

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 15,325
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Appeal of)
)

INTRODUCTION

The petitioners (hereinafter sometimes referred to as Mr. and Mrs. G.) appeal the decision by the Department of Aging and Disabilities (DAD) "substantiating" a report that the petitioners abused T.F., a disabled adult who was in their care.

FINDINGS OF FACT

1. T.F., the alleged victim in these proceedings, is a mentally retarded adult who has cerebral palsy and is blind. He is confined to a wheelchair and also has paralysis of the diaphragm, which makes it difficult for him to swallow.

2. The petitioners were T.F.'s adult protective services home providers from August, 1995, until March, 1997.

3. In April, 1997, DAD received a report from T.F.'s new home provider that T.F. had reported to her that the petitioners had mistreated him while he was in their care. A DAD adult protective services caseworker investigated the allegations, including interviews with T.F., T.F.'s guardian, T.F.'s new care provider, and the petitioners. Based on this investigation, DAD concluded that Mrs. G. had

abused T.F. by calling him derogatory names and that Mr. G. had abused him by hitting him on the arm and pushing him underwater in a swimming pool.

4. T.F., himself, testified at the hearing in this matter, held on October 20, 1998. By agreement of the parties, his testimony was taken in a room with a one-way mirror, out of the presence of the petitioners. While he appeared to understand the questions posed to him and responded appropriately, his answers were cursory and required prompting.

5. T.F. testified that when he was in the petitioners' care Mrs. G. "called me mean and selfish and I'm not". He also stated that Mrs. G. called him a "bastard", and that this made him feel "awful".

6. T.F. also testified that he had been pushed underwater in the swimming pool at the petitioners' house and had ended up in the hospital; but he stated that he did not know who pushed him under.

7. T.F. also stated, and demonstrated, that Mr. G. had "hit" his forearm "after drinking" and that this had occurred "many times".

8. T.F.'s present caregiver testified that T.F. was very nervous about eating in front of others when he first came to her home, and that he told her Mr. G. would drink beer and hit him on the arm if he made a mess while eating, and that Mrs. G. would call him a bastard if he wet his

pants. The caregiver also related an incident when she and T.F. ran into Mrs. G. at the Special Olympics and Mrs. G. told her that sometimes T.F. could be a "little bastard".

9. T.F.'s guardian testified that when T.F. was in the petitioners' home there developed some serious "issues" surrounding their care of T.F. The guardian felt that Mrs. G. said "degrading" things to T.F., like calling him "lazy". He also felt the petitioners "blamed" T.F. for things that he felt were not in T.F.'s control, and that they were "indiscreet" when discussing their problems with T.F. in front of others.

10. The guardian also testified that the petitioners eventually resigned as T.F.'s caregivers, but that T.F. had never complained of his care or treatment when he lived with the petitioners. Both T.F. and his guardian testified that T.F. was upset when the petitioners resigned as his caregivers and he was forced to move to another home.

11. Mrs. G. testified extensively in her own behalf. She lives with her husband and their two teenage daughters.

She stated that the household treated T.F. "like one of the family", and they had included T.F. in virtually all their family activities.

12. Mrs. G. stated that for more than a year after T.F. came to live with them there were few problems. However, in November, 1996, "out of the blue" T.F. began deliberately smearing his feces in the bathroom and

escalated a behavior of overstuffing his mouth leading him to choke whenever he ate his meals with the family.

13. Mrs. G. reported these problems to T.F.'s caseworker at DAD and was referred by the caseworker to a psychologist for counseling.

14. Mrs. G. testified that she and T.F. met several times with the psychologist, and that the psychologist would then talk to T.F. alone. She stated that through counseling they developed a "plan" whereby she would attempt to make T.F. aware of his actions by trying to relate it to situations T.F. may have seen on television.

15. Mrs. G. also testified that an "eating plan" was developed through consultations with T.F.'s treatment team whereby when T.F. began to overstuff himself Mr. or Mrs. G. would place their hand on T.F.'s forearm to prevent him from putting more food in his mouth before he had swallowed the last mouthful.

16. Mrs. G. stated that T.F. became very angry and frustrated by this method, and that the team eventually decided that he should be allowed to eat by himself in front of the TV, which is what he preferred.

17. Mrs. G. admitted that she became increasingly distraught and frustrated by T.F.'s behaviors, which were physically draining for her and emotionally difficult for her family. Eventually, she thought it best for everyone if she resigned as T.F.'s caregiver.

18. Mrs. G. explained T.F.'s problems as jealous attempts by T.F. to divert her attention toward him and away from the rest of her family. From her testimony and demeanor it was apparent to the hearing officer that Mrs. G. had affection for T.F. and was greatly upset by his behavior. Mrs. G. adamantly denies ever calling T.F. names.

19. The hearing officer finds Mrs. G.'s testimony to be credible. From her demeanor, and from the testimony of T.F.'s guardian, it appears that Mrs. G. may have acted inappropriately with T.F. in attempting to "reason" with him about his behavior, and to describe those behaviors to him in negative terms. Mrs. G. admits that she would tell T.F. that she thought he had two personalities--like Jekyll and Hyde (a movie T.F. had seen on TV). It appears that T.F. understood these conversations to mean that Mrs. G. was calling him names. It is unlikely that T.F. is able to distinguish a discussion in which his behaviors are described in negative terms as opposed to ad hominem name-calling.

20. Based on the testimony of T.F.'s guardian and Mrs. G. it is also found that Mrs. G. probably gave T.F. too much credit for his ability to understand and control his behavior. Although her discussions with T.F. may have been inappropriate, it is concluded that they were based on Mrs. G.'s inability, despite her experience, to understand the nature of T.F.'s disability rather than any "abuse" of T.F.

on her part.

21. Similarly, it is also found that T.F.'s perception that Mr. G. was "hitting" him on the arm was caused by T.F.'s inability to understand and his frustration with corrective discipline. From T.F.'s testimony and his demonstration of what Mr. G. did to him, it cannot be concluded that Mr. G. "abused" T.F. by attempting to restrain his arm during feeding. It appears that T.F. misunderstood these actions and may well have thought that Mr. G. was "hitting" him (and there is some corroboration from the fact that Mr. G. may drink to excess); but there is no credible evidence that Mr. G. either inflicted or intended to inflict any pain, harm, or suffering on T.F.

22. Although Mrs. G. admits to a frightening incident in which T.F. appeared to have a "seizure" in the swimming pool, and the rescue squad had to be called, there is no credible evidence that Mr. G., or anyone else, ever pushed T.F.'s head under the water in the pool.

ORDER

The Department's decision is reversed and the report found to be not substantiated.

REASONS

The Commissioner of the Department of Aging and Disabilities is required by statute to investigate reports regarding the abuse of elderly and disabled persons and to keep those reports which are substantiated in a registry under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911. Persons who are found to have committed abuse may apply to the Human Services Board for relief on the grounds that the report is "unsubstantiated". 33 V.S.A. § 6906(d).

The statute which protects elderly and disabled adults, 33 V.S.A. § 6902(1), defines "abuse" as follows:

(A) Any treatment of an elderly or disabled adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to an elderly or disabled adult;

(C) Unnecessary confinement or unnecessary restraint of an elderly or disabled adult;

(D) Any sexual activity with an elderly or disabled adult by a caregiver; either, while providing a service for which he or she receives financial compensation, or at a caregiving facility or program;

(E) Any pattern of malicious behavior which results in impaired emotional well-being of an elderly or disabled adult.

As found above, the petitioners' conduct in this case, though perhaps inappropriate and misguided, was not malicious and was not intended to cause T.F. any pain or

suffering. Although he misunderstood them, there is also no evidence that T.F. was actually harmed by any of these incidents. Thus, it must be concluded that none of the petitioners' actions in this case constituted "abuse" of a disabled person within the meaning of the statute.

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