

(h) A person may, at any time, apply to the human service 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 statute 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.

. . .

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

33 V.S.A. § 4912

The petitioner in this matter does not specifically argue that the findings made by the Vermont Family Court fall outside of the definition of "risk of harm" as that term is

used in the above statute. Even if he did, there is no question that the facts found by that Court (that on March 30, 2003 the petitioner physically assaulted the mother of his then-six-month-old child, knocking her down while she was holding the child) clearly describe an act that placed the child at grave risk of physical harm, as defined by the above statute. The preliminary 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 Family Court proceeding from making its own findings in the context of an expungement hearing. See Fair Hearings No. 11,444, 12,309, 13,432, and 13,517. 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.

Id at 265.

In this matter, the petitioner was a party in the earlier Family Court proceeding. The matter was resolved by a final judgment on the merits in the Family Court and became final when the Vermont Supreme Court dismissed the petitioner's appeal. The issue, whether facts exist which constitute the petitioner placing his son at risk of harm, was clearly resolved by the Family Court, which specifically found that the petitioner assaulted his wife while she was holding the child, and concluded that the assault created a "dangerous situation" for the child. The petitioner continues to contest these findings, but it is clear that he had a full and fair opportunity to litigate this issue in the custody proceeding in Family Court.

The primary basis of the petitioner's appeal appears to be his contention (essentially undisputed) that the Family

Court also made several findings that reflect favorably on his parenting and negatively on the child's mother in that regard, and that he should be allowed to present additional evidence on those points. It must be concluded, however, that even if this evidence is found in the petitioner's favor, it would not affect the finding as to the specific incident that occurred on March 30, 2003, which is the sole basis of the Department's substantiation of child abuse.

The petitioner also might argue that preclusion is unfair because he did not know that the facts found by the Family Court could be used against him in a Department investigation of child abuse. If that is so, he was poorly advised by his attorney, who could have discovered that by reference to existing caselaw and the decisions of the Board in prior fair hearings (see *supra*). In any event, the petitioner does not say what he could have done differently in the Family Court proceeding, where he had much more at stake, had he known that the facts found therein would be applied to him in an administrative child abuse proceeding. Therefore, it cannot be concluded that applying the facts found by the Family Court is unreasonable or unfair.

Inasmuch as the Trepanier test (*supra*) is clearly met, the Department's request for a preliminary ruling in its favor must be granted.

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