

BEFORE A HEARING OFFICER OF THE  
DELAWARE DIVISION OF FAMILY SERVICES

In the Matter of: )  
)  
)  
)  
)  
)  
on behalf of her minor )  
daughter )  
)

**DECISION OF THE HEARING OFFICER**

A representative of the Division of Family Services has made an administrative finding that

has committed an act or acts which constitute physical child abuse. Ms. grandmother, has filed a timely request for an appeal hearing to challenge that finding.

and her granddaughter are now represented in these proceedings by Marybeth Putnick of the Disabilities Law Program, Community Legal Aid Society. The Division of Family Services is represented by Kathryn L. Bunville, Deputy Attorney General.

An appeal hearing has been scheduled for October 18, 2000. The undersigned has been requested by the Division to serve as independent hearing officer in the matter.

On September 13, 2000, counsel for Ms. filed a letter with the hearing officer requesting a summary decision on a threshold legal issue in this case. The letter from Ms. Putnick contained a factual summary and legal argument. I requested that Ms. Bunville file a response to Ms. Putnick's

September 13 legal memorandum. She has now done so on behalf of the Division of Family Services.

Ms. Putnick has requested summary disposition of this matter on the question of whether [redacted] is a person who could have committed physical child abuse under the circumstances of this case as a matter of law. Ms. Bunville agrees that the case can be decided summarily on the legal issues, and that there may not be a need for a hearing. Based on the fact that the parties appear to agree that a factual hearing is likely not necessary, I will decide the case on the arguments presented and on the facts about which there appears to be no dispute.

#### **Statement of Facts**

1. This factual summary is drawn from the cross-submissions of counsel. Where a particular fact is or may be in dispute, I do not include that matter in this section of my decision. I note at this stage that the parties appear to have stipulated to sufficient facts to allow me to decide the case without the need to conduct a fact-finding hearing.

2. [redacted] was 11 years old on January 22, 2000. Legal custody in [redacted] is held by her grandmother,

3. Around the time of the incident in this case, [redacted] was apparently a resident at the Terry Center. It is represented by her counsel that she was being treated at the time for attention deficient disorder, oppositional defiant disorder and

other conditions.

4. On January 22 [redacted] was in the home of Ms. [redacted] for an overnight visit. Also present in the home was her younger sister, [redacted]. At bedtime the two were put to bed by [redacted] in separate bedrooms in her home. [redacted] remained in the home at all times that evening as the adult caregiver.

5. At some point during the night, [redacted] left her bedroom and went to [redacted] room. She woke up [redacted] and [redacted] took her or led her to a family room in Ms. [redacted] home. There the two apparently watched television. While the two girls were in the family room, [redacted] inserted her finger in [redacted] vagina. Ms. [redacted] was wakened at approximately 4:30 a.m. when she heard [redacted] yelling.

6. Ms. [redacted] ascertained what had happened and reported this incident to officials at the Terry Center. She was instructed to report the matter to the Division of Family Services. She did so at the end of January. [redacted] ing its investigation of the incident, [redacted] admitted bringing her sister to the family room and touching her inappropriately. Upon conclusion of its investigation, the Division substantiated a charge of sexual abuse against [redacted]. That finding has apparently resulted in the entry of [redacted] name on the Central Registry of individuals founded for abuse and neglect in Delaware pursuant to 16 Del. c. §902(2).

## Contentions of the Parties

1. Appellant contends that \_\_\_\_\_ can not be found to have committed child abuse under the Delaware Abuse of Children Act as a matter of law as she was not responsible for the "care, custody or control" of \_\_\_\_\_ at the time of the incident. Appellant further argues that due to her age and "significant mental health problems," \_\_\_\_\_ was not capable of being responsible for the care, custody or control of her sister.

2. On the other hand, the Division of Family Services contends that the Abuse of Children Act and the enabling statutes for the abuse/neglect Central Registry do not limit those whose names may be entered therein to only adults. The Division further contends that at the time of the incident, \_\_\_\_\_ was exercising control over her younger sister. Finally, the Division argues that because \_\_\_\_\_ was a member of \_\_\_\_\_ and Ms. \_\_\_\_\_ household at the time of the incident, she is a person who may commit child abuse as a matter of law under 16 Del. C. §902(12).

## Discussion

1. As a general proposition, I agree with the Division's position that a person who is a minor can commit physical child abuse under the State Abuse of Children Act. 16 DelC. Ch. 9. There is no restriction within that law which limits the universe of child abusers only to persons above the age of 18 years. Since teenagers and others are now routinely employed in

hospitals, day care facilities and other places where children are present, the absence of such a limitation is understandable. Regardless, I assume that if the General Assembly had intended to restrict entries on the Registry to adults only, the legislature would have clearly done so.

2. After closely reviewing the appellant's legal arguments, however, it does not appear that she is contending that [redacted]'s name should not be entered in the Registry solely on account of her age. Rather, the focus of her argument appears to be that "abuse" can only be committed under the Abuse of Children Act by one who has "care, custody and control" over his or her alleged victim, 16 Del. C. §902(1), and that [redacted] was not in such a relationship with [redacted] when the incident occurred. I will now turn to that contention.

3. "Abuse" is defined in the Act as "physical injury to a child, by those responsible for the care, custody, and control of the child, through unjustified force as defined in 11 Del. C. §468(1)(c), emotional abuse, torture, criminally negligent treatment, sexual abuse, exploitation, maltreatment, or mistreatment." 16 Del. c. §902(1).

4. The Division states in its argument that the parties do not dispute that [redacted] insertion of her finger in her sister's vagina is sexual abuse. Ms. Putnick's letter memorandum does not make that concession. Rather, appellant refers to the incident as "inappropriate touching" without conceding sexual

abuse occurred. Nonetheless, [redacted] apparently described the incident to an investigator or to her grandmother. If it is assumed for the sake of this case that there was penetration or other inappropriate touching of the genitalia, that act is sexual abuse and is listed as conduct under the Act which qualifies a perpetrator for entry into the Registry.

5. But the analysis does not end there. The parties have focused in this case on the issue of "care, custody and control". They take widely divergent positions on that issue.

6. In this case the facts reflect that an alleged 11 year old perpetrator led or "took" her six-year old sister to a family room and fondled her genitalia or inserted a finger in her vagina. Appellant contends that this does not satisfy the "care, custody and control" requirement of the Abuse of Children Act. The Division contends that the particulars of the incident demonstrate that at the time [redacted] was exercising "some control and supervision" over her sister so as to support a child abuse finding.

7. Though unfortunately the parties or their counsel have likely not had the benefit of reviewing prior administrative decisions in this area, this hearing officer on at least one prior occasion has decided a case not entirely dissimilar to this one.

8. In the case of In re: L.P.\*, a 14 year old boy touched the genitalia of his stepbrothers, approximately age 6, while

\* The initials of the child in the prior case have been changed to ensure confidentiality.

they were in bed, and perhaps rubbed his penis on the buttocks of one of the boys. There was no evidence that the alleged perpetrator was responsible for the care, custody, control or well-being of either of the two victims. All were admittedly members of the same "household" at the time of the incident. In that case this hearing officer found that "an isolated act of inappropriate sexual conduct between siblings or half-siblings such as in this case should not result in a finding of child sexual abuse under Title 16." In re: L.P. at 13. Simply by being members of the same household, inappropriate conduct as between the children did not rise to the level of "child abuse" under the Act. I determined in L.P. that the Act requires some position of responsibility as between perpetrator and victim.

9. L.P. has relevance here. In this case, absent a showing of additional facts, [redacted] was not a person "responsible for the care, custody and control" of [redacted] No adult had entrusted [redacted] to the care of [redacted]. The evidence shows that they were put to bed in separate bedrooms, and were presumably to remain apart until they woke up the next morning. Certainly [redacted] had no custodial relationship over her sister.

10. The Division contends, however, that by her action of waking [redacted] up and leading her, taking her, or directing that she go to the family room, that she exercised "control" over [redacted] as that term is contemplated in the Abuse of Children

Act. I disagree. It is presumed for the sake of this decision that by her age or her size, [redacted] did exercise some "control" over [redacted] by suggesting that the two go to the family room, or by directing that [redacted] go there.

11. However, as in L.P., in my opinion that is not the type "control" which was intended in the phrase "care, custody and control." Arguably, when the General Assembly used the conjunctive "and" within that phrase, the legislature intended that more than mere brief physical control was required for an abusive relationship to arise as a matter of law.

12. The Division's final argument is that [redacted] exercised "care, custody and control" over [redacted] because at the time the two were members of the same household under 16 Del. C. §902(12). That provision at least partially defines those persons with who may have "care, custody and control" of children. Such a person "shall include, but not be limited to, the parents or guardian of the child, other members of the child's household, adults within the household who have responsibility for the child's well-being, persons who have temporary responsibility for the child's well being, or a custodian...." Id.

13. I find that the two girls were clearly members of Ms. [redacted] household at the time of the incident. I disagree, however, that simply being a member of the same household per se creates the sort of position of responsibility between

perpetrator and victim which is required under the Abuse of Children Act. Without more, the mere fact that two young children live in the same home does not elevate assaultive conduct as between them to the status of "child abuse." I agree that a child can have "care, custody and control" over another child in the same household for purposes of the Act. A young babysitter or temporary caregiver may satisfy that phrase. But the facts in this case do not support such a finding. Put another way, Section 902(12) is a statement of those who may, have "care, custody and control" of a child. It is not a legislative statement that merely being a household member gives rise to such a relationship as between children within that household.

14. Finally, I have concluded that at the time of the incident [redacted] did not "have temporary responsibility for ( [redacted] well being." When an 11-year old unilaterally entices a six year old to go into another room where the younger child is then inappropriately sexually touched does not mean that the older child had "temporary responsibility" for the younger. At least the facts of this case do not support such a conclusion.

15. I also find that in this case [redacted] has certain psychological challenges which are being addressed through treatment. There was no evidence that she is presently a danger to others or is the sort of sexual predator whose name should be entered on the Central Registry in order to protect the public from her actions.

**Decision**

Based on the stipulated facts of this case and the discussion above, I have concluded that the administrative finding of "child abuse" as to \_\_\_\_\_ should be reversed and her name removed from the Central Registry. The hearing scheduled in this case is hereby canceled.

  
\_\_\_\_\_  
Roger A. Akin  
Hearing Officer

Dated:      October/T , 2000