

came to pick up her child. When the petitioner returned to the house the children were still in the upstairs room, except for the child whose mother had arrived and brought her child downstairs. The petitioner explained the circumstances of her leaving, and the mother did not immediately express disapproval. A few days later, however, the mother reported the incident to SRS, which promptly investigated. After initially denying it, the petitioner admitted to SRS that she left the children unattended on the day in question.

Based on its investigation SRS "founded" the report, concluding that the petitioner had neglected the children in a manner that threatened them with physical harm. The petitioner was immediately (as she continues to be) contrite, fully accepting of the blame, and willing to admit the gravity of her lapse in judgement. Rather than dispute the charges, she voluntarily relinquished her day care registration.

In the one year since the incident the petitioner has (with SRS's knowledge) continued to provide care in her home for children within the maximum allowable under the law (without being required to "register" as a day care provider). However, because other parents have asked her to provide day care, the petitioner recently decided to attempt to have her registration reinstated. SRS's regulations provide that an individual who has a report of child abuse or neglect "founded" against them cannot be issued a

"registration" to provide child care in their homes.² Therefore, the petitioner seeks at this time to have the report of neglect against her "expunged" from the department's registry.

At the hearing in this matter (held on December 2, 1988) it was apparent that SRS was, at most, ambivalent in its desire to have the petitioner prevented from again becoming registered to provide child care. SRS maintains, however, that the incident that occurred last year meets the legal definition of "neglect", and that, as a result, it is required by law to maintain the report in its "registry" and, thus, to deny a day care home registration to the petitioner on that basis.³

As noted above, the petitioner does not dispute the severity of her lapse in judgement. She feels, however, that she has learned her lesson and that she is, in spite of the incident that occurred, qualified to provide care for children in her home. Although the petitioner was understandably emotional when called upon to state her case, she was completely candid throughout the hearing. She struck the hearing officer as an extremely sensitive and caring mother who has been thoroughly chastened by her experience. She did not attempt, in any way, to diminish the seriousness of what she did or to deny her culpability.

There is no evidence, however, that the incident in question was anything but an isolated and uncharacteristic lapse in the petitioner's judgement. The children

(fortunately) were not injured or traumatized in any way. SRS does not dispute that the petitioner is, and was, otherwise a caring and competent mother and caregiver to children in her care.

ORDER

The department's decision is reversed. The report of child neglect shall be expunged from SRS's registry.

REASONS

33 V.S.A. § 686 provides in part:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 685 unless the commissioner or his designee determines after investigation that the reported facts are unfounded . . .

. . .

(e) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him on the grounds that it is unfounded or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

33 V.S.A. § 682 includes the following "definitions":

. . .

(2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare or a child who is sexually abused by any person.

. . .

(4) "Threatened harm" means a substantial risk of physical or mental injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted

impairment of physical or mental health or protracted loss of impairment of the function of any bodily organ.

As noted above, the petitioner does not dispute the seriousness of her actions and the fact that the children could well have been severely injured (even killed) in her absence, however brief it was. Based on the undisputed facts of this matter the above definitions of "neglect" and "threatened harm" appear to be met.

In most cases, the above conclusion would be dispositive that the report was "founded". When, as here, however, the evidence also clearly establishes, and SRS does not dispute, that the incident was isolated and is unlikely to recur, it cannot be concluded that the report was "founded".

The entire chapter (Chapter 14 of 33 V.S.A.) regarding "abuse of children" is prefaced by the following statutory declaration of "purpose" (33 V.S.A. § 681):

The purpose of this chapter is to: protect children whose health and welfare may be adversely affected through abuse or neglect; to strengthen the family and to make the home safe for children whenever possible by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse and neglect, investigation of such reports and provision of services, when needed, to such child and family.

33 V.S.A. § 685, which sets forth the circumstances and scope of SRS's "investigations" in these matters (and which is specifically referred to in § 686, see supra, regarding

SRS's "records of abuse and neglect"), includes the following provision:

(c) If the investigation produces evidence that the child has been abused or neglected, the commissioner shall cause assistance to be provided to the child and his family in accordance with a written plan of treatment. (Emphasis added.)

Finally, 33 V.S.A. § 686(d) includes the following:

All registry records shall be maintained according to the name of the child who has been abused or neglected. (Emphasis added.)

Reading the entire chapter, especially the above-cited provisions, in pari materia, it is clear that the sole legislative objective in creating the child abuse "registry" was the protection of children. In this case, however, although the naked definition of "neglect" appears to have been met (see supra), clear and undisputed evidence also establishes that the children involved in the incident are not in need of "protection"--either that afforded by the registry or by any other service of SRS. From the point of view of these children's "health and welfare", it is clear that there is no need or compelling justification for SRS to maintain in its "child abuse and neglect registry" the records of its investigation of this incident--an incident which, though undeniably serious, SRS, itself, appears satisfied was isolated and unlikely to recur, and which had absolutely no "adverse" physical or psychological affect on the children involved. Because of this, it cannot be concluded that the report was "founded" within the meaning

of the above statutes.

Given the clearly stated purposes of the statutes (supra) it cannot be concluded that the legislature intended SRS to compile a dossier on each and every incident of "threatened harm" to children that happens to come to its attention. One can reasonably posit that virtually every parent or caregiver, however competent and caring, has committed at least one lapse in judgement that exposed children in their care to "substantial risk of injury"-- e.g., driving too fast with children in the car, not using a child restraint or car seat, carelessly leaving dangerous objects where children had access to them, using excessive physical discipline, becoming distracted while out of sight and earshot of young children. Clearly, few children whose parents commit such isolated lapses in judgement need "protection" from SRS, or from anyone else. However, inasmuch as the above examples, as well as countless others that come easily to mind, could well constitute "threatened harm" within the meaning of the above statute, the only legally significant thing distinguishing the petitioner in this matter from potentially every other parent in the State of Vermont is the fact that this petitioner's isolated lapse in judgement happened to come to SRS's attention.

Again, this is not to minimize the severity of the petitioner's actions nor to question SRS's decision to thoroughly investigate the report. However, it simply strains credulity that the legislature could have intended

to create a state-agency "registry" of each and every parental (or caregiver) lapse in judgement that, in retrospect, exposed a child (or children) to risk of injury.

The intrusiveness that such a "registry" would have on family sanctity and privacy--not to mention the impossibility that SRS, given its present resources, could investigate and record all such instances (assuming they were all reported to the agency)--is patent. The board simply cannot accept that such a potentially "absurd" result was the legislature's intent in its enactment of the statutes in question. See Lubinsky v. Fair Haven Zoning Board, 148 VT 47 (1986) and State v. Rice, 145 VT 25 (1984).

The board clearly recognizes, however, that in many, if not most, cases of abuse and neglect--both actual and "threatened"--the seriousness of or the circumstances surrounding the act itself will compel the conclusion that the interest of protecting the affected child is served by maintaining a record of the act (or omission) on the SRS registry. When, as here, however, the petitioner can clearly demonstrate, and when SRS, itself, does not seriously dispute, that the act in question was an isolated lapse in judgement that did not--and, in all likelihood, will not--adversely affect the children involved, the report must be considered "unfounded" and not subject to placement in the registry.⁴ For the above reasons, the report in question herein shall be expunged.⁵

FOOTNOTES

¹Pursuant to SRS regulations. See 33 V.S.A. § 2852.

²The effect and reasonableness of this regulation are not in dispute in this matter.

³It appears that SRS, itself, seeks from this case the equivalent of a declaratory ruling on its position so that it can have some "guidance" as to how to proceed in this and, perhaps, future matters.

⁴In this regard the burden of proof will always rest with the person seeking to have the report expunged from the registry. It should also be made clear that the provision by SRS of "assistance" under § 685(c) (supra) is not a prerequisite for SRS placing a report of abuse or neglect on its "registry".

⁵At this time, all other issues, if any, relative to whether SRS "registers" the petitioner to provide day care are left to the agency's consideration and discretion. If SRS denies the petitioner a registration for her day care, the petitioner, of course, has the right of further appeal.

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