

-A public health nurse reported to SRS that the children's father was having sex in front of the children and that J. was beginning to act sexually aggressive towards other children.

-a foster parent reported to SRS that J. and G. reported being beaten from a young age by their father with a variety of objects; that G. was forced into a hot shower as a punishment; that J. was forced to watch his father have oral sex with his girlfriend; that J. was locked in a bedroom as a punishment; that G. was forced to wipe the urine of another child off the floor; that J.'s father made sexual advances toward her when she was ten years old; and that both J. and G. were beaten and punched by their father, giving them welts which later became infected.

4. No allegations were made in the complaint with regard to the youngest child, R, who was six-years-old when her father and mother separated.

5. The petitioner was represented by an attorney in the above proceeding which took place in the Washington County Family Court. No hearing was held to determine the accuracy of the facts. Instead, the parties filed a stipulation which formed a basis for the Court's finding on September 26, 1986, that the allegations in the complaint had been proven and the state had established that all three children were in need of care or supervision. Temporary custody of the children were placed with SRS, and on October 23, 1986, a final order was made granting legal custody to SRS, guardianship to the children's maternal uncle, and structured visitation to the petitioner, subject to his obtaining counseling on issues of abuse.

6. The petitioner never regained custody of his children, two of whom are now adults. The petitioner disputes all of the findings of the Family Court claiming that he was coerced into signing the stipulation by the three attorneys who represented him in the CHINS petition.

7. At the administrative hearing in this matter, the same SRS social worker testified that she had herself spoken with J. and G., who related the above allegations about their father's abuse, which statements she found compelling. She also testified that the children told her that they did not want to be placed in their father's custody. It was her opinion that the petitioner's alleged actions constituted excessive discipline, emotional abuse, and sexual abuse.

ORDER

The Department's decision finding that the petitioner abused his children, J. and G., is affirmed and the request to expunge that registry record is denied.

REASONS

The petitioner has made application for an order to expunge a substantiation of abuse placed by SRS in its registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(h) A person may, at any time, 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 3 on the application at which hearing

the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report 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). Abuse and neglect are specifically defined in the regulations which are set out in pertinent part 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;

. . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other

presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

The issue presented here, which is one of first impression, is whether the Board is bound by a decision of the Family Court in a CHINS proceeding finding that a child is in need of supervision with regard to a request for an expungement from the registry of a substantiation of abuse. The Department argues that decisions of the Family Court in juvenile matters override decisions of the Human Services Board and are res judicata as to a finding of abuse for purposes of the abuse reporting statute.

Presumably SRS is relying on 33 V.S.A. § 633 which states that the juvenile court has "exclusive jurisdiction over all proceedings concerning any child who is or who is alleged to be...a child in need of care or supervision." The Supreme Court has specifically stated that the human services board is not deprived of jurisdiction to hear matters relating to juveniles that are not part of "a proceeding" over which the juvenile court has exclusive jurisdiction." 33 V.S.A. § 633(a) In re Susan Kirkpatrick, 147 Vt. 637, 638 (1987).

The statute at 33 V.S.A. § 4916(h) cited above specifically states that the human services board, not the juvenile court, must make decisions on requests to expunge findings from the registry. It must be concluded that the

juvenile court could not, and indeed did not, consider and decide the petitioner's request for expungement from the registry. Therefore, the petitioner's claim for expungement is properly before the board at this point, as his claim for expungement from the registry could not have been raised before the juvenile court. Therefore, the decision of the Family Court is not res judicata as to a decision before the Board on this separate claim. see American Trucking Assoc., Inc. v. Conway 152 Vt. 363 (1989).

Although the petitioner's claim is properly before the Board, he is clearly trying to relitigate issues--whether the petitioner performed certain acts--which have already been decided by the juvenile court. The Supreme Court has made it clear that a forum is collaterally estopped from trying issues again which have already been decided provided the following criteria are met:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgement on the merits;
- (3) the issue is the same as the one raised in the later action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc. 155 Vt. 259, 265 (1990)

Applying these criteria to the present case, it must be

concluded that the petitioner was the same party against whom the prior action was taken, that there was a final judgment on the merits, and that the same facts were raised with regard to the juvenile court and human services board matters. It must also be concluded that the petitioner had a full and fair opportunity to proceed in juvenile court on these issues. In fact, the petitioner clearly had procedural safeguards in Family Court which are not afforded to him in an administrative proceeding, not to mention the assistance of assigned counsel, which make for a high degree of accuracy and reliability in those findings. There is absolutely no rationale for requiring the Department to retry those facts in this forum. The petitioner has put forth no grounds upon which it could be found that using the court's findings in the former proceeding would be unfair to him now. Therefore, it must be found that the human services board is collaterally estopped from retrying those issues again. The petitioner is similarly collaterally estopped from trying to attack the reliability of those issues in this forum. If there is any relief available to him on that issue, it is in the family court, not the human services board.¹

¹ The petitioner's claim that a judgment made on the basis of a stipulation rather than a hearing should not be given the same weight, has been rejected by the Supreme Court which has held that a final judgment entered by consent and stipulation is just as conclusive as one entered after a hearing on the merits. Town of Putney v. Town of Brookline, 126 Vt. 194 (1967)

As a practical matter, a finding by a juvenile court that a child is in need of supervision will probably, in most cases, result in a finding that the child was abused under the reporting system. However, because the definitions are not identical, a finding by the Family Court that a child is "in need of supervision" is not binding on the board with regard to a decision under the expungement statute.² A person requesting an expungement has a right to have the behaviors found by the Family Court compared to the standards and definitions in the abuse reporting statute at 33 V.S.A. § 4912, cited above.

The juvenile court found, among other facts, that the petitioner inflicted bruises and welts on J. and G. by hitting them with a belt and other objects. The Board has previously interpreted the infliction of bruises and sores from spankings and beatings as meeting the definition of temporary

² The juvenile proceedings statute does not specifically define "abuse" as does the abuse reporting statute. The juvenile statute offers the following definition:

(12) "child in need of care or supervision" means a child who:

- (A) Has been abandoned or abused by his parents, guardian or other custodian; or
- (B) Is without proper parental care or subsistence, education, medical, or other care necessary for his well-being; or
- (C) Is without or beyond the control of his parents, guardian or other custodian, or being subject to compulsory school attendance, is habitually and without justification truant from school.

disfigurement in the statute at 33 V.S.A. § 4912(6) Fair Hearing No. 10,419. Forcing children to watch sexual acts between adults also fits the definition of lewd and lascivious behavior set forth at 33 V.S.A. § 4912(8). A reasonable person could easily conclude that the foregoing acts alone constituted physical and sexual abuse under the statute.

It must be concluded that the Department has met its burden of proving that it had accurate and reliable information (through the Family Court's findings) which would lead a reasonable person to believe that J. and G. had been physically and sexually abused. Therefore, the Department's decision must be upheld and the petitioner's request for expungement denied. 3 V.S.A. § 3091(d).

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