

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0820**

In the Matter of
the Welfare of the Child of:
A. K. H. and J. D. C., Parents

**Filed December 9, 2008
Affirmed
Klaphake, Judge**

Itasca County District Court
File No. 31-JV-08-102

Thomas J. Nolan, Jr., 31905-299th Place, Aitkin, MN 56431 (for appellant A.K.H.)

Erica L. Hill Austad, P.O. Box 130, Grand Rapids, MN 55744 (for respondent J.D.C.)

Michael J. Haig, Assistant Itasca County Attorney, 123 Northeast Fourth Street, Grand Rapids, MN 55744 (for respondent Itasca County Health and Human Services)

Kimberly A. Wimmer, Wimmer Law Office, P.A., 401 Main Street, P.O. Box 151, Littlefork, MN 56653 (for Guardian ad Litem Amy Koebke)

Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Worke, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant A.H. is the mother of D.H., born October 25, 2001. Appellant challenges the district court's April 8, 2008 ruling that D.H. is a child in need of protection or services (CHIPS) because she was a victim of sexual abuse or would reside

with a perpetrator of sexual abuse, Minn. Stat. § 260C.007, subd. 6(2) (2006), and is without proper parental care because of A.H.’s emotional or mental disability, or immaturity, Minn. Stat. § 260C.007, subd. 6(8) (2006). We affirm because we conclude that the district court did not err in determining that there was clear and convincing evidence to support a CHIPS adjudication on either statutory ground. We also observe no error in the district court’s admission of J.V.’s testimony, a witness to whom D.H. made corroborative statements that she was sexually abused.

D E C I S I O N

“The paramount consideration in all proceedings concerning a child alleged or found to be in need of protection or services is the health, safety, and best interests of the child.” Minn. Stat. § 260C.001, subd. 2 (2006). In CHIPS proceedings, the district court must “determine whether the statutory grounds set forth in the petition are or are not proved[,]” Minn. R. Juv. Prot. P. 39.01, and “the burden of proof in the district court is ‘clear and convincing’ evidence.” *In re Welfare of B.A.B.*, 572 N.W.2d 776, 778 (Minn. App. 1998); Minn. Stat. § 260C.163, subd. 1 (2006) (requiring CHIPS allegations to be proved by “clear and convincing evidence”); Minn. R. Juv. Prot. P. 39.04, subd. 1 (same). The district court has “broad discretion” in making CHIPS dispositions. *In re Welfare of T.P.*, 492 N.W.2d 267, 268 (Minn. App. 1992). The court’s findings in a juvenile protection matter will not be reversed unless clearly erroneous or unsupported by substantial evidence. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). This court reviews questions of law de novo. *In re Welfare of the Children of N.F.*, 735

N.W.2d 735, 737 (Minn. App. 2007), *aff'd in part, rev'd in part*, 749 N.W.2d 802 (Minn. 2008).

I. Evidence of Sexual Abuse

Appellant argues that the record lacks clear and convincing evidence to prove that A.H.'s live-in boyfriend, J.S., sexually abused D.H. D.H. told her maternal grandmother, I.H., who lived nearby, that J.S. "put his [penis] on her." D.H. also made similar statements to others in her extended family, as well as to a registered nurse who interviewed her following the allegations of sexual abuse.

Appellant attacks the district court's findings and conclusions as they relate to her testimony and the testimony of several witnesses, including D.H.'s grandmothers, I.H. and M.S.; her father, J.C.; Valerie Evje, the registered nurse who examined D.H.; and J.V., who resides with paternal grandmother M.S. and lived with M.S. when D.H. was transferred to M.S.'s home as a consequence of the allegations of sexual abuse. Because the district court is in a superior position to assess the credibility of witnesses, this court must give considerable deference to the district court's credibility determinations. *L.A.F.*, 554 N.W.2d at 396.

The bulk of the testimony supports the district court's findings and conclusions that D.H. was sexually abused. The district court found D.H.'s statements to Evje more credible than her somewhat equivocal in-court testimony, and the court's findings include the bases for this determination. D.H.'s statements about J.S.'s abuse were essentially consistent and specific enough to establish clear and convincing evidence to support the CHIPS determination. The testimony of other witnesses, including I.H., J.V., and J.C.,

corroborated D.H.'s statements. While appellant contends that maternal grandmother I.H. was uncertain about dates and demonstrated an overall deficient memory, I.H.'s statements were clear about the facts pertaining to her granddaughter's statements about the sexual abuse. Although the court did not make findings on evidence about I.H.'s motivation to testify falsely, any such evidence was apparently rejected by the district court in determining her credibility.

Further, after reviewing the transcript of Evje's interview with D.H., we conclude that Evje's questions were not suggestive and appeared to be designed to elicit information from D.H. or to begin the interview process, rather than to suggest to D.H. what happened to her. As to Evje's credibility, while the district court did not specifically state that it found her credible, its other findings implicitly show that it found her testimony credible.

As to J.V., appellant claims that discrepancies in his statements undermine his credibility. After the first day of trial when D.H. had testified in-chambers, J.V. voluntarily approached J.C.'s counsel and informed her that D.H. had made corroborative disclosures to him. Respondent Itasca County moved to add J.V. as a witness, and appellant's counsel objected. Following an offer of proof, the district court, while acknowledging potential prejudice, allowed J.V. to testify to four incidents in which D.H. made disclosures to him about J.S. pulling her pants down. While J.V.'s testimony, when examined closely, is more detailed at trial than in his offer of proof, his trial testimony was consistent with his offer of proof, and any discrepancies between the two were minor.

Finally, while appellant contends that J.C.'s testimony is suspect because he did nothing in response to his daughter's first revelation that J.S. was mean to her and pulled down her pants, his testimony was corroborative of sexual abuse but did not, alone, provide evidence of abuse. Therefore, J.C.'s response to D.H.'s statements did not undermine his credibility.

Taken as a whole, the record provides clear and convincing evidence that D.H. was sexually abused under Minn. Stat. § 260C.007, subd. 6(2).

II. Lack of Parental Care

Appellant also claims that the record was insufficient to show that she did not provide proper parental care to D.H. Again, the record demonstrates that there was clear and convincing evidence to support the district court's CHIPS determination. The district court's findings, which are supported by two of D.H.'s teachers, extended family members, and law enforcement personnel who witnessed appellant's treatment of D.H., support the court's conclusion that appellant failed to provide D.H. with proper parental care.

The record shows that (1) appellant verbally abused D.H., including routinely swearing at her and stating that she hated her; (2) appellant was wholly uncooperative in the investigation of J.S.'s sexual abuse of D.H. and gave untruthful testimony about his contact with D.H.; (3) appellant was unable to appreciate D.H.'s significant developmental delays or to assist in addressing them; and (4) appellant's anger management issues were detrimental to her parenting of D.H. Appellant's conduct towards her daughter evinced a negligent or undiscerning regard for D.H. Appellant

restricted the school's attempts to address D.H.'s developmental issues, and while appellant contends that D.H.'s medical and dental issues were properly addressed, the record shows that they were not. Many witnesses testified to appellant's poor treatment of D.H. Perhaps most telling, the district court found that D.H. has thrived since leaving her mother's care, including in all former areas of concern, whether social, developmental, or physical. We conclude that this record provides clear and convincing evidence that the district court did not err in its CHIPS determination.

III. Admissibility of J.V.'s Testimony

Appellant finally argues that the district court erred in allowing J.V. to testify at trial because he was not sequestered with other witnesses who were subject to a sequestration order initiated by appellant. Typically, sequestration is sought to discourage a witness from being influenced by other witnesses' testimony and to ensure that a witness testifies from personal recollections. *Perry v. Leeke*, 488 U.S. 272, 281-82, 109 S. Ct. 594, 600 (1989). The Rules of Juvenile Protection Procedure do not provide for sequestration of witnesses and refer to the Minnesota Rules of Civil Procedure, as alternatively applicable rules, only when specifically allowed by the juvenile rules or by statute. Minn. R. Juv. Prot. P. 3.01; *cf.* Minn. R. Crim. P. 26.03, subd. 7 (allowing district court in criminal proceedings to apply its discretion in determining whether to sequester witnesses).

Generally, however, a party claiming a violation of a sequestration order must show prejudice resulting from the violation before seeking a new trial. *State v. Erdman*, 383 N.W.2d 331, 334 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986).

Prejudice consists of a showing that there was an attempt to influence the testimony of another witness or that a person made statements to a sequestered witness that did influence that witness. *Id.*

Here, J.V. was not subject to the sequestration order. In addition, appellant has not shown that J.V. overheard any testimony of other witnesses. Further, there was no showing either that there was an attempt by a witness to influence J.V. or that he was influenced by another witness. Thus, appellant has not demonstrated any prejudice because of J.V. not being sequestered. Finally, as respondent argues, appellant did not seek a new trial, and she thus waived the sequestration issue, because it should have been brought to the district court's attention in a new trial motion. *See In Re Welfare of D.D.G.*, 558 N.W.2d 481, 485 (Minn. 1997) (ruling that in termination of parental rights case, mother's failure to raise issues in new trial motion results in their waiver); *In re Welfare of S.G.*, 390 N.W.2d 336, 340-41 (Minn. App. 1986) (applying waiver rule in child neglect case). For all of these reasons, we conclude that appellant has demonstrated no error in the district court's failure to sequester J.V.

Affirmed.