

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 16,479  
 )  
Appeal of )

INTRODUCTION

The petitioner requests a ruling from the Board as to whether or not certain evidence is admissible which is relied upon by the Department to meet its burden of a finding of sexual abuse of an elderly adult against him.

FINDINGS OF FACT

The parties have stipulated that the following are the applicable facts for purposes of this ruling:

1. If the above-entitled matter came to hearing, [S. P.], R.N., would testify that on November 10, 1999, the Adult Protective Services Unit within the Department of Aging and Disabilities received a report alleging that [petitioner] had sexually exploited an elderly resident of the [Home]. The resident, L. H., was 87 years old at the time and was diagnosed with mild dementia and other medical conditions. [Petitioner] was employed by the [Home] as a licensed nurses' aide.

2. [S. P.], R.N., would testify that she conducted an investigation of the allegations against [petitioner] on November 17, 1999, and that her investigation included interviews with L. H., [petitioner], numerous staff from the facility and the daughter of L.H. [Ms. P.] would testify that L. H.'s statements to her about the alleged incident remained consistent.
3. [C. C.], to whom L. H. first made the allegations against [petitioner], would testify that she was a physical therapist at [Home]. She and [S. P.] would testify that L. H. told [Ms. C.] that she was afraid at night because a man entered her room and touched her, and that the name of the individual who touched her was [petitioner]. [Ms. C.] would state that she was not aware at that time that there was an employee at the facility by the name [petitioner], and that she reported the allegation to one of the directors of nursing services, [D. K.].
4. [Ms. C.] would testify that L. H. asked her not to tell her (L. H.'s) daughter about her allegations because her daughter would think she was making it up just to get out of the facility. L. H.'s

daughter did not believe the allegations, apparently stating "someone wants to go home" when informed by the nursing director of the allegations. [Ms. C.] also would testify that she did not consider L. H. a totally reliable source.

5. [D. K.] and [S. P.] both would testify that [Ms. K.] informed [Ms. P.] that when interviewed, L. H. repeated her allegations. They also will testify that L. H. told [Ms. K.] that on another occasion [petitioner] had kissed her and remarked about her Southern accent. [Ms. K.] also would state that she spoke with [petitioner], who denied an improper conduct with L. H., but did concede that he might have kissed L. H., and commented on her Southern accent. [Ms. K.] would testify that she did not consider L. H. a reliable witness.

6. [S. P.] would testify that she interviewed [petitioner] about the allegations, and that [petitioner] denied any inappropriate behavior with L. H. She would state that [petitioner] told her that he entered the room of L. H. and put his hand on the pad under her and on her nightgown to determine if they were wet. She also would testify

that [petitioner] indicated to her that he might have touched the hip and chest of L. H. when putting the bedclothes back into place. [Ms. P.] would state that [petitioner] denied kissing L. H., but stated that he might have commented on her Southern accent and on her nightgown. [Ms. P.] would testify that she found L. H.'s report to be credible because of the manner in which she reported it, the person to whom she reported, the use of the [petitioner's] name, her awareness that her daughter would not believe her and the consistency of her allegations.

7. The fair hearing scheduled at the request of [petitioner] is an administrative proceeding in which L. H., a mentally ill adult, is a putative victim of exploitation under 33 V.S.A. § 6913.
8. The statements by L. H. to which [C. C.], [D. K.] and [S. P.] would testify concern the allegedly wrongful activity.
9. The statements to these individuals were not taken in preparation for a legal proceeding. None of L. H.'s statements were taken under oath, videotaped or recorded.

10. It is the Department's position that the time, content and circumstances of the statements by L. H. provide indicia of their trustworthiness. [Petitioner] disputes that any of L. H.'s statements are trustworthy or that the time, content and circumstances of the statements provide indicia of their trustworthiness.
11. L. H. is physically available to testify but has indicated that she does not wish to do so. The Department will not subpoena L. H. to appear, nor has it moved pursuant to V.R.E. 807(b) that L. H.'s testimony be taken as recorded testimony.
12. It is [petitioner's] contention that L. H. therefore is unavailable as that term is defined under V.R.E. 804(a)(4). The Department disputes that argument.

ORDER

The Board finds that the evidence presented by the Department (the testimony of the nurse, therapist and investigator) is inadmissible to show that the sexual abuse occurred. As the burden is on the Department to prove the alleged facts in a sexual abuse appeal and as the only evidence offered to prove these facts is those statements, the

decision of the Department is reversed that sexual abuse was substantiated in this case.

REASONS

Very frequently, allegations of sexual abuse occur in a context where there is no physical evidence and no eyewitnesses. The only evidence that such an event occurred is the statement of the victim. It is the task of the trier of fact to determine whether the victim is telling the truth. Other evidence may be offered that helps the trier to determine whether the statement is true or not but, under the Vermont Rules of Evidence, this other evidence may not be used to establish the underlying facts. V.R.E. 802. That is because such evidence, usually the reports of other persons as to what the alleged victim said, meets the definition of "hearsay":

"Hearsay" is a statement, other than one made by the decalarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

V.R.E. 801

The general rule is that hearsay is not admissible unless it falls under a specifically enumerated exception. V.R.E. 802. Thus, under the rules of evidence it is expected in the

ordinary case that a fact will be proved through the testimony of the person who asserts first hand knowledge of the fact. In sexual abuse cases where there is no physical evidence or eyewitness, the only person with first-hand relevant knowledge is the alleged victim. It is expected, then, that the abuse would be proved through the direct testimony of the alleged victim.

The Human Services Board is bound by its own rules to follow the "rules of evidence applied in civil cases by the courts of the State of Vermont". Fair Hearing Rule 12. This requirement frequently presents a dilemma for social services agencies defending abuse substantiations before the Board. Such agencies may be loathe to subpoena alleged victims to testify at hearings out of concern for causing further trauma as a result of requiring them to appear at a hearing against their will, forcing a confrontation with the alleged abuser and subjecting them to a hostile cross-examination. The Board has been sensitive to this problem in the past and has used its "relaxed hearsay rule" to allow substitutions for direct testimony of alleged victims when it feels the result would be "unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs". Fair Hearing Rule 12. Most

commonly, child and adult welfare agencies have been allowed to present recordings or transcripts of interviews made with the alleged victims at or near the time of the occurrences alleged as the basis for abuse. Sometimes, statements told to and recorded by therapists have been allowed as well.

In a fairly recent case, the Board determined to allow a young sexual abuse victim's allegations into evidence primarily through the testimony of her mother and aunt. Fair Hearing No. 13,720. The Board felt that the two were accurately recounting the child's statements and were sincere in their beliefs that the child was telling the truth. The Board concluded that the child's statements that the father had sexually abused her were true based on that testimony. The father appealed to the Supreme Court which reversed the Board's decision and criticized it for relying on the mother's and aunt's statements to find that the child was telling the truth. In re C.M. 168 Vt. 389 (1998). The Court said that the credibility of the mother and aunt were irrelevant because "[t]he point . . . is not whether the witnesses relating the hearsay were telling the truth, but whether the hearsay was worthy of belief". Id. at 394. The Court made it clear that it was inappropriate to determine the credibility of the victim solely from the testimony of those who heard her story.

Furthermore, and more critical to this case, the Court pointed out as well in that decision that the Board should not have used the "relaxed" hearsay rule to admit any hearsay into evidence because administrative proceedings involving child sexual abuse cases are ruled by the requirements of Vermont Rule of Evidence 804a. That rule applies to the following proceedings:

RULE 804a. HEARSAY EXCEPTION; PUTATIVE VICTIM AGE TEN OR UNDER; PUTATIVE VICTIM AGE TEN OR UNDER; MENTALLY RETARDED OR MENTALLY ILL ADULT

(a) Statements by a person who is a child ten years of age or under or a mentally retarded or mentally ill adult as defined in 14 V.S.A. § 3061 at the time of trial are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal or administrative proceeding in which the child or mentally retarded or mentally ill adult is a § 3252, aggravated sexual assault under 13 V.S.A. § 3253, lewd or lascivious conduct under 13 V.S.A. § 2602, incest under 13 V.S.A. § 205, abuse neglect or exploitation under 33 V.S.A. § 6913 or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile proceeding under Chapter 55 of Title 33 involving a delinquent act alleged to have been committed against a child thirteen years of age or under or a mentally retarded or mentally ill adult, if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under Chapter 55 of Title 33, and the statement related to the sexual abuse of the child:

In In Re C.M., the proceeding involved a substantiation of child sexual abuse under 33 V.S.A. 4916. Although proceedings under that chapter are not specifically enumerated in the proceedings covered by V.R.E. 804a, the Court, nevertheless, held that V.R.E. 804a applied. The Court found that the legislature "intended this hearsay exception to apply to any civil, criminal or administrative proceeding in which such statements are offered" and not just those which were specifically enumerated (the majority of which were criminal proceedings). Id at 395. The Court concluded that V.R.E. 804a is a rule of general applicability in all administrative proceedings involving sexual abuse, including expungement hearings before the Human Services Board. Id at 396.

The instant matter is an appeal of a substantiation of sexual abuse against a mentally ill adult brought pursuant to 33 V.S.A. § 6906.<sup>1</sup> There is no difference between this case and In re C.M. except that it involves a mentally ill adult and not a child. V.R.E. 804a(a)(1) specifically refers to both a "child or mentally retarded or mentally ill adult" as the subject of the administrative sexual abuse proceeding.

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<sup>1</sup> The parties have stipulated that this is a proceeding under 33 V.S.A. § 6913, a section specifically enumerated in 804a. That appears to be in error since that section involves criminal fines and incarceration for

Clearly, under the Court's decision and the plain language of V.R.E. 804a, that rule is applicable to this proceeding as well.

The Department's hearsay evidence is only admissible, then, if it meets all the requirements of V.R.E. 804a. Those other requirements are:

. . .

- (2) the statements were not taken in preparation for a legal proceeding. . .
- (3) the child or mentally retarded or mentally ill adult is available to testify in court or under Rule 807<sup>2</sup>; and
- (4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

V.R.E. 804a(a)

The first criterion is that the hearsay statements were not taken in preparation for a legal proceeding. The parties have stipulated that this is true. These statements were obtained in the course of an investigation primarily concerned with the protection of L.H., not with the prosecution of the petitioner. The Court has already ruled that such statements

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sexually abusing mentally ill and retarded adults. This error is of no consequence in light of the Court's ruling in In re C.M.

are not excluded as statements taken to prepare for a legal proceeding. See. State v. Duffy, 158 Vt. 170 (1992) and State v. Blackburn, 162 Vt. 21 (1993).

The second requirement is that the mentally ill adult must be available to testify in court or appear pursuant to Rule 807. The Department has indicated that it does not plan to subpoena the putative victim to the hearing, that she does not plan to attend the hearing and that no arrangement has been made to provide her testimony through Rule 807. The petitioner claims that the witness is, therefore, not available for cross-examination. The Department claims that she is "available" under 804a.

There is no definition of "available to testify" offered in 804a. There is no caselaw discussing availability in the context of this rule of evidence other than to say that it encompasses a meaningful opportunity to cross-examine the alleged victim to test the reliability of the hearsay. In re M.B., 158 Vt. 63 (1992) and In re C.K. 164 Vt. 462 (1995). There is nothing in the definition or regulations that indicates whether "availability" is destroyed when the Department decides not to subpoena the witness.

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<sup>2</sup> Rule 807 allows recorded testimony and testimony via two-way closed circuit television.

There is helpful language, however, in another rule governing hearsay exceptions that defines when a witness is "unavailable". V.R.E. 804. Among the situations in which a witness is "unavailable" is when the declarant is "absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means". V.R.E. 804 (a)(5). This definition clearly contemplates that the proponent of the statement, that is, the party who wants to use the hearsay statements of the witness, is required to attempt to procure the attendance of the witness at the hearing for purposes of cross-examination before any finding of unavailability is made. It stands to reason, then, that a witness is made "available" under V.R.E. 804a when the party who wants to use his hearsay statements compels the witness to attend at least part of the hearing in order to be available for cross-examination.

The Department in this case is the proponent of the hearsay testimony. The Department's decision not to compel the mentally ill adult witness to attend the hearing coupled with the witness' statement that she will not attend the hearing means that the witness is not available under Rule 804a. She cannot be cross-examined by the petitioner's attorney to test the accuracy of her recollection. In that

circumstance, any hearsay statements made by the other witnesses regarding what the alleged victim said that are offered to prove the truth of the alleged victim's statements will not be admissible under the rule. As the Department's case is admittedly built entirely upon these hearsay statements, the Department cannot meet its burden of proof under 33 V.S.A. 6906 and the matter must be dismissed.<sup>3</sup>

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<sup>3</sup> The hearing officer is constrained to add that even if all of the other requirements were met, it would be difficult to accept the testimony of a mentally confused adult through statements made by third parties unless it was very clearly shown that her competency had been well-tested. Thus, the proponent would probably have difficulties meeting the requirements at V.R.E. 804a(a)(4) as well.