



home at about 9 p.m. on May 15, 1992, upset and crying about another argument with his mother. She observed at that time that he had scratches on his back about three inches in length which were very deep and purplish-red with raised skin on them. The skin on his back was scraped up and some skin was missing. J.M. told her that while he was in the kitchen his mother called him into his room because he had not picked up his belongings. J.M. described his mother as very angry and upset and said when he appeared at the door, she pushed him into the room and began to scream at him. She raised her hand to strike him and he stopped her by holding her wrists. He told C.B. he turned to flee the room and his mother grabbed him on the neck and back. He stated that he had received the scratches during the argument. C.B. also testified that the boy told her that there had been a lot of fighting for quite a while and that his mother had been drinking.

After two hours of crying and talking, J.M. told C.B. that he was afraid to go home because he felt his mother would continue to fight with him. C.B. knew from her foster daughter that J.M. had slept outside the month before after his argument with his mother so she told J.M. to call his mother to get permission to stay at her house.

J.M. called his mother and she angrily told him to come home and threatened him not to stay there overnight. C.B. testified that she tried to speak with his mother but that the mother told her she was "in big trouble" and hung up on

her. Prior to this confrontation, the two women, who were acquaintances, had been on good terms with each other and had occasionally baby-sat for each other's children.

C.B. testified that, unwilling to send the boy home but also unwilling to keep him against his mother's wishes, she called the police to ask them to persuade the boy's mother to allow him to stay overnight. The police were finally able to obtain the mother's permission and he did stay overnight. C.B. drove him to school in the morning and was not involved any further in the matter. She has had a couple of short casual conversations with J.M. since that time during which he told her that things were better since his stepfather, who had been away on business, had returned home.

The social worker testified that the above matter was reported to S.R.S. and that morning, she called the petitioner's mother to speak with her. After consulting her lawyer, the mother reluctantly agreed and the social worker went to her home. The social worker was told by the petitioner that there had been an argument and a struggle in which J.M. held her wrist and hurt her. She did not recall trying to hit J.M. or the scratch marks. The worker told the mother that she was going to the school to talk with her son before she decided what action, if any, might be taken.

She also suggested that counseling might be appropriate which suggestion was flatly refused by the petitioner. The social worker described the petitioner as very agitated and

aggravated by S.R.S.'s involvement. Thereafter, the social worker went to J.M.'s school to interview him. She testified that she observed three scratches on J.M.'s left upper back approximately three inches long and parallel to each other about a half inch apart. They were red in color, "fairly deep" and the skin was missing where they appeared.

She spoke with J.M. in the presence of the school guidance counselor. She testified that J.M. told her he had come home from a ball game with his mother and little sister and was called down to his room by his mother. He hesitated to come and she began yelling at him. His mother shoved him into the room and there was a struggle with his mother trying to hit him. He held her by the wrists to prevent that. He told the social worker that his mother scratched him in the course of the struggle. He also told her that things were bad at home and that there had been a lot of arguing with his mother whom he described as under stress. He stated that his mom had been drinking a lot and was coming down on him quite a bit.

The social worker testified that during the course of this interview, the petitioner arrived at the school, along with her sister-in-law, and angrily demanded that she be left alone to talk with her son. The social worker and counselor reluctantly left the petitioner and her sister-in-law alone in the counselor's office with J.M. Through the door and the window the social worker testified that she could see and hear the petitioner loudly yelling at her son

and see him crying with his face down on his chest. The social worker testified that she felt this berating was so extreme that she felt the need to intervene at one point and when she did so was physically pushed out of the room by the petitioner who then locked the door. After twenty minutes or so of this behavior during which the mother refused to open the door, a state trooper was called in who came to the door and asked the petitioner to unlock it. When she refused, an assistant principal unlocked the door. The state trooper spoke with the petitioner and the others and everyone agreed that the boy should go home with his aunt (the petitioner's sister-in-law) until things cooled off. J.M. asked if he and his mother could go to counseling and learn to stop arguing. After J.M. left, S.R.S., the trooper and the petitioner agreed that the petitioner would go to counseling and that the boy would stay at his aunt's for a few days in lieu of the police taking him into custody.

The social worker further testified that she called about one month after this report to follow-up on the situation and was told by the petitioner's husband that the boy's welfare was none of her business and that neither he nor his wife wanted to speak with her. She stated that both the petitioner who did speak with her and her husband were loud and aggressive and that she was "unable to get a word in edgewise". The petitioner concluded the call by hanging up on the social worker. The social worker also testified that she had spoken with the school guidance counselor who

said that J.M. was a good student, esteemed by his peers and a member of a lot of school clubs. She had received no report of abusive practices regarding J.M. before but believed from conversations with the boy that things were "bad" at home. Based on all of the about evidence, the worker concluded that the petitioner had abused her son and that a finding should be placed in the registry.

The petitioner herself testified that she had been in a car accident in March of 1991 and had sustained injuries which made it difficult for her to lift objects. Because her husband's work takes him out of town frequently, she was forced to rely on her son and younger daughter that Spring more than usual. The extra demands on her son caused some tension between them. She admitted that during one argument in April, her son fled the house and slept outside in a car overnight.

It was her testimony that on May 15, 1991 at about 8:00 p.m., after returning from a ball game, she called her son down to his room which he was supposed to have cleaned the day before but had not. He openly defied her and refused to clean the room, a stance which she felt he would not have taken in the presence of his stepfather. She became angry and ordered him to leave the house. As he was leaving the room, she quickly changed her mind and decided he should stay and clean his room. She grabbed him by his upper left back to turn him around but does not recall touching his skin or scratching him in any way. J.M. then ran out of the

house and did not return. When he had still not returned by 10:00 p.m., the petitioner supposed he was spending the night at a friend's house or in the barn or a car as he had done on the prior occasion a month earlier when he had run away. She received a phone call at about 11:00 p.m. from J.M. asking for permission to stay at C.B.'s home. She stated to him to come home but he refused. Thereafter, the police called her and, she says, threatened to award custody to the state if she didn't allow him to stay at C.B.'s so she finally agreed to the stay.

The next morning, according to the petitioner's testimony, S.R.S.'s social worker called to speak with her.

After talking with her attorney, she allowed the worker to come over but she was very angry that she was in the house.

She stated that she admitted that she had been leaning on J.M. a little more than usual but denied being physically abusive. She also stated that J.M. was exhibiting a bad attitude lately. It was during this discussion that the petitioner says she first heard about the scratches. She stated it was possible that she had scratched J.M. but does not remember it. She told the social worker that she was shocked at and angry with her son during the confrontation and that she felt helpless to deal with him.

After her discussion with the social worker, the petitioner decided to go to school to talk to her son. On the way there, she encountered her sister-in-law who accompanied her to the school. She said she found J.M. in

the counselor's office with three other persons and asked for five minutes alone with him. She denied yelling at J.M. in the office or pushing the social worker out but admitted that she locked the door for privacy and would admit no one.

She stated that J.M. was crying and saying he just needed someone to talk with and that the whole matter had been blown out of proportion.

Thereafter the petitioner testified that the trooper, the social worker and others came into the room an agreement was reached that she would go to counseling and allow her son to go to her sister-in-law's home temporarily as a way to cool things off and get the state off her back. The petitioner does not recall refusing to admit the state trooper to the room. The petitioner testified that although she agreed to go to counseling, she had no intention of doing so and has not done so. She stated that she does not believe what happened was a serious problem or that any counseling was needed. She only made that statement to get the state out of the case. She said that J.M. returned home a few days later and that there have been no further problems. She characterized her son as a very sensitive boy who is easily upset and is generally not a behavioral problem. She also characterized the Department's investigation as a ridiculous vendetta and admits she hung up the telephone when the social worker called her to follow-up a month later. She denied that she had a drinking problem and specifically that she had been drinking at all

on May 15, 1991.

The petitioner called her son J.M. as a witness in her behalf. She had taken him out of school for nearly two full days to await his testimony. Although his mother was initially accompanied by him during the hearing, he was excluded from the hearing room by the hearing officer. His testimony was taken outside of the presence of his mother, with her consent. J.M. is a mature, intelligent and unusually poised boy of fifteen. During his time in the hearing room, he attempted to understand and assist his mother in the conduct of her case. During his testimony it was obvious that he felt that his actions had caused too much trouble for his mother, whom he loves very much and with whom he wishes, above all, to have a good relationship.

J.M. did not deny the statements attributed to him by the social worker and C.B. regarding the incidents on May 15, 1991 but testified that the statements he then made were not entirely accurate or were interpreted inaccurately. He felt he had a better recollection of the events now than he did then. He testified that he did not exactly recall that his mother had scratched his back or saying that she had actually scratched his back. He stated that he may have been scratched by an unfinished casing on his door about three and a half feet high which he may have brushed on his way out the room. He did not notice the pain and stinging on his back until he was about a half mile away from home. He stated that he felt he over-reacted by running away after

the argument and that he was at fault for provoking his mother by being defiant. He also denied that he said his mother had been drinking before the event.

With regard to the events at school the next day, J.M. explained that he was crying in the room with his mother not because she was yelling at him but because he realized he had hurt her and had dug an "unnecessary hole" for the two of them. He stated he was interested in counseling but that his mother was not and that he has since dealt with his problems better since he has found other family members, particularly his aunt, in whom he can confide.

The sister-in-law who accompanied the petitioner to the school also testified on behalf of the petitioner. She said that she had observed J.M. testing his mother that Spring while his stepfather was out of town. She also described the petitioner as a good mother who did not hit her children nor drink to excess. She testified that she was in the room with J.M. and his mother on May 16, 1991 and she did not observe the petitioner push anyone out of the room or anyone trying to come in the room although on cross-examination her confidence in this version of the facts waivered considerably. She stated that J.M. stayed with her after the incident and complained to her that words were put into his head and that the Department had caused the matter to get out of hand. She described J.M. as an emotional boy who cries easily.

FINDINGS OF FACT

1. J.M.'s description of the events which occurred on the evening of May 15, 1991 as they were related to the social worker and the foster mother neighbor that evening and next day are found as fact both because the two reports are consistent and close in time to the actual event and because they are not inconsistent with the petitioner's own recollection of the event. Specifically it is found that the petitioner, angry and upset because of her son's open defiance, engaged in a heated argument with him in his bedroom on the evening of May 15, 1991, during which time she raised her arms to him perhaps in a striking motion and that he held her wrists. J.M., the boy, thereafter attempted to leave the room either by her order or his own desire and when his back was turned was deliberately grabbed on the upper left shoulder by his mother and thereby sustained three fairly deep scratches on his upper back which removed his skin and caused red and purple marks during the days thereafter. J.M.'s later attempts to explain the origin of the marks through other means is found to be unlikely and unconvincing. There is no evidence, however, that by grabbing her son's shoulder, the petitioner intended to scratch him either in retribution or as a form of punishment. It is likely, therefore, that the scratch marks were accidentally inflicted as the mother attempted to restrain her son.

2. J.M. went to a neighbor's home some three miles

away to seek comfort following the argument. He was very upset and afraid to return home because he felt his mother was still angry and that the argument would continue. He generally complained of drinking by his mother and persistent conflicts and arguments. A similar incident had occurred a month before when J.M. had slept outside rather than return home. At the insistence of the neighbor, he called home for permission to stay overnight and it was refused by his mother who threatened him if he did not return home. The neighbor, because the boy was still afraid to return home, sought assistance from the police who were able to persuade the petitioner to let him stay.

3. The incident was reported to S.R.S. and an experienced social worker began an investigation the next day. She spoke with J.M.'s mother (after her lawyer advised her to do so) who admitted her anger, the fight and the possibility of having inflicted the scratch marks but who minimized the seriousness of the event and blamed her son's defiant behavior for having provoked her. She did admit that she had been hard on J.M. lately due to her own physical limitations from an auto accident and the absence of her husband but dismissed her behavior as being in the normal range of parent/child relationships.

4. The S.R.S. worker told the mother that she was going to interview J.M. at school. She did interview J.M. at the school in the presence of the guidance counselor where he related the incidents in paragraph one and two

above. The petitioner appeared at school with her sister-in-law and demanded to see J.M. alone which she was reluctantly allowed to do. While in the counselor's room with J.M. and her sister-in-law, the petitioner harangued him and made him cry for some twenty minutes and pushed the social worker, who attempted to alleviate the situation, out of the room. She finally locked the door and refused to even let the state trooper in. The petitioner's, her sister-in-law's and J.M.'s denial of these events are found to lack credibility because they conflict with each other and are inconsistent with the social worker's very credible eyewitness testimony on this issue.

5. The incident was resolved by S.R.S., the petitioner, and the state trooper by the petitioner agreeing to go to counseling, as requested by her son, and by agreeing to allow her son to live with his aunt for a few days until their feelings calmed down.

6. The petitioner admitted that she had no intention to go to counseling as she promised and lied about her intention simply to resolve the matter. She insists that she does not need counseling. She characterized the incident as blown out of proportion and her behavior as a justifiable response to a defiant child who was testing her during a stressful period of her life. She took her child out of school for two days and called him as a witness to corroborate her theory. She views the Department's investigation with contempt and admits to refusing to

cooperate with attempts by the Department to follow-up on the situation.

7. The social worker for S.R.S., based upon virtually the same facts as found above, concluded that J.M. had been physically abused by his mother and placed that report in the registry.

ORDER

The Department's decision substantiating that the petitioner abused her child, J.M., should be reversed.

REASONS

33 V.S.A. § 4901 et. seq. requires the Department of Social and Rehabilitation Services to protect and to prevent the abuse and neglect of children by, among other things, promptly investigating reports of abuse, (33 V.S.A. § 4915) and maintaining a registry of all reports which are "substantiated". (33 V.S.A. § 4916(a)) A "substantiated report" is defined by statute as one which "is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected". 33 V.S.A. § 4912(10) Persons who are found to have abused children under this statute may apply to the Human Services Board "for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of title three 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. § 4916(h)

The Board has held that this statute places a burden on the Department to establish by the usual civil standard of a preponderance of the evidence both that the information it used to place the report in the registry was accurate and reliable and that the information constitutes a reasonable basis for concluding that the child has been abused as that term is defined in the statute. See Fair Hearings No. 8110, 8816, and 9247.

The credible evidence here does show that the Department's information that the boy received substantial scratches from his mother during the course of a heated argument is more likely than not quite accurate. The placement and position of the marks are consistent with the boy's contemporaneous testimony as well as the mother's. However, there is no evidence that the petitioner intended to inflict those scratches on her son as a form of punishment or retribution. The scratches appear to have occurred accidentally while the mother attempted to restrain the boy.

The second part of the Department's burden is to show whether the above facts constitute "abuse" under the statute. The statute defines abuse as follows:

. . .

(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.

(3) "Harm to a child's health or welfare can occur when the parent or other person responsible for his welfare:

- (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury; or
- (B) Commits, or allows to be committed, against the child, sexual abuse; or
- (C) Fails to supply the child with adequate food, clothing, shelter or health care. For the purposes of this subchapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law. Notwithstanding that a child might be found to be without proper parental care under chapter 55 of Title 33, a parent or other person responsible for a child's care legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone.

33 V.S.A. § 4912(2) and (3)

"Physical injury" is further defined by the statute as meaning "death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means". 33 V.S.A. § 4912(6). (Emphasis supplied.) As the injury here was accidental, it does not meet the above statutory definition of abuse which would subject the victim and perpetrator to placement in the registry. See Fair Hearing No. 8892. As the Department proved no facts upon which it could be found that this child had been abused by his mother, the registry should be expunged.

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