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No. 3--10--0229

Order filed April 13, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

In re THE PARENTAGE OF M.C.S.,) Appeal from the Circuit Court
a Minor) of the 12th Judicial Circuit,
) Will County, Illinois,
(Roberta D., f/k/a Roberta J.)
and Roberta E.,)
)
Petitioner-Appellee,) No. 06--F--751
)
v.)
)
Erik S.,) Honorable
) Lawrence C. Gray,
Respondent-Appellant).) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

Held: The trial court properly admitted the minor's hearsay statement of sexual abuse into evidence. However, the minor's uncorroborated hearsay statements could not support a finding of abuse. Consequently, the petitioner failed to present enough evidence to show that the respondent's visitation with the minor would endanger seriously the minor's physical, mental, moral or emotional health.

The petitioner, Roberta D., filed a parentage action against the respondent, Erik S. The trial court granted Roberta's motion

to suspend Erik's visitation with their daughter, M.C.S., based on M.C.S.'s allegations of sexual abuse. Erik appeals, arguing that the trial court erred by: (1) admitting hearsay statements of M.C.S. over his objection; and (2) finding that Erik's visitation would endanger seriously M.C.S.'s physical, mental, moral, or emotional health. We reverse and remand.

We note that no appellee's brief has been filed. However, we find that we may reach the merits of the case because the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

FACTS

The parties met each other in 2000 and lived together in Arizona. On June 24, 2004, M.C.S. was born. In January of 2006, Roberta took M.C.S. to Illinois, and Erik remained in Arizona. Also in 2006, Roberta married John D., with whom she and M.C.S. resided in Illinois. On October 13, 2006, Roberta filed this parentage action, and Erik was named as M.C.S.'s biological father. Roberta filed for temporary child support.

On April 20, 2007, the parties entered an agreed order that Erik would pay temporary child support. On May 7, 2007, the parties agreed to establish telephone visitation between M.C.S. and Erik. On June 13, 2007, after a pretrial hearing, the trial

court ordered telephone visitation as per the parties' agreement, with each party recording the conversation. The court also recommended that Erik have visitation with M.C.S. to be supervised by both grandmothers. On June 20, 2007, the court entered an order indicating that Roberta refused to follow the court's recommendations and ordered that Erik be allowed to have telephone visitation. Thereafter, the court granted the respondent visitation with M.C.S. on July 15, August 11, and September 20, 2007.¹

On October 30, 2007, Erik filed a petition for custody of M.C.S., arguing that Roberta had "embarked upon a course of conduct calculated to alienate [Erik] from [M.C.S.], and ha[d] demonstrated a complete lack of willingness or ability to facilitate and encourage a close and continuing relationship between [him] and [M.C.S.]." On February 15, 2008, Erik filed a motion for a summer visitation schedule and for a rule to show cause why Roberta refused his telephone visits.

On April 8, 2008, the parties entered an agreed order for Erik to have: (1) telephone visits every Sunday; (2) weekend visitations on April 18, May 30, and June 13, 2008; (3) a five-day visit in Arizona in August of 2008; (4) two-week summer visits beginning in 2009; and (5) visits on alternating holiday

¹ The record does not indicate whether these visits took place.

breaks. The trial court also ordered that M.C.S. must be accompanied on flight by either Erik or his mother. Roberta filed a motion to vacate the portion of the order indicating that Erik's mother was allowed to accompany M.C.S. on air flights because Erik's mother had previously obtained an order of protection against Roberta and Roberta did not want M.C.S. to be alone with her. In response, Erik argued that the court could not restrict his visitation unless it found that his visitation with M.C.S. would endanger seriously her physical, mental, moral or emotional health.

On July 18, 2008, Roberta filed an emergency petition to suspend Erik's visitation, alleging that: (1) after Erik's visit on April 18, 2008, M.C.S. (age 4) exhibited significant behavioral issues at day care that she had not exhibited prior to the visit; (2) after June 1, 2008, M.C.S. "began holding her vagina and sticking toys in their [sic] and she told [her stepgrandmother] 'my pee hurt' and 'Erik touched my pee and it hurts real bad' "; (3) the Department of Child and Family Services (DCFS) had an open investigation pending; and (4) clinical social worker Dyann Bockstahler opined that the visitation in Arizona on August 11, 2008, was not advisable. The court suspended Erik's August visitation without prejudice "pending hearing" and indicated that "make up visitation time will be considered instanter" if the petition to suspend

visitation was denied.

In support of the motion to suspend Erik's visitation, Roberta attached her own affidavit, a letter from Bockstahler, and 11 incident reports from M.C.S.'s day care. The day care reports from April 21 through July 14, 2008, indicated that M.C.S. would not follow directions, kicked chairs, screamed, would not share, knocked her head into the teacher's mouth, ran around the room, screamed "no" when told to be sit or quiet, bit other students, threw toys, and kicked the teacher.

On December 5, 2008, at a hearing on Roberta's motion to suspend Erik's visitation, evidence indicated that after Erik's weekend visit he and his mother returned M.C.S. at 3 p.m. on June 1, 2008. Roberta testified that she immediately bathed M.C.S. because she was "filthy dirty." During the bath M.C.S. said "Eri[k] touched my pee-pee[.]" Erik's attorney objected to the statement as hearsay, which the trial court overruled.

In continuing, Roberta testified that she and her husband, John, took M.C.S. to John's parents' home and then to the hospital. At the hospital M.C.S. was examined and diagnosed with "genital irritation." After that day, M.C.S.'s behavior changed in that she hit other children in school and became very defiant. The day after M.C.S. was examined in the hospital, she began "spreading her legs and opening up her vaginal area trying to shove toys in it." For three consecutive nights after the

examination, M.C.S. woke up "screaming just erratically." M.C.S. grabbed their dog's genitals on three occasions. M.C.S. would "[s]tand[] up on the sides of the bathtub and spread[] her vaginal area open and urinat[e] into the tub." As a result of M.C.S.'s behavior, Roberta and John took M.C.S. to Bockstahler for counseling.

On cross-examination, Roberta acknowledged that a rape kit was administered at the hospital and there was no finding of DNA or abuse. The Joliet police interviewed M.C.S., and no charges were filed against Erik.

On January 5, 2009, both parties filed a memorandum of law as to Erik's objection to hearsay statements of M.C.S. On January 26, 2009, the trial court overruled Erik's objection.

On January 30, 2009, John testified that prior to June 2008 M.C.S. was playful and energetic but since then has had "a lot of problems" in that she "expresses herself to her mother a lot" by "showing her what happened." Since June 2008, John and Roberta "were getting letters home" from the day care, and he picked M.C.S. up from school on four occasions because she was not listening and was being violent.

According to John, when Erik dropped off M.C.S. on June 1, 2008, he indicated to John that M.C.S. was "having problems." John took M.C.S. out of her car seat and noticed that she looked pale and dirty. John put M.C.S. on the ground, and she cried for

Erik. Erik returned to her to give her a hug and then left. M.C.S. sat with a blank stare on her face until Roberta came out of the house. Roberta brought M.C.S. into the house to get cleaned up. When John went into the house, he heard Roberta and M.C.S. screaming. After M.C.S. was dressed, they went to John's parents' home, where M.C.S. was "sluggish," "timid," and "standoffish." John's mother noticed that M.C.S. was grabbing her crotch area violently. Roberta and John took M.C.S. to the hospital, where she was given a catheter. At the hospital, a child's advocate tried to talk with M.C.S., but she was "screaming for her mother that Eri[k] had hurt her."

In seeking help for M.C.S., John and Roberta were referred to Bockstahler. John testified that M.C.S. still touches herself and "says very graphic pictures" and wants to talk about the incident "if she's having a bad day[.]" John testified that M.C.S. used to talk about the incident four times per day but now she may only talk about it once per day. According to John, the evening prior to his testimony M.C.S. pulled the poker from the fireplace and said, "[Erik] stuck a stick in me." John acknowledged that the result of the testing at the hospital indicated that M.C.S. was not penetrated.

John's mother testified that she saw M.C.S. two or three times per week and described M.C.S. as a delightful, happy girl, with a great personality. According to John's mother, when

M.C.S. came over on June 1, 2008, she noticed that M.C.S. grabbed herself "[d]own in her private area" three times, so she mentioned it to Roberta. Since June of 2008 John's mother had not noticed a change in M.C.S.'s behavior. M.C.S. never repeated the behavior of grabbing her crotch area. A few weeks after June 1, 2008, M.C.S. told John's mother that Erik was mean and that Erik hurt her and was a monster. Erik's attorney made an ongoing objection to hearsay statements of M.C.S., which was overruled.

The director of M.C.S.'s day care testified that M.C.S. was a "[h]appy little girl" with "[a] real good disposition." The director did not know of any problems with M.C.S. She indicated that at times M.C.S. was defiant and had trouble following directions, but the director did not believe that M.C.S.'s behavior was unusual for a child her age.

Bockstahler testified that she began seeing M.C.S. for counseling on June 30, 2008. At the first session M.C.S. was happy but "she blurted out, 'Eri[k] touched my pee-pee and it hurt.'" In July, M.C.S. was playing with anatomically correct dolls and pointed to the male doll's penis and said, "That is what Eri[k]'s pee-pee looked like." Until the end of July M.C.S. talked about Erik touching her pee-pee hard and it hurting.

On August 6, 2008, M.C.S. entered Bockstahler's office with a happy and excited demeanor, but Roberta said that M.C.S. had

just "put a stick up her vagina, and said 'This is what Eri[k] did to me.' " In the session M.C.S. played with a male doll by having him touch the private area of the two baby dolls and "blurted out, 'Eri[k] touched my pee-pee hard and it hurt.'"

On August 9, 2008, M.C.S. told Bockstahler that Erik was scary and that he had said police would put him in a cage. She also said "Eri[k] touched my pee-pee hard and it hurt." In response to questions about the incident, M.C.S. told Bockstahler that the incident took place in a bedroom with green carpet while both she and Erik were wearing nothing, and described Erik's "pee-pee" as "blue."

On November 1, 2008, M.C.S. was pretending to be a doctor and "grabbed her crotch" multiple times and "look[ed] distressed." Bockstahler asked M.C.S. why she kept grabbing her vagina. M.C.S. looked distressed and said that when Erik touched her, "[i]t hurt." After a session, M.C.S. went to the car with John but then said that she had more to tell Bockstahler and returned saying, "Eri[k] touched my pee-pee hard and it really hurt."

Bockstahler believed that M.C.S. was telling the truth and did not feel that M.C.S. was coached or coerced. Bockstahler felt that something happened to M.C.S. and that M.C.S. believed that Erik did something to her. Bockstahler did not see any behavior problems with M.C.S. Bockstahler treated M.C.S. because

Roberta told her that M.C.S. "may or may not have been sexually molested" and was in emotional distress. Bockstahler testified that visitation with Erik would be detrimental to M.C.S.'s feeling of safety and his presence with M.C.S. would endanger seriously M.C.S.'s physical, mental, moral, or emotional health.

Detective John Nosal testified that on June 9, 2008, during an interview, M.C.S. was asked if her father ever touched her "pee-pee" and M.C.S. said no. During the interview, M.C.S. became uncooperative and was not able to finish the interview. M.C.S. stated that her back, stomach, and butt hurt and that her mother did it. Nosal testified that the allegations of sexual abuse against Erik were unfounded.

Erik's mother testified that she was with Erik "every minute" of his visitation with M.C.S. They shared one motel room with two beds and a bathroom. On Friday, May 30, 2008, M.C.S. had diarrhea on the way to the motel so Erik's mother washed M.C.S. in the shower while Erik stayed in the room. M.C.S. played in the shower while Erik's mother scrubbed out the clothes in the sink. M.C.S. dressed herself. They drove to the store for ginger ale, returned to the room, watched television, and went to bed.

Erik's mother and M.C.S. slept in one bed and Erik slept in the other bed. On Saturday, they ate breakfast, went to the zoo, returned to the motel, and went swimming. During swimming,

M.C.S. said that she had to "poop," and she "pooped" in her swimsuit on the way to the room. M.C.S. started screaming and crying, "Don't tell mommy I pooped." They did the same routine of M.C.S. showering and Erik's mother washing out her swimsuit. They ate at Denny's, returned to the room, watched television and went to bed. M.C.S. slept with Erik's mother, and Erik slept alone. On Sunday, they ate breakfast, checked out of the motel, went to the park, and went to McDonald's. M.C.S. became tired after crying that she did not want to go home. According to Erik's mother, Erik was never alone with M.C.S. and was never undressed in front of M.C.S. M.C.S. was never left alone with M.C.S. because Erik's previous counsel advised them not to leave M.C.S. alone with Erik just in case Roberta brought "a case like this" against Erik.

Erik's testimony was similar to his mother's testimony as to the sequence of events over the weekend of May 30, 2008. Photographs of M.C.S. on each day of their visit were entered into evidence, which depicted M.C.S. as being happy throughout the visit. Erik testified that upon returning M.C.S. home, he asked John for help getting M.C.S. out of the car because she was sleeping. John removed M.C.S. from the car and put her down. Erik testified he never touched M.C.S.'s vagina, never had sexual contact with her, never exposed himself to her, and never inserted anything into her vagina.

The court continued the matter multiple times for DCFS to comply with a trial subpoena and produce documents. On April 28, 2009, Roberta's attorney motioned to withdraw as counsel, which was granted on October 27, 2009.

On January 13, 2010, over a year after the hearing began, the trial court heard closing arguments. Erik's attorney argued, *inter alia*, that the DCFS reports reviewed by the court *in camera* indicated the claims that Erik sexually abused M.C.S. were unfounded and M.C.S. was coached. On February 18, 2010, the court found that M.C.S. had "undergone some form of trauma which she associate[d] with [Erik]", and ordered that his visitation be suspended and that M.C.S. and Erik undergo counseling, with "[v]isitation to be resumed pending the recommendation and/or conditions made by the counsel and the court."

ANALYSIS

On appeal, Erik argues that Roberta failed to prove that Erik's visitation with M.C.S. would endanger seriously M.C.S.'s physical, mental, moral, or emotional health and that the trial court erred in overruling his hearsay objections pertaining to M.C.S.'s statements. We hold that the hearsay testimony was properly admitted but that the evidence failed to show that Erik's visitation with M.C.S. would endanger her.

A determination regarding the admissibility of evidence is within the sound discretion of the trial court, and a reviewing

court will not reverse that decision absent a clear abuse of discretion. *In re Marriage of Rudd*, 293 Ill. App. 3d 367 (1997). Under section 606(e) of the Illinois Marriage and Dissolution Act (Marriage Act):

"Previous statements made by the child relating to any allegations that the child is an abused or neglected child *** shall be admissible in evidence in a hearing concerning custody of or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect." 750 ILCS 5/606(e) (West 2008).

Section 8--2601(a) of the Code of Civil Procedure also concerns the admission of hearsay statements by abused children in civil proceedings, providing:

"An out-of-court statement made by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act *** is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence

of the act which is the subject of the statement. 735 ILCS 5/8--2601(a) (West 2008).

Both statutory provisions concern the admissibility of hearsay statements by allegedly abused children in a civil proceeding. However, section 606(e) of the Marriage Act is the more specific statute regarding an out-of-court statement of a child alleging sexual abuse by a parent and is specifically applicable to hearings concerning visitation. *Daria W. v. Bradley W.*, 317 Ill. App. 3d 194 (2000). The first sentence of section 606(e) creates a statutory exception to the general rule against hearsay for a minor's out-of-court statements of allegations of abuse or neglect in a hearing concerning custody of or visitation with the child. Therefore, pursuant to section 606(e) of the Marriage Act, the hearsay statements were admissible.

Nonetheless, we agree with Erik that there was insufficient evidence to prove that his visitation with M.C.S. would endanger seriously M.C.S.'s physical, mental, moral, or emotional health. In this case, M.C.S.'s uncorroborated hearsay statements alone were insufficient to support a finding of abuse. Whether there is sufficient corroboration of evidence is determined on a case-by-case basis. *In re A.P.*, 179 Ill. 2d 184 (1997). Sufficient corroboration of the abuse or neglect requires more than just witnesses testifying that a minor related claims of abuse or

neglect to them. *A.P.*, 179 Ill. 2d 184. Corroboration of abuse or neglect requires independent evidence that would support a logical and reasonable inference that the act of abuse or neglect described in the hearsay statement occurred. *A.P.*, 179 Ill. 2d 184. Corroborating evidence makes it more probable that a minor was abused or neglected. *A.P.*, 179 Ill. 2d 184.

Here, M.C.S. did not testify at the proceedings and was not subject to cross-examination, giving rise to the need for corroborative evidence to support a finding that she had been sexually abused by Erik. The diagnosis at the hospital of M.C.S.'s genital irritation was not sufficiently corroborative because in days leading up to the diagnosis M.C.S. had diarrhea in her pants, showered and scrubbed herself, went to the zoo, swam in a hotel pool, defecated in her pants, showered and scrubbed herself again, was in a Denny's restaurant, played at the park, played at a McDonalds, stayed in a hotel for two nights, was given a bath by Roberta, and grabbed her crotch "violently." On these facts, it cannot be said that M.C.S.'s genital irritation makes it more probable that she was abused.

Also, M.C.S.'s alleged defiant and sexual behavior is not corroborative of her hearsay statements. First, we note that the director of M.C.S.'s school, Bockstahler, and M.C.S.'s stepgrandmother testified that M.C.S. did not have behavioral problems abnormal for a four-year old. M.C.S.'s behavior of

touching her own vagina and sticking toys not only coincided with Erik's visit but also with M.C.S. undergoing a vaginal examination and having a catheter inserted. As such, based on these facts, it cannot be said M.C.S.'s behavior makes it more probable that she was abused.

As M.C.S.'s uncorroborated statements cannot be used to support a finding of abuse, Roberta failed to present enough evidence to show that Erik's visitation would endanger seriously M.C.S.'s physical, mental, moral or emotional health. Furthermore, there was evidence negating the allegations of abuse in that: (1) the results of a rape kit administered to M.C.S. indicated that there was no physical evidence of abuse; (2) M.C.S. was interviewed at the Child Advocacy Center and said that Erik did not touch her "pee-pee"; and (3) DCFS determined that the reports of abuse were unfounded. Accordingly, we reverse the trial court's order granting Roberta's motion to suspend Erik's visitation and remand for further proceedings.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Will County circuit court and remand.

Reverse and remanded.