



for violating the order. The petitioner told the police that he had broken into her house, twisted her arm, choked her and slammed her against a refrigerator. Based on those acts, he was found in contempt of court and placed on probation on January 31, 1990. On March 5, 1990, he was arrested for violating his probation for making harassing and drunken phone calls to the petitioner on several occasions and harassing her at a bowling alley and bar. The TRO was reinstated for one year on June 1, 1990, at which time the petitioner's husband left the state for "counseling". In November of 1990, the petitioner, believing that her husband's behavior had improved, revoked the TRO and allowed him to move back in with her household. After he moved in (and after she applied for the registration certificate) the petitioner's husband returned to his old ways and she asked him to leave. He did so reluctantly and has been with his father in New York for several weeks. The petitioner does not plan to let him return to her home and says she will divorce him.

4. The evidence clearly shows that while her husband was in the house, he was frequently drunk and the children who are now four to thirteen years of age are frequently verbally and physically abused through slappings and beatings by him, with and without belts. In addition, his behavior was particularly difficult for the thirteen-year-old daughter who is trying to recover from being sexually abused by an uncle. The petitioner (and her witnesses) does

not dispute that her home is not a safe place for children when her husband is there.

5. During the summer of 1990, the petitioner lived first over a clinical center for sexually abused children and then in a complex which also housed a post office. The program coordinator for the clinic and an employee at the post office both testified that the petitioner's two youngest children, then aged four and three, were outside a good deal of the time without any adult supervision and appeared to be in the care of a twelve-year-old sister who frequently hit and slapped and verbally abused the children.

At the center, the little children ran into the street a couple of times and destroyed mail in the business mailboxes while in the twelve-year-old's care. The program coordinator spoke with the petitioner about this on at least one occasion with no improvement in the situation. At the post office, the little children were allowed to play in the parking lot, on the edge of a busy street where they were in the path of large trucks and other vehicles moving about. The children also crawled on cars and threw dirt and rocks in the mail slots. The postal employee informed the petitioner orally on three occasions and in writing by certified mail of the danger her children were in and asked her to prevent her children from playing in the parking lot and post office porch and steps. The children continued to play in those places even after the requests were made. Based on this credible evidence, it is found that at least

during the summer of 1990, the petitioner failed to adequately supervise her two small children on a regular basis and as a result their safety was endangered.

6. The petitioner has been voluntarily going to counseling for some weeks in order, among other things, to get help with her parenting skills, especially of her twelve-year-old daughter whom she had slapped several times during conflicts. Her counselor is of the opinion that the petitioner is trying very hard to take good care of her children under very stressful circumstances and is genuinely interested in becoming a better parent and breaking away from her abusive husband. A long-time friend of the petitioner who is a psychiatric nurse testified that the petitioner had been a good baby-sitter for her as a teenager and during those times (about once a month) when she visited the petitioner, her supervision seemed to be appropriate, as long as her husband was not there. When he is there the situation is chaotic. Both the petitioner's therapist and her psychiatric nurse friend, were of the opinion that it was going to be difficult for the petitioner to permanently break away from her husband because there has been a long-term pattern of separation and reconciliation in spite of her husband's continued abuse and in spite of the considerable support she has received in dealing with this problem.

7. The petitioner disagrees that she has failed to supervise her children in the past but states that she is

building a six foot fence around her home to contain any children she might care for. She also stated that she intends to divorce her husband and does not plan to allow him to return to her home. She wants a day care registration certificate in order to stay with her children during the day and earn some money and because she loves to be around children. The petitioner is found to be an entirely sincere individual and there is no doubt that the above statement reflects her present desire in the matter.

ORDER

The Department's decision is affirmed.

REASONS

Family day care home registration is the Department's method of registering caregivers which method relies on the accuracy of statements made by applicants and reports made by parents and others as to the adequacy of the care. Persons in the program are not regularly supervised and monitored as are persons who hold day care licences.

33 V.S.A. § 306(b)(1) authorizes the Commissioner of the Department of Social and Rehabilitation Services in general to "issue regulations governing application for, and issuance, revocation, term and renewal of licenses and registration. In the regulations he may prescribe standards and conditions to be met. . ."

The statute further provides that:

Regulations pertaining to day care facilities and family day care homes shall be designed to insure that children in day care facilities and family day care

homes are provided with wholesome growth and educational experiences, and are not subjected to neglect, mistreatment or immoral surroundings.

33 V.S.A. § 3502(d)

In addition to this authority to make rules governing applications, the statute specifically requires:

Before a family day care home registration<sup>1</sup> is granted, the department shall make inquiry and investigation. Inquiry and investigation may include a visit to and inspection of the premises for which the registration is requested. Further inquiry and investigation may be made as the Commissioner may direct.

33 V.S.A. § 306(b)(4)

Pursuant to its regulation making authority, SRS has adopted the following regulation with regard to denying registration certificates:

. . .

(4) The Division may deny the issuance of a Registration Certificate if it has found that the person who has submitted the Registration Statement has not complied with these regulations or has demonstrated behavior which indicates an inability to care adequately for children.

Section V, Regulations for Family Day Care Homes, effective January 3, 1991.

Among the further pertinent regulations promulgated by the Department are the following:

. . .

2. The Registrant, and all other caregivers, shall be at least eighteen (18) years of age, able to read, and physically and emotionally capable of performing activities normally related to the provision of child care.

3. The Registrant, and all other persons in the home, shall not use or be under the effect of alcohol and/or drugs (except over the counter medication which would not impair the ability of the caregiver to provide child care) during the hours of care. Medication

prescribed by a physician that, in the opinion of the physician does not impair the ability to provide adequate care and supervision during hours of care may be taken.

4. The Registrant shall be responsible for the actions of all caregivers, as well as all other persons in the home and shall ensure that compliance with the Family Day Care Home Registration Regulations is maintained.

5. The following persons may not operate, reside at, be employed at or be present at a Family Day Care Home:

- a. persons convicted of fraud, or an offense involving violence or other bodily injury including, but not limited to abuse, neglect and/or sexual activity with a child; or
- b. persons who have had a report of abuse or neglect founded against them.

Section I, Regulations for Family Day Care Homes, effective January 3, 1991.

. . .

2. Guidance/discipline shall not include any form of cruel and unusual punishment, including corporal punishment, such as, but not limited to:

- a. Hitting, shaking, biting, spanking, pinching.

Section III, Regulations for Family Day Care Homes

. . .

9. Children in care shall be protected from any and all conditions which, in the opinion of the Department, threatens a child's health, safety and well-being. This includes, but is not limited to, human, man-made and naturally occurring hazards. Stoves or fireplaces shall be screened or otherwise shielded from children in care when in use. Wells shall be capped.

Section VI, Regulations for Family Day Care Homes

There is no disagreement between the petitioner and the Department that her husband consumes excessive amounts of alcohol, is abusive to her and the children, and has been

convicted of contempt of court for physically and verbally assaulting the petitioner. Although he appears to have left the home for now, there is no restraining order currently in effect and it is not unreasonable to assume that he may return in the near future either with or without the petitioner's permission. It must be found, therefore, that the petitioner's husband's potential presence in her household, to which there is currently no legal obstacle, violates Section I (3), and (5), Section VI (9) and potentially Section III (2) as well. Based on the admitted facts involving her husband alone, it must be concluded that the petitioner's home does not comply with the regulations.

In addition, substantial evidence was presented by the Department rebutting the petitioner's claim that she herself is a person who can adequately care for children. The petitioner has the support of two persons trained in counseling who have known her for some time, who have observed her at home with her children, but not on a frequent basis, and have considerable faith in her abilities to care for children. The Department, however, presented credible evidence from two persons who observed her small children in dangerous situations without adequate supervision on a regular ongoing basis, which evidence raises serious questions about the petitioner own supervisory skills and, in effect, rebut her positive evidence. It must be concluded from that evidence that the petitioner herself has "demonstrated behavior which

indicates an inability to care adequately for children" in violation of Regulation V (5).

The Department has, thus, put on persuasive evidence that conditions exist in the petitioner's home which violate several day care home registration regulations promulgated by the Department. The Department, therefore, has the discretion to determine whether it will deny the application for a registration certificate based on those violations. Huntington v. SRS, 139 Vt. 416 (1981). The Board will not intervene in this decision unless the petitioner can show that the Department abused its discretion.

The petitioner argues that the Department has acted unreasonably in denying her registration because her husband is not in her home and will not be allowed to return. She has also argued that supervision will no longer be a problem because she is putting up a six foot fence around her yard.

She has even agreed to condition her registration upon her husband's being out of the home.

The Department has heard and considered the petitioner's mitigating evidence but has decided that denial is still appropriate. This decision is based on the Department's belief that the petitioner's supervisory problems are so severe that they may not be resolved by a physical barrier and upon the Department's inability to monitor the home for the presence of the petitioner's husband.

Based on the above, it cannot be found that the petitioner met her heavy burden of showing that the Department's decision to deny the certificate is an abuse of its discretion. The regulations violated are serious ones which clearly "implicate neglect, mistreatment or immoral surroundings or risk of health, safety or the well-being of children", concerns which are at the heart of the protection statutes. See 33 V.S.A. § 3502(d) (above) and Fair Hearings No. 6773, 7764, and 10,092. In addition, as day care registered homes, unlike licensed facilities, are not regularly monitored, the petitioner's "guarantees" of safety cannot be verified on a regular basis. As such, the Department was certainly justified in deciding to deny the petitioner's application.

SRS's denial is no doubt very discouraging for the petitioner who is clearly making sincere attempts to turn around the lives of her children and herself after years of tumult and abuse. There is evidence which indicates that the petitioner's own caretaking inadequacies are the result of the general chaos which ensues when her husband is a part of the household. If the petitioner is successful in her stated desire to remove this person from her life, there is good reason to hope that she can improve the atmosphere in her household and her own caretaking skills to the point where in the future it may not be unreasonable for her to reapply for a certificate and have her situation reassessed.

FOOTNOTES

<sup>1</sup>This term is defined at 33 V.S.A. § 4902(3).

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