

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,432

)

Appeal of)

)

INTRODUCTION

The petitioner seeks an expungement of a finding made by the Department of Social and Rehabilitation Services (SRS) that he sexually abused his fifteen-year-old daughter. The issue is whether the Board should be bound by findings of the Family Court of Vermont in a CHINS petition regarding the same juvenile.

FINDINGS OF FACT

1. On January 25, 1995, the State's Attorney, at the request of SRS and based on an affidavit of an SRS social worker, brought a petition in the Family Court of Vermont, Windham County, alleging that the petitioner's fifteen year old daughter was a child in need of care or supervision because she had been sexually abused by her father. A copy of that petition and affidavit are attached hereto and incorporated by reference as Exhibit No. One.
2. On January 26, 1995, SRS mailed the petitioner a letter saying that a report of child abuse/neglect had been substantiated against him involving his fifteen year old daughter. On February 15, 1995, the petitioner requested an expungement of that finding through his attorney.
3. On March 6, 1995, the petitioner received a criminal citation regarding the same matter which at least as of August of 1995 was still pending in criminal court.
4. Subsequent to his appeal to the Board requesting expungement of the substantiation, the petitioner made motions for documents in the possession of SRS, requested an open session and issued five subpoenas to potential witnesses including the petitioner's two daughters, one of whom was the alleged victim in the substantiation.
5. After some wrangling by the parties over the production of documents⁽¹⁾, SRS informed the hearing officer on November 22, 1995, that the Vermont Family Court had held a hearing on the merits on August 24, 1995, had issued written findings of fact and had concluded that the petitioner had abused his daughter as alleged in SRS' CHINS petition. Based on the Court's findings, SRS asked to continue the

hearing then scheduled for December 5, 1995, until the Vermont Supreme Court could decide the appeal of this decision.

6. The petitioner responded that he was unaware that the findings in the Vermont Family Court could be used against him in the Board hearing and asked for documents which would apprise him of the basis of SRS' case against him in the substantiation hearing. SRS responded that the substantiation of abuse in the registry was based on the same grounds alleged in the CHINS petition.

7. On November 30, 1995, SRS provided the hearing officer and the petitioner with the findings and order and a partial transcript containing the detailed findings of the Family Court with regard to the actions of the petitioner which it sought to be adopted by the Board. Copies of those documents are attached hereto and incorporated by reference as Exhibit Nos. Two and Three. The petitioner objected to the adoption of those findings in a letter dated December 1, 1995. That letter is attached hereto as Exhibit No. Four and is incorporated herein by reference.

8. On December 1, 1995, SRS made motions to quash the subpoenas issued to the petitioner's daughters, including the alleged victim, on the grounds that it would be a hardship to them and because the Board was collaterally estopped from making new findings on the matters already decided by the Family Court. Those motions are attached hereto as Exhibit Nos. Five and Six and are incorporated herein by reference.

9. The hearing on the merits was continued and the petitioner and SRS were invited to argue the above motion by the hearing officer at a further hearing limited to the applicability of the preclusion issue. However, both parties declined to take advantage of that opportunity and relied instead on written memoranda submitted on June 6 and June 7, 1996. Based on those written arguments, the hearing officer notified the parties that she would recommend to the Board that the findings of the Vermont Family Court be adopted as the findings of the Board with regard to the petitioner's actions with his daughter. The parties were given the opportunity for a further hearing to argue whether those findings would justify the Department's conclusion that the child had been abused as that term is defined in the regulations governing the expungement process. The parties waived the hearing and agreed that the record would consist of the facts set out in their memoranda, the findings of the Vermont Family Court, and the partial transcript of the August 24, 1995 hearing.

10. Based on the information presented by the parties it cannot be found that the petitioner was surprised or was genuinely unaware of the grounds for the finding by SRS that his name should be placed in the administrative abuse registry. The substantiation letter was mailed one day after the CHINS petition was filed. The CHINS petition contained considerable detail about the facts relied upon by SRS to bring that petition. There was nothing in the discovery requests made by the petitioner's attorney during the first nine months of the HSB appeal which indicated that he was unaware of the allegations which formed the basis for the administrative substantiation. When he finally indicated that he wanted a statement of the grounds in November of 1995, the Department informed him within two days that they were indeed the same facts that were relied upon in the CHINS petition. There is nothing from the record from which it can reasonably be concluded that the petitioner at any time was actually unaware of the facts which were relied on by SRS as the basis for the substantiation.

11. The petitioner was a party to the CHINS hearing and was represented by an attorney, the same one who represents him herein. He contested the facts alleged as the basis for that petition, which are the same as the facts supporting the substantiation finding, although he did not call any witnesses on his

behalf. He had the benefit of discovery before that hearing and cross-examined the state's witnesses. He knowingly waived participation in the disposition phase of the process because he did not want to be questioned by SRS or state personnel. He appealed the decision issued against him in August of 1995, on the basis of the Court's jurisdiction, which decision was affirmed by the Vermont Supreme Court on April 4, 1996. A copy of that decision is attached hereto as Exhibit No. Seven and incorporated herein by reference. It must be concluded from the above that the petitioner was a party to and had a full and fair opportunity to contest the facts found by the Court in the CHINS petition; that the Court proceeding also directly involved the legal issue of whether the petitioner had abused his child; and, that a final judgment on the merits has been issued by the Family Court, which was appealed and affirmed by the Supreme Court.

12. On August 24, 1995, the Family Court of Vermont concluded that the facts alleged in the CHINS petition filed on January 24, 1995, had been established "beyond a reasonable doubt" and that the child had been abused by her father, the petitioner. She was continued in the custody of SRS pending a hearing on the disposition. Specifically the Court concluded that:

A. There was no reasonable doubt that the fifteen year old daughter had been abused by the father even though the standard to be proved was preponderance of the evidence.

B. There was no fabrication as to the events that took place in the petitioner's home in November of 1994, December of 1994 and January of 1995.

C. That sometime around Thanksgiving of 1994, the

father [petitioner] "fondled her [the fifteen year old daughter] by putting his hand under her shirt and touching her breast."

D. That in December of 1994, the father [petitioner] "entered the bathroom while she [the daughter] was taking a shower and again fondled her breast and touched her vagina."

E. That in January 1995, the father [petitioner] "entered her [the daughter's] bedroom and engaged her in a conversation clearly indicating that he expected her to consent to engaging in sexual activity with him, and indicating that he had--that he had knowledge of her body, that he expected that she was sexually active and had been engaging in some form of sexual activity just before he came in, and that he expected that he would be allowed to participate in it."

ORDER

The Department's request to adopt the findings of the family court is granted. The Department's decision finding that the petitioner abused his fifteen year old daughter, M.H., is affirmed and the request to expunge the registry record is denied.

REASONS

The petitioner had 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 health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

...

(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 parties in this matter do not argue that the findings made by the Vermont Family Court fall outside of the definition of "sexual abuse" as that term is used in the above statute. Indeed, the facts found by that Court clearly do describe acts which involve sexual molestation and exploitation of a child. The sole issue for purposes of this appeal is whether the Department's motion that the Board adopt the findings of the Vermont Family Court under the doctrine of collateral estoppel should be granted.

The Board has adopted the doctrine of collateral estoppel in prior proceedings and has relied on the test established in Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990), to determine whether it is precluded by the findings in a CHINS proceeding from making its own findings in the context of an expungement hearing. See Fair Hearings No. 11,444 and 12,309. The criteria set forth by that Court are as follows:

- (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 judgment 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 action is fair.

Supra at 265.

In this matter, the petitioner was a party in the earlier CHINS proceeding. The matter was resolved by a final judgment on the merits in the Family Court and was affirmed on appeal by the Vermont Supreme Court. The issue, whether facts exist which constitute sexual abuse by the petitioner of his fifteen year old daughter, is the same in both actions. The petitioner argues, however, that he did not have a full and fair opportunity to litigate the issue in the CHINS proceeding and that preclusion is unfair in his case.

The gravamen of the petitioner's argument is twofold: that he was unable to fully litigate the issue of his abuse in the CHINS petition because he did not want to prematurely disclose his defense in the pending criminal action and that he had no incentive to litigate because he did not want custody of his daughter returned to him after she had "lied" about his actions in court and he did not wish to force her to live in his household against her will.

The facts in this matter show, however, that the petitioner did contest the hearing. If he had not wished to contest the matter he could have so informed the Court.⁽²⁾ Instead, his lawyer defended him against the allegations although it appears that he did not call the petitioner or any of his witnesses in rebuttal at the CHINS hearing. The petitioner's incentive to litigate the matter was strong not only because a finding might be entered that he abused his child but also because the CHINS statute allows both custody and the residual rights and responsibilities regarding an abused child to be transferred from the parent to SRS, a foster home or a child placing agency. 33 V.S.A. § 5528(a)(3). Furthermore, the process involved in the CHINS petition affords the petitioner an attorney, formal discovery and a full hearing on the merits under the Rules of Evidence, all safeguards which are not available in the administrative forum. It must be concluded that the petitioner had a full and fair opportunity to litigate this matter in the Family Court forum. The fact that he may have chosen not to fully litigate the matter for his own strategic purposes does not mean that he had no opportunity to do so.

The petitioner also argues that preclusion is unfair because he did not know the facts found by the CHINS court could be used against him in the HSB proceeding. If that is so, he was poorly advised by his attorney who could have discovered that by reference to the decisions of the Board in prior matters. In any event, he does not say what he might have done differently in the CHINS proceeding, where he had much more at stake, had he known that the facts found therein would be applied to him in the administrative HSB proceedings. In that event it is difficult to conclude that applying the facts found therein would be unfair to him in any way.⁽³⁾

###

1. On November 8, 1995, with a hearing scheduled for December 5, 1995, the petitioner informed the hearing officer that he had requested copies of documents from the Department which he had not yet received and which he felt he had a right to receive under Rule 4, even if they were duplicates of documents he had received in connection with discovery in the CHINS petition and the criminal matter. In response to this letter, the hearing officer reminded the parties of their obligations under Rule 11 and

the sanctions for failure to comply. The Department replied that it had already provided all the relevant documents in the CHINS and criminal proceedings and knew of no requirement to duplicate those documents. In response to a further admonishment by the hearing officer, the Department agreed on November 29, 1995 to provide documents it would rely on.

2. The petitioner relies on State of Vermont v. Begins, 147 Vt. 295 (1986) to argue that the process was unfair to him. In that case the Court agreed that the petitioner's constitutional rights were implicated when she was required first to go through a non-criminal parole revocation hearing which formed the same basis for a subsequent criminal hearing. The Court ruled that the necessity of proceeding first with the revocation hearing would have to be shown and that the petitioner would have to be advised that if he decided to testify at the first hearing that it could not be admissible against him in the subsequent proceeding.

While this may very well have been an argument that could have been raised by the petitioner at the CHINS proceeding and in his subsequent appeal of that proceeding, there is no evidence that he raised that issue at all below and it certainly was not addressed by the Supreme Court upon appeal. The Board cannot now be asked to collaterally attack the fairness of that CHINS proceeding against the petitioner who was represented by counsel and who presumably knew of the existence of this 1986 Court ruling at the time of the CHINS proceeding.

3. The petitioner relies on In re Estate of Perley Leno, 139 Vt. 554 to argue that mistake is a ground upon which to prevent the doctrine of collateral estoppel applying for purposes of issue preclusion. The petitioner is correct that the Court ruled that facts found in a divorce proceeding which the petitioner reasonably believed she did not have to appear in and contest due to the existence of a prior divorce decree issued by another court could not fairly be used in a subsequent probate action. However, he does not argue convincingly that he was similarly mistaken as to the need to appear in and contest the CHINS petition. In fact, as stated above, the petitioner did appear and did defend in the CHINS action.