned the police to tell of the report and to ask them to send an officer to the interview to avoid multiple interviews. She conducted the interview a couple of hours after the call came to the SRS offices. The matter was considered urgent because the children were due to return to their father that afternoon under a joint custody arrangement. The two children were interviewed separately with their mother and the police officer present at the girl's interview and the police officer present at the boy's interview.

The social worker testified that she first interviewed the little girl who was friendly and talkative. She talked to the little girl about the difference between the truth and a lie and through the use of dolls and drawings probed

into any inappropriate touching the child may have received. The girl said that her father and "J" (a common male first name, which is also the first name of J.Y.) had done "no touches" with their fingers on her in the vaginal and buttock areas which she demonstrated on anatomically correct drawings and dolls. She also said she had touched Daddy's and "J."s "pee-pee" indicating an erect penis on the male drawing and doll. The little girl also stated that a mouse came out of her father's penis. Although she was unable to identify where these events had taken place she estimated they had occurred five times with Daddy and six times with "J". The child identified "J" as an uncle.

The worker testified that she judged the girl's statements to be credible based upon the spontaneous nature of her disclosures and the age inappropriate knowledge of specific sexual details. The worker admitted that she had inadvertently asked a few leading questions (i.e. was the penis hard or soft?) during the interview and that the child had told a couple of "fantastic" stories. However, she did not feel that these events reflected negatively on the child's credibility.

The worker verified that based upon this sixty-minute interview and the subsequent interviews with the psychologist, she concluded that J.Y. had abused the girl.

She could not recall however that the girl had specifically identified "J" as J.Y. She testified it was possible that the girl's mother had provided J.Y.'s name.

The boy was nervous and uncomfortable when he was interviewed and evaded questions making no disclosures. With regard to questions about "J" he stated that "J" had tickled him until he "peed his pants". He also stated that his father had hit him twenty times on the head with a hammer. The worker testified that her conclusion that J.Y. had sexually abused the little boy was based on later interviews conducted by the psychologist, not on her interview with him.

The worker testified that she did not speak with J.Y. himself because of possible future criminal prosecution, but that the police did and that they reported to her that they could only place J.Y. with the children on one occasion and that they felt that there was not sufficient evidence to prosecute him. The worker did not consider that report inconsistent with the children's testimony. The worker also testified that she felt the mother who reported the abuse was credible and had no ulterior motives in so doing or in naming J.Y. as the "J" involved even though she revealed at least two other "J."s--one her sister's husband and one an ex-boyfriend--in the course of her discussion. However, the worker also admitted that she learned later that the mother had reported sexual abuse on several occasions previously, had named several different perpetrators and continued to make reports of sexual abuse even after visits became "supervised" by order of the court. She was also aware that the mother suffered from

mood swings and was being medicated for that illness.

Shortly after the reported abuse, the children were interviewed at SRS's request by a licensed psychologist, Dr. C., whose specialty is assessing and treating both the child victims and adolescent adult perpetrators of sexual abuse and who had performed well over 100 such interviews, one third of which were on children under the age of five.

The purpose of the interviews was to resolve uncertainties SRS had as to whether the children had been abused. Dr. C.'s testimony regarding his specific findings was lengthy and hampered by the fact that he no present recollection of the details of the interviews which occurred three years ago. In addition, there was no tape recording of the interviews upon which he could rely, and his written report and contemporaneous notes contained few details as to why J.Y. was determined to be a perpetrator.

Dr. C.'s testimony based solely upon his notes and written responses was that he interviewed the little girl on April 17, 1986 for two hours. His technique involved asking open-ended questions, such as "has anyone touched you in a way you didn't like?", and after the initial disclosure was made using anatomically correct drawings and dolls for further illustration. He described the child as very bright and not easily confused. In response to his questions the little girl stated that Daddy, her brother and "J." had touched her in the "pee pee", "hiney", and "mouth", and that water had come out of Daddy's penis and

run down his leg. She stated that "J." had peed in her mouth with his penis. When asked to choose an anatomically correct drawing to represent "J.", the girl picked a drawing of a white teenage male and indicated on the pictures that "J." had used his penis to touch her on the mouth and vaginal area. She added that the inappropriate touching took place at her Dad's house in the bedroom at night.

Based upon her age appropriate use of language, spontaneity, anxious affect and use of detail, Dr. C. concluded that the girl had been abused by her father, brother and "J". The above facts are laid out in the report prepared by Dr. C. on April 28, 1986. What is not clear from the report is how Dr. C. decided that the "J" referred to was indeed J.Y. The confusion arose from the fact that Dr. C.'s notes of the April 17 meeting with the girl apparently also contain statements made by the mother prior to or subsequent to the interview regarding persons in the family tree as well as topics placed there prior to the meeting which he wished to discuss with the little girl. The notes state in a black ink (as distinguished from the blue ink or pencil used in the rest of the notes,) the full name of J.Y. and a description saying "'J.' who lives with Aunt H." There is a pencil notation recording the name of "Uncle J.". Unfortunately, there is nothing in the notes distinguishing which notes were made during the interview and which came before or after. Dr. C. testified

that he discussed the possible identity of "J." with the child's mother before or after the interview and that he definitely got the full-name J.Y. from the mother. He thought he got the description "'J.' who lives with Aunt H." from the child but he could not explain why that notation was in the same color ink as other information he got from the mother. Later in his testimony, Dr. C. changed his mind and said he got all the information identifying "J." from the child. However, it was apparent at that point that he really could not remember who told him what, and that his notes were not giving him much assistance because they were a jumble of what the girl, the mother and perhaps the boy on the day before had told him without attribution to the source.

Dr. C. could not testify with any certainty that the child herself had identified J.Y. as the perpetrator. Also, he could not deny that it may have been the child's mother alone who suggested that the "J." the girl spoke of was J.Y. the nephew of her husband. Dr. C. also testified that the mother called him on several occasions to volunteer family information which he recorded and that he was aware that she had a somewhat "histrionic" personality and that her reliability was questionable because she was involved in a bitter custody battle over the children. He also was aware that there was an "uncle J." in the family on the mother's side and that J.Y. was a relative of the children's father. He had no information regarding J.Y.'s

access to the children.

On April 28, 1986, Dr. C. concluded that the girl had been abused by J.Y. (and by her father) and recommended that J.Y. be prosecuted.

Dr. C. testified that he interviewed the boy on six occasions from April 16 through May 23, 1986. At the first meeting the child was reluctant to make a disclosure but through the use of puppets revealed that "J." had touched his penis with his hand. The boy picked an anatomically detailed picture of a white teenage boy to represent "J" and marked his hand as the part which touched his penis. Dr. C.'s notes do not indicate that "J." was further identified at that meeting. On April 24, Dr. C.'s notes indicate that "J." is a cousin and "H. is his mom." Again, however, Dr. C. had no memory of whether this information came from the child or whether he had learned it on April 17 when he talked with the children's mother regarding the family tree. Notes from the next meeting on May 8, 1986 indicate that Dr. C. was still trying to determine the identity of "J." although he testified that he knew then who was "J." was and was just confirming the fact. However, Dr. C. admitted in an earlier deposition that as of the May 20 meeting with the boy he was still trying to determine from the boy who "J." was. At the last meeting on May 23, 1986, Dr. C. testified that he believed the boy identified "J." as J.Y. However, he could point to nothing in his notes or reports which indicated that the boy had

made such a statement. There is also some indication that the boy was rewarded for giving answers at the last session because he was otherwise reluctant to talk. Dr. C. himself indicated that such activity might bias the result.

Based on his interviews, Dr. C. concluded that the boy had been sexually abused by his father and "J." whom he concluded was J.Y. He found the disclosure as to the acts to be credible because of the boy's heightened emotional reaction, the consistency of the description throughout the sessions and his age appropriate use of language to describe the events.

FINDINGS OF FACT

1. A report was received by SRS on April 12, 1986 that two small siblings, a five-year-old boy and a three-year-old girl, were being sexually abused by their father.

The report came from the children's mother who was going through a divorce from the father which included a bitter battle over custody of the children.

2. A SRS social worker who was relatively inexperienced was assigned to the case. She interviewed the children separately with a police officer present.

3. Based on her interview, the social worker became convinced that the girl had been sexually abused by her father, her brother, and by someone named "uncle J.".

4. The social worker's interview with the boy was inconclusive. She referred both children to a psychologist and deferred a finding until his report was obtained.

5. Based on information supplied by the children's mother, SRS and the police, SRS conducted its investigation on the assumption that "uncle J." was actually a cousin, J.Y. the son of the father's sister.

6. The police reported to SRS that they had interviewed J.Y. and had been able to place him with the children on only one occasion. They reported they had insufficient evidence upon which to initiate a criminal action against J.Y.

7. On April 17, 1986, a licensed psychologist interviewed the girl and concluded that she had been sexually abused by her father, her brother and by someone named "J.".

8. The psychologist concluded in a report dated April 28, 1986 that "J." was in fact the petitioner, J.Y. Because the psychologist has no recollection of his interview with the girl he had to rely on his notes and his written report to back up his conclusion.

9. The psychologist's notes and reports contain descriptions of "J." as "uncle J.", "J.Y." and "J. who lives with aunt H." The notes do not indicate whether the girl or the girl's mother supplied the psychologist with a description of "J" which was then recorded on the same page and interspersed with statements made by the child. It is possible that the mother and not the child gave the psychologist all the information which identified the "J." referred to as being J.Y. The child did choose an

anatomical picture of a teenage white male to represent "J." but there is no credible evidence that she ever connected "J" was J.Y.

10. Information given to the psychologist by the mother indicated that there were at least two other persons named "J." in the children's lives, including her sister's husband, (an "uncle J.") who was thirty-six years old and a former boyfriend of hers. The Department made no attempt to reconcile its choice of "cousin J." as the perpetrator with the child's describing "J." as an uncle in the initial interview.

11. From April 16, 1986 to May 23, 1986 the psychologist interviewed the boy on six occasions and concluded that he had been sexually abused by his father and "J.". He concluded that "J." was a white teenager based on pictures chosen by the child. The psychologist's notes indicate that on April 24, 1989, "J." was described as "a cousin and H. was his mom". However, there is no indication that this description came from the child and could have come from the child's mother as her comments were interspersed in his interview notes. The evidence shows that the psychologist continued to search for the identity of "J." even after April 24, 1986, making it less likely that the earlier identification came from the child himself.

12. Based on the above evidence it cannot be found that either child at any time actually identified "J." as

being J.Y. or a "cousin who lives with aunt H." It can be concluded that "J." was described at least by the little girl as being an "uncle".

13. The identification of "J." as J.Y. made by the mother was not based on first hand knowledge of the abuse and was potentially biased by her custody dispute with her husband.

14. The Department's finding was based solely upon the interviews conducted by the social worker, the psychologist and the police officer.

ORDER

The finding of SRS that J.Y. abused the children in question shall be expunged from the registry as being unsubstantiated.

REASONS

The Vermont statutes protecting abused children require the Commissioner of Social and Rehabilitation Services to investigate reports that a child has been abused by any person within seventy-two hours of such report. See 33 V.S.A. § 682 et seq. "Sexual abuse" is specifically defined by statute as follows:

(8) "Sexual abuse" consists of any act 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 in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

As part of its investigation, the commissioner is required, "to the extent that it is reasonable" to include "the identity of the person responsible for such abuse or neglect." 33 V.S.A. § 685(b)(4). The commissioner is further required to:

" . . . maintain a registry which shall contain written records of all investigations initiated under section 685 unless the commissioner or his designee determines after investigation that the reported facts are unfounded, in which case, after notice to the person complained about, the unsubstantiated report shall be destroyed unless the person complained about requests within 30 days that the report not be destroyed. A report shall be considered to be unfounded if it is not based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused or neglected." 33 V.S.A. § 686(a).

The statute places two burdens on the Department which must be met by the usual civil standard of a preponderance of the evidence. The first burden is to establish that its decision to place in its registry a report of child abuse is based upon information which is both accurate and reliable. Second, the Department must show that the information relied upon constitutes a reasonable basis for concluding that a child has been abused or neglected. See Fair Hearings No. 8110, 8816

The petitioner here does not challenge the characterization of the information obtained as meeting the statutory definition of sexual abuse. Rather he challenges the accuracy, and reliability of the information obtained by the Department finding that he was one of the

perpetrators of the complained of activity. The burden is, therefore, on the Department to prove by a preponderance of the evidence that its information linking the petitioner to the allegations of sexual abuse is both accurate and reliable.

The Department failed to meet this burden because it could present no reliable evidence that either child had actually identified the petitioner as the person involved in the activity described. At best, it could be said that the evidence presented showed that the children's statements gave the Department grounds upon which to include the petitioner along with one or two others, in a group of possible perpetrators.¹ The exact identity of the person involved awaited further investigation which was never done. Instead, it appears from the evidence that the Department's investigators, including the social worker and the psychologist, may have relied on statements made by the children's mother to reach their conclusions that the petitioner was the perpetrator.² If that is so, such reliance was improper as the mother did not observe the reported on act and may have been biased against the perpetrator because he was a relative of her husband, a person with whom she was embroiled in a pitched battle for custody of the children.

In addition, the police report of the interview with the petitioner, indicating a significant absence of opportunity for contact with the children was in fact

inconsistent with the child's statement that the abuse by the perpetrator "J" had occurred five or six times. There is no indication that the Department attempted to reconcile this inconsistency or in any way considered it as part of its "finding". For the above reasons, it cannot be found that the information relied on by the Department, to wit the investigative reports of the social worker and the psychologist, was accurate and reliable in its identification of the perpetrator "J." as the petitioner. The "finding" that the petitioner sexually abused either child involved shall, therefore, be expunged from the registry.

FOOTNOTES

¹The selection of a teenage picture to represent "J." may or may not have narrowed the possibilities but that alone did not represent sufficient evidence to conclude that "J." was J.Y.

²It may also be that the actual identification was made by the children. However, the records made of the children's statements were defective in this regard, and as some time has passed since the interviews, no evidence even approaching accuracy or reliability could be put forth on that subject by the witnesses. The better practice in the future would be to tape record all statements made by children which are to form part of the basis for expert opinions on the likelihood of abuse having occurred and the probable perpetrator of this abuse.

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