

DISCUSSION

The petitioner has made an application for an order to expunge a substantiation of neglect 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 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 "harm" or "risk of harm" as that term is used in the above statute.¹ Rather, his appeal in this matter is an attempt to relitigate those findings. 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 consistently 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

¹ The decision of the Windsor County Family Court (Docket No. 122-7-01/18-1-02 Wrjv, September 30, 2003) includes forty pages of findings regarding the petitioner's and his wife's neglect of their children. Regarding the child in question in this matter, who was an infant at that time, these findings include the petitioner's repeated failure to feed the child properly (#32, 36, 71, 73 & 81), failure to seek timely medical attention for the child (#44 & 45), and allowing the child to play with dangerous objects (#74). In affirming that decision the Supreme Court noted that the evidence was "overwhelming that termination of parental rights was in the children's best interests". (Docket No. 2003-462, Mar. 24, 2004.)

findings in the context of an expungement hearing. See Fair Hearings No. 11,444, 12,309, 13,432, 13,517, and 19,147. 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 affirmed Family Court's decision. At all times, the petitioner was represented by counsel. The issue, whether facts exist which constitute the petitioner placing his child at risk of harm, was clearly resolved by the Family Court. 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 CHINS proceeding in Family Court. 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.

#