

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,698
)
Appeal of)
)

INTRODUCTION

The petitioner appeals a finding by the Department of Aging and Disabilities (DAD) that he abused a disabled adult.

FINDINGS OF FACT

1. The petitioner was the caretaker of F.C., his sixty-one year old aunt-by-marriage, in April of 2003. The petitioner's wife had guardianship of her aunt who, in addition to other health problems (mild mental retardation and cystic fibrosis), suffered from diabetes which was not well controlled.¹ F.C. spent some thirty-six hours per week at an adult day care center.

2. On April 14, 2003, the aunt appeared at the day care center with bruises on the back side of her right hand and wrist about one to one and a half inches in diameter. She told the nurse at the day care that she got the bruises when her nephew grabbed a box of sugared cereal from her that she

¹ Within a few weeks of this incident, F.C. was hospitalized for a condition related to her out-of-control diabetes.

was not supposed to be eating. This was the first time the day care had received a complaint of possible abuse from F.C. Because the nurse at the center is a mandatory reporter she called DAD to report the bruises.

3. An investigator from DAD talked with F.C., the staff at the adult day care and the petitioner. The investigator established that F.C.'s diabetes condition was out of control and that the petitioner had locked away sugared products in his kitchen to prevent her from getting at it. On the morning at issue, the petitioner came upon his aunt clutching a box of sugared cereal which she was rapidly consuming. The petitioner, concerned for her health, asked her to give him the box. When she refused he tried to get the box away from her by pulling it out of her hands but F.C. managed to hang onto the inner bag lining the box and continued to stuff the food into her mouth. At that point, the petitioner pried her fingers loose from the bag. In the course of this incident the back of the petitioner's right hand became bruised either because it hit the table during the tug of war or was pressed during the prying process.

4. Based on this information, DAD determined to substantiate abuse against the petitioner saying that he acted

with a "reckless disregard" that a "physical altercation" was likely to cause harm to this disabled adult.

5. The petitioner does not disagree with the findings of DAD about the facts although he feels that the bruises were more likely caused when she hit her right hand on the table than when he was prying the bag out of her hands. However, he disagrees with DAD's conclusion that he acted with "reckless disregard" of the harm he might cause to his aunt.

ORDER

The decision of DAD is reversed.

REASONS

The Department of Aging and Disabilities is charged by statute to protect disabled and elderly adults from abuse by investigating complaints and placing the names of those found to have abused such adults in a registry. 33 V.S.A. 6901, 6906(a), (b) and (c). Any person who is found by DAD to have abused a vulnerable adult has a right to appeal that decision to the Human Services Board where the burden is upon DAD to show that it had substantial evidence to find that an adult has been abused as that term is defined in the statute. 33 V.S.A. 6906(d).

Following its investigation into this matter, DAD determined that the petitioner had abused the petitioner because he had taken actions on the morning of April 14, 2003 that evidenced a "reckless disregard" for the safety of F.C. DAD relied in its conclusions on the following definition of abuse found in the statute:

(1) "Abuse" means:

. . .

(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.

33 V.S.A. § 6902

DAD concedes that the petitioner did not intend to hurt his aunt but that his wresting the box away from her was a reckless act that led to her being unnecessarily harmed. Even though DAD does not dispute that the petitioner's motives in snatching the bag were to stop her from eating a substance (sugar) which could cause her harm, it argues that his methods were "inappropriate" and "harsh" and amount to "reckless disregard" for the harm (the bruises) that came to her.

The petitioner argues that under Vermont law, "reckless disregard" is something more than inappropriate or even harsh treatment. That term has not been defined in the context of

this abuse statute but has been defined in the Model Penal Code adopted by Vermont as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.

Cited in State v. Brooks 163 Vt. 245, 251 (1995)

Applying that definition to this case, the petitioner would be acting with "reckless disregard" if the action he took of wresting the cereal box away from his aunt was a gross deviation from the normal conduct one would expect in the circumstances and was made with a conscious disregard of the risk of serious harm that likely could follow that action.

It cannot be said that the petitioner's action of prying the box out of his aunt's hands was a gross deviation from conduct which could be expected in this situation. When someone is holding something dangerous in her hands, it would not be out of the ordinary for the caretaker of that person to try to take it out of her hands by using some force. If the petitioner had beaten his aunt, or threatened her with a lethal weapon, it would be easy to find that his conduct was a gross deviation from that which could be expected in this

situation. His wresting the dangerous object from her does not fit into the category of a gross deviation from normal conduct. Neither can it be said that the petitioner was consciously disregarding a serious risk when he pried the box from her hands. It would not occur to most individuals that such an act could put a person at serious risk of harm. Although the petitioner did receive some minor bruises to the back of her hands in the course of this activity and such an injury could be anticipated, the risk of that kind of injury cannot fairly be called "substantial" or "unjustifiable."

At best, the petitioner's conduct was a minor and justified use of force to prevent a greater harm. At worst, it was an inappropriate way to deal with a situation which could have been handled in some better way without the use of any force. Even if the latter were the case, the Board has held repeatedly that an "inappropriate" choice for dealing with an elderly or mentally ill adult does not rise to the definition of "abuse" found in the statute. See Fair Hearing Nos. 15,325, 16,822 and 17,203. DAD has failed to meet its burden of showing that the petitioner acted with reckless disregard with regard to his aunt and thus the petitioner's request to reverse the substantiation is granted.

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