STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ZACHARY SEQUIN, EMILY SEQUIN and PAUL HENRY SEQUIN, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LOUIS E. SEQUIN,

Respondent-Appellant,

and

RENEE SEQUIN,

Respondent.

UNPUBLISHED
June 13, 2000

No. 216602
Wayne Circuit Court
Family Division
LC No. 97-019415-NA

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Respondent-father appeals as of right from an order of the circuit court assuming jurisdiction and removing the minor children from respondents' home. We affirm.

This case began in early 1997 when respondent-father's minor daughter began to make statements indicating that she had been sexually abused by respondent-father. The first statement was made to respondent-mother's sister, the second was made while the child was at summer camp, and the third was made to the child's maternal grandmother. The second statement was reported to authorities, who began an investigation in July 1997. An FIA protective services worker was dispatched to the family home, where he questioned the minor girl. The child repeatedly denied in this interview that any abuse had occurred. Shortly after the third statement was made, the family left the state, eventually ending up in Buffalo, New York. Eleven months later, the family was found and returned to Michigan.

Thereafter, the children were placed in the home of the maternal grandparents, and these custody proceedings began. The girl was also taken to see psychologist Steven Spencer, director of the Center for the Family in Petoskey. During subsequent sessions with Spencer, the child made further statements indicating that she had been sexually abused. A pretrial hearing was held to determine whether the child's statements would be admitted under MCR 5.972(C)(2). At the end of that hearing, having concluded that the requirements of the court rule had been satisfied, the court admitted the statements. Thereafter, the court assumed jurisdiction and made the children temporary wards of the court.

At the heart of this appeal is the lower court's decision to admit into evidence the statements made by the minor female in which she claimed to have been sexually abused by respondent-father. Woven throughout respondent-father's argument is an assertion that because his fundamental constitutional right to father his children is at stake, the admission of the statements should be subject to certain constitutional protections. Specifically, respondent-father relies heavily on evidentiary tests articulated in *New Jersey v Michaels*, 642 A2d 1372 (1994), and a series of United States Supreme Court cases, the most important of which is *Idaho v Wright*, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990). While we agree with respondent-father that the rights at stake are fundamental, see *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *Lassiter v Dep't of Social Services*, 452 US 18, 27; 101 S Ct 2153; 68 L Ed 2d 640 (1981), we disagree that the rules he identifies are applicable.

The defendant in *Wright* had been convicted of "two counts of lewd conduct with a minor under 16." *Wright, supra* at 812. The victims were the defendant's 2 ½and 5 ½year old daughters. *Id* at 808. The Idaho Supreme Court had held that the defendant's rights under the Confrontation Clause of the Sixth Amendment to the federal constitution[1] had been violated by the admission at trial of inculpatory hearsay statements made by the younger daughter. *Id.* at 812. The statements were admitted at trial under Idaho's residual hearsay exception. *Id.* at 811.[2] The *Wright* Court agreed with the Idaho Supreme Court, concluding that the statements were not reliable. *Id.* at 827. The *Wright* Court noted that reliability could be shown one of two ways: if "the evidence falls within a firmly rooted hearsay exception," *id.* at 815, or if the statements "possessed sufficient 'particularized guarantees of trustworthiness.'" *Id.* at 827, quoting *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). The *Wright* Court found that under the circumstances of that case, neither prong of this test had been satisfied. *Id.* at 817, 827.

The *Wright* Court's decision was based on the special protections offered a criminal defendant under the Sixth Amendment. As the Court observed, "the Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." *Id.* at 814. In other words, although both the hearsay rule and the Confrontation Clause protect similar interests, *id.*, the scope of protection offered a criminal defendant by the latter is broader than that

[1] The Sixth Amendment reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

[2] Except for minor linguistic differences, the hearsay exception at issue in *Wright* is identical to Michigan's residual hearsay exception. MRE 803(24).

afforded by the former. This additional protection is based on the particularized guarantees of the Confrontation Clause. Respondent-father's constitutional right to confrontation are not implicated in the case at hand. Accordingly, although *Wright* has been cited for guidance on what factors relate to the reliability of child hearsay statements, see *In re Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1992), the particularized protections offered by the *Wright* test do not apply.

Michaels also addressed the admission of a child's hearsay statements at a criminal trial. The defendant in *Michaels* was convicted of multiple counts of aggravated sexual assault, sexual assault, endangering the welfare of children, and terroristic threats. *Michaels, supra* at 1375. At issue in *Michaels* was the investigatory interviews conducted with the alleged child victims. *Id.* The *Michaels* Court concluded that when a defendant establishes that a child's allegation of sexual abuse is "the product of suggestive or coercive interview techniques," *id.* at 1383, a trial court must hold a "taint" hearing to determine if the child's statements and evidence derived from them "retains a sufficient degree of reliability to warrant admission at trial." *Id.* at 1385. As with *Wright*, the decision in *Michaels* should not be removed from the context in which it was delivered. The *Michaels* test, with its shifting burdens of proof, is predicated on the notion that a criminal defendant's right to a fair and just trial must be protected. *Id.* at 1380. Such concerns are not before us in the case at hand. Nonetheless, we do believe that guidance can be gleaned from both *Wright* and *Michaels* on the issue of evaluating the reliability of out of court declarations by children regarding alleged sexual abuse.

Respondent-father persuasively argues that a growing number of authorities recognize that a child's recollection of events can be distorted, particularly by suggestive interviewing techniques. See, e.g., Note, *Evaluating and admitting expert opinion testimony in child sexual abuse prosecutions*, 41 Duke J 691 (1991); *Children's Eyewitness Memory* (Ceci *et al.* eds., 1987). Such a potentiality was specifically recognized by the *Michaels* Court. *Michaels, supra* at 1379. Accordingly, given the fundamental interests at stake in a termination proceeding, we believe that due process requires that a trial court proceed with caution when evaluating child hearsay testimony at a MCR 5.972(C)(2) pretrial hearing.

We choose not to set forth a static list of factors to be considered when evaluating the reliability of statements such as at issue in the case before us; the potential sources of contamination are as varied as the situations in which they might arise. See *Wright, supra* at 822. However, there are some pertinent factors that we believe a court should be aware of when judging the reliability of such statements. These include the existence of interviewer bias, the use of leading questions, familial influences, spontaneity of recall, repetition of allegations, the use of rewards, motivation to lie, the age of the declarant, and the terminology employed. See *Wright, supra* at 821-822; *In re Brimer, supra* at 405; *Michaels, supra* at 1383. We do not mean to imply that each of these practices necessarily corrupts a child's memory, nor are we indicating that these practices are always inappropriate. We are simply stating that a trial court should consider at a pretrial hearing held under MCR 5.972(C)(2) whether the reliability of the statements at issue was influenced by such practices.

Respondent-father's appeal rests squarely on the application of a hearsay exception found in MCR 5.972(C)(2):

> A statement made by a child under ten years of age describing an act of child abuse as defined in section 2(c) of the child protection law, MCL 722.622(c); MSA 25.248(2)(c), performed with or on the child, not otherwise admissible under an exception to the hearsay rule, may be admitted into evidence at the trial if the court has found, in a hearing held prior to trial, that the nature and circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness, and that there is sufficient corroborative evidence of the act.

We begin our analysis by noting that our Supreme Court's promulgation of this court rule is based on the its exclusive constitutional authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state." 1963 Const., art 6, sec. 5.

As with the exceptions found in MRE 803, the exception before us permits admission at trial of hearsay evidence that, under the circumstances, carries with it guarantees of trustworthiness sufficient to justify admission, even though the declarant will not be subject to cross-examination. Like MRE 803(24), MCR 5.972(C)(2) allows for the admission at child protective proceedings, statements that exhibit a degree of trustworthiness equivalent to those exceptions found in MRE 803(1) through (23). MCR 5.972(C)(2) also requires that the trial court consider the corroborative evidence that the alleged act of abuse occurred. This requirement must not be confused with the first, i.e., the examination of corroborative evidence is not done to support a finding that the statements carry the "adequate indicia of trustworthiness" under the circumstances. Finally, the court rule requires that these determinations be made in a pretrial hearing akin to the taint hearing spoken of in *Michaels*. The trial court admitted into evidence several statements made by the child because it determined that each statement satisfied the requirements of MCR 5.972(C)(2). We believe the decision to admit the statements does not amount to an abuse of discretion.

The first statement—"My daddy tickles my - my 'gina"—was made to the child's aunt in April 1997. The spontaneity of this statement is suspect given that it came in response to a leading question posed by the aunt. Further, the use of the term "'gina" is not surprising given the aunt's prior educating of the children on anatomically correct language including the word vagina. However, the child did repeat the same allegation to her maternal grandmother in August 1997. Spencer also testified that she indicated to him that respondent-father "had tickled, is her word, her vagina with his tongue and fingers on several occasions." The child also appears to have had no motive to lie. The aunt did not offer any reward for the assertion, nor is there any evidence that the child held a particular animus against respondent-father. Although it is a close question, we cannot say that the trial court erred in concluding that this statement was sufficiently reliable.

The second statement was made in July 1997, while the child was away at summer camp. The child's counselor testified that the girl said one day at the lunch table "that she ate her father's penis." Unlike the first statement, the second statement was not made in response to a direct question posed by an adult. The reliability of this statement is also supported by the counselor's testimony that the girl demonstrated to another child how "she unbuttoned and unzipped his pants," i.e., behavior that is consistent with having performed a sexual act. See *United States v Dorian*, 803 F2d 1439, 1445 (CA 8, 1986). Additionally, variations on this statement were repeated to Spencer approximately one

year later. The first of these came during Spencer's first session with the girl, where, according to Spencer, the child told him respondent-father wanted her to "kiss" respondent-father's penis. Spencer also reported that the child expounded on this statement at their second session. "[S]he said," Spencer testified, "'the penis thing happened on my birthday, and he was in the bathroom. He asked me to touch it, took my hand to touch it, then asked me to touch it with my lips, and forced me to do it." At a subsequent meeting, the following exchange took place between the child and Spencer:

> "[T]hen he wanted me to kiss his penis, pushed my head there . . . . Sometimes I won and sometimes he did. The cheesy stuff came out. He made me taste it almost, said it was gooey cheese. I didn't." Then she said, "It's this color," and she pointed to a legal yellow pad that was on my desk, "But its not paper. It's not cheese; melted gooey pee like clear Jell-O, some yellow and some clear. He told me deintegrating [sic] pee like cream you put on your body, it goes away. . . ."

There also appears no motivation for the child to have made up the second statement. Respondent-father's assertion that the child was just playing a game and trying to impress her friends is not supported by the record before us.

The third statement was made to the child's maternal grandmother in July 1997. According to the grandmother, she was preparing breakfast when her granddaughter walked up to her and said, "Grandma, Daddy tickled my 'gina." There is no evidence that the girl was asked any leading questions before making this statement. Indeed, the grandmother testified that the remark came "[t]otally out of the blue." Further, the description of the alleged contact was identical to description given to the child's aunt several months earlier, and similar to comments made to Spencer. Finally, respondent-father's ad hominem assertions aside, there is no evidence that the child had any motive to lie when she made this remark.

The final statements came during the child's sessions with Spencer. One series of statements, quoted at length above, concerned allegations that the child was forced to perform oral sex on respondent-father. The first of these (that respondent-father wanted the child to "kiss" his penis), does not appear to have been prompted by a leading question. Spencer did say that he was asking the group assembled[3] if there were "any problems going on in the family," but there is no indication that he posed a specific question about sexual abuse. Further, there is no indication that the child had a motive to make up this allegation. This statement is also consistent with the child's earlier statement at summer camp, and her subsequent statement to Spencer concerning respondent-father's ejaculate. As for this later statement, we believe her graphic, yet childlike description of the ejaculate supports the conclusion that the statement was reliable. *Dorian*, *supra* at 1445; *United States v Nick*, 604 F2d 1199, 1204 (CA 9, 1979). And while this graphic description did come in response to a direct question about what "other things that she and her dad did," she was not asked to describe any sexual contact. This question does suggest that Spencer believed that something had occurred between the two, and given the context in which it was asked (the child's previous revelations had been about sexual contact between she and respondent-father), it is reasonable to assume that the child would have understood

[3] The group consisted of the minor girl, her brother, and the children's maternal grandparents.

that Spencer was asking about further sexual contact. However, the question was general in form, eliciting as it did a narrative response. There is no indication that the child's narrative was interrupted and redirected by Spencer. Thus, her vivid and extended description of those contacts have an aura of spontaneity that belies any suggestion that they were distorted by Spencer's handling of the interview.

This narrative also contained two remarks that had not, according to the record, been previously revealed by the child to any other person. The first of these new allegations concerns the child having seen respondent-father ejaculate while he was lying on a water bed. She also for the first time revealed that her mother had seen respondent-father "tickling" the child's vagina, and that her mother and respondent-father had been involved in a physical altercation when the mother threatened to reveal the abuse to authorities. Spencer also revealed that the child said this fight ended with her mother and respondent-father engaging in sexual intercourse, an act which the child claimed to have witnessed. All of these revelations appear to have been spontaneous, made in response to the general question posed by Spencer. There is no indication that Spencer manipulated the child into making these allegations, and the abundance of detail supplied tends to support the finding that they are reliable. As with all the other statements, there is no identifiable motivation for the child to lie about these matters.

We now turn to the issue of corroboration. As previously noted, MCR 5.972(C)(2) specifically requires a court to determine if sufficient corroborative evidence exists to support the finding that the sexual abuse occurred. Respondent-father argues at length that the trial court used improperly "bootstrapped" evidence in reaching its decision to admit the disputed hearsay testimony. In support of this argument, respondent-father relies heavily on the *Wright* Court's discussion of the subject. We believe respondent-father's reliance on *Wright* is misplaced. The *Wright* Court was divided on the question of whether corroboration could be used to support a finding that a given hearsay statement bears "particularized guarantees of trustworthiness." *Wright*, *supra* at 822-824, 827-835. The record in the case before us clearly indicates that the evidence cited by respondent-father as improperly relied upon was used by the trial court during its examination of whether sufficient corroborative evidence existed. The trial court did not use this evidence when examining the trustworthiness of the statements.

However, respondent-father does correctly point out that the trial court did improperly use other hearsay during its examination of the corroborating evidence. "[T]he Court also finds that the statements . . . corroborate each other," the court observed, "and . . . looking at the entire matter, the Court finds that the—the statements do corroborate each other." This was error. In the context of a child sexual abuse case, corroborative evidence is "evidence, direct or circumstantial, that is *independent of and supplementary to the child's hearsay statement* and that tends to confirm that the act described in the child's statement actually occurred." *Colorado v Bowers*, 801 P2d 511, 525 (Colo, 1990) (emphasis added). To allow one hearsay statement to corroborate another would, in effect, make the hearsay statements self-corroborating, thereby rendering the corroborative requirement meaningless. *Id*.

Nevertheless, the record does contain corroborative evidence other than the statements themselves. Due to the lack of any physical evidence tending to prove that the abuse occurred, corroboration for the allegations is only found in circumstantial evidence. As the court observed, the evidence that the family fled the state for nearly one year after the allegations first came to light tends to

confirm that the sexual abuse occurred.[4] Further, there was evidence that the girl's minor brother twice took steps to suppress his sister's revelations. The first occurred when the girl spoke to her maternal grandmother in July 1997. According to the grandmother, after the girl made the remark, "her brother came up and stifled her." The second occurred at the first session held with Spencer, when, after the girl stated that respondent-father had asked her to "kiss" his penis and that she had "more secrets," the brother attempted to cover his sister's mouth. It is reasonable to conclude that both of these actions were understandable attempts by a child to prevent the disclosure of a shrouded event that would threaten the stability of the family. Additionally, the girl twice displayed behavior that tends to support the allegations. The first was when the girl showed another girl at summer camp how she unbuttoned and unzipped respondent-father's pants. The second was when the girl used anatomically accurate dolls provided to her by Spencer to demonstrate how respondent-father had forced her to manually masturbate him.

For the forgoing reasons, we conclude that the trial court did not abuse its discretion when admitting the hearsay statements. We also conclude after carefully reviewing the record that sufficient evidence supported the trial court's assumption of jurisdiction and making the children temporary wards of the court. MCR 5.972(C)(1); *In re Brimer, supra* at 693.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins

[4] There was testimony that the family fled on the advice of an unnamed attorney. The court appears to have discounted this explanation. We see no reason to second guess this conclusion, given the trial court's superior capacity to assess the credibility of the witnesses.