

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. V-02/09-96  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Department, to substantiate risk of harm of a child. The issue is whether the Department has shown by a preponderance of evidence that the petitioner placed a child at risk of harm within the meaning of the pertinent statutes.

A series of telephone status conferences were held because the petitioner had difficulty locating a witness who lives outside the United States. The hearing commenced on August 6, 2009. There were difficulties contacting C.M., the witness who lives outside the country. The hearing concluded on October 13, 2009 with the testimony of C.M.

The Department presented testimony from S.Q. who investigated the case on behalf of the Department. The petitioner testified and presented testimony from C.M. The decision is based on the evidence admitted at hearing.

FINDINGS OF FACT

1. The petitioner is the father of two children. This case involves his younger son, P.J., who was three years old at the time of the incident during August 2008.

2. S.Q., was an investigator with the Department for approximately one year. S.Q. had been on the job as an investigator for approximately three months when she was assigned petitioner's case during September 2008.

3. The case was reported to the Department by petitioner's ex-mother-in-law during a time when the petitioner was involved in divorce and custody litigation regarding P.J. The ex-mother-in-law did not witness the events in question.

4. Neither petitioner nor S.Q. were able at hearing to give a specific date for the incident beyond August 2008.

5. C.M. worked for a local resort during the summer of 2008. C.M. was an "international" worker as a housekeeper supervisor. That summer, C.M. was working her third summer at the resort.

She met petitioner through her work; petitioner worked in maintenance for the resort. Petitioner and C.M. became friends and have remained in contact through e-mail and text messaging.

6. C.M. pinpointed the date of the incident as August 15, 2008, the date she gave a party for her name day<sup>1</sup>. C.M. resided at a motel<sup>2</sup> that provided housing to international workers; she held her party there.

7. The motel is located off the Notch Road. There is a parking lot in front and a pool in back. There is a large common area in the middle with motel rooms extending in two wings. The common room is two stories with a game room in the lower level.

8. As part of her investigation, S.Q. interviewed petitioner and went to the motel to check out the layout. S.Q. informed petitioner that there was an allegation that he left P.J. unsupervised while he attended a party. S.Q. was unable to talk to C.M. who had returned to her home country. S.Q. tried to get C.M.'s contact information from the human resources department of C.M.'s employer to no avail. S.Q. testified that she asked petitioner for contact information for C.M. but he said he did not have this information.

9. S.Q. testified that petitioner told her he had been invited to a party and that he arrived around 8:00 p.m. He was driving his truck and P.J. was asleep in his car seat.

---

<sup>1</sup> C.M. is Greek Orthodox. She explained that celebrating her name day is a religious custom.

<sup>2</sup> The Highlander is located in Jeffersonville off the Notch Road.

Petitioner told S.Q. that he looked in at P.J. every five to ten minutes. S.Q. was told by petitioner that he took P.J. to C.M.'s room around 9:30 p.m. and played a video for P.J. to fall asleep. Petitioner told S.Q. that no one else was in C.M.'s room when he took P.J. there. Petitioner told S.Q. that he was leaving the party around 12:30 p.m. but that he decided to stay and sleep in the truck because he had too much to drink. He did not have P.J. with him. Petitioner told S.Q. that he awoke around 6:00 a.m. and found P.J. in the common room. S.Q. testified that petitioner told her he did not know how P.J. got from C.M.'s room to the common room. Petitioner admitted to S.Q. that he made a bad call that evening.

Upon cross-examination, S.Q. testified that she did not ask petitioner if anyone else was watching P.J. that evening, but she added that she believed petitioner would have volunteered that information if it were the case. S.Q. did not ask for the names of others attending the party.

10. S.Q. testified that she recommended substantiation to her supervisor because P.J. was left unsupervised in both the truck and the motel and that P.J. was at risk of harm while unsupervised.

11. Petitioner testified that he was invited to a party by C.M. He explained that C.M. had met P.J. about twelve times prior to the party. Petitioner testified that other children were at the party. He stated that he came to the party with P.J. and with his friend B.D.

Petitioner's parents were not available to watch P.J. that evening and petitioner did not have another babysitter to watch P.J. that evening. Under the court order<sup>3</sup> at the time, petitioner had P.J. with him starting the night before the party. Petitioner testified that he liked to spend time with P.J. on those occasions P.J. was with him.

12. Petitioner testified that P.J. was asleep in his car seat when they arrived at the party. He testified that P.J. had been asleep for twenty minutes. Petitioner left P.J. asleep in his SUV and went into the party. Petitioner said he parked one car space down from the common room. Petitioner testified that he checked on P.J. every five to ten minutes. Petitioner testified that C.M. and B.D. also checked on P.J. every now and then while petitioner was in the common room. Petitioner testified that P.J. was asleep in the SUV for forty-five minutes. B.D. informed petitioner

---

<sup>3</sup> The subsequent divorce decree granted petitioner and his ex-wife equal parental rights and responsibilities for P.J.

that P.J. was awake. Petitioner brought P.J. into the common room for about thirty minutes to hear the music and play. Then, petitioner took P.J. to C.M.'s room, and put on a video for P.J. Petitioner testified that he checked on P.J. every ten to fifteen minutes. C.M.'s room was two rooms down from the common room. He testified that P.J. was in C.M.'s room approximately two hours.

Petitioner testified that he decided to leave the party at approximately 11:30 p.m. He was leaving with B.D. and P.J. Petitioner testified that he decided not to drive because he had been drinking. Petitioner testified that C.M. came to the vehicle and took P.J. into the common room for the night where she watched P.J. B.D. went with C.M. and P.J.; petitioner slept in his vehicle. Petitioner testified that B.D. woke him around 6:00 a.m. Petitioner went into the common room for P.J.

On cross-examination, petitioner admitted that he did not tell S.Q. that his friends checked on P.J., that C.M. brought P.J. into the common room at the end of the party or other details. Petitioner testified that he did not tell S.Q. because she did not specifically ask questions such as whether anyone else watched P.J. Petitioner answered other questions in the same way that he did not volunteer

information to S.Q. but only answered questions as asked. Petitioner said that he told S.Q. he made a bad call because he could have decided not to stay at the party and he had to deal with this case.

13. C.M. is a Romanian. She stated that she is a masters level college student at a Romanian University. During the years 2006-2008, she worked for a local resort during the summer months. In 2008, she worked for the resort until August 17, 2008. She lived at a local motel that provided housing to international workers until August 17, 2008. She remained in the area for the next four to six weeks.

14. C.M. testified by telephone. She testified that she hosted a party on August 15, 2008 to celebrate her name day. The party began at 6:00 p.m. and was attended by friends including children. She testified that she did not have anything to drink because she felt responsible for her guests.

C.M. testified that petitioner arrived at about 9:00 p.m., after it was dark outside. Petitioner drove to the party with his son P.J. and with B.D. At that time, some of her guests were outside near the pool area and the others were in the game room of the common area. C.M. testified

that petitioner and B.D. came in to let her know they were there. Petitioner told her that P.J. was asleep in his vehicle. According to C.M., P.J. was asleep, lying down on the seat and covered by a blanket.

C.M. testified that she, petitioner, and B.D. took turns checking on P.J. every five to seven minutes. She is not sure who found P.J. awake and crying in the truck. P.J. was brought into the party where C.M. danced with him while holding him.

C.M. testified that P.J. was tired because the time was late for a child of his age and that she took P.J. to her room to sleep. The petitioner was with her and the petitioner stayed with P.J. until P.J. fell asleep. P.J. was in her room about 1.5 to 2 hours. During that time, they checked on P.J. every five to ten minutes.

C.M. testified that she had a problem with petitioner leaving because he had been drinking and would not let B.D. drive. She told petitioner her misgivings. P.J. was asleep during these events. Petitioner left with P.J. and B.D. and drove onto the road but turned back into the parking lot. C.M. testified that she told petitioner to sleep in his vehicle and she took P.J. into the common room where she set up P.J. on a couch with a pillow and blanket. C.M. said she

stayed up all night in the common room talking to B.D. while P.J. slept. She stated B.D. went to petitioner between 5:00 to 6:00 a.m. to wake him so they could leave.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a child protection registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915 and 4916.

The Legislature amended the statute to include an administrative review process by which an individual can challenge his/her placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the individual can request a de novo fair hearing before the Human Services Board pursuant to 33 V.S.A. § 4916b and 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the child protection registry that an appeal is pending. 33 V.S.A. § 4916b(a).

"Abuse" and "risk of harm" are defined in 33 V.S.A. § 4912 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.

. . .

(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.

The hearing before the Human Services Board is a de novo hearing. The Department bears the burden of proof by a preponderance of evidence based on the evidence adduced at hearing to show that the petitioner's actions rise to the level of "risk of harm".

The petitioner has raised a number of questions as to the Department's investigation and decision to substantiate petitioner. The petitioner's concerns can be summarized as (1) the inexperience of the Department's investigator, (2) not seeking the identity of others attending the party who could corroborate what occurred, (3) the complaint's timing— one month after the incident, and (4) the complaint being made by a person adverse to petitioner (his ex-mother-in-law) during a period that petitioner was contesting custody of P.J.

The Department has argued that (1) the petitioner has been less than forthcoming during the investigation by not volunteering information that could provide context and corroboration, (2) the petitioner admitted to an error in judgment, and (3) the child was in danger during those periods in which he was not supervised.

Risk of harm is more than poor judgment. The Board uses a gross negligence or reckless behavior standard to determine if an individual's actions meet the criteria for "other than by accidental means" exception found in 33 V.S.A. § 4912(4). The Board references the gross negligence standard used in Rivard v. Roy, 144 Vt. 32 (1963). In Fair Hearing Nos. 17,588 and B-06/08-293, the Board stated the standard requires a showing that:

. . .the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

See also Fair Hearing Nos. Y-01/08-22 and B-08/08-384.

The petitioner was invited to a party. Although his son was asleep in his vehicle, petitioner wanted to stay. In retrospect, the better decision would have been to leave and return to his home with his child. His decision can be

characterized as an error of judgment. Petitioner admitted his error of judgment to the Department's investigator.

The question remains whether the Department has shown that petitioner's subsequent actions can be characterized as gross negligence or reckless behavior that placed petitioner's child at risk of harm within the meaning of the statute. The Department's evidence does not rise to the level necessary to affirm a substantiation.

The Department has an obligation to investigate all reports they receive. However, that obligation is consistent with a careful analysis of the information obtained after a thorough investigation.

Petitioner's case raised several red flags at the inception based on timing of the report and the identity of the reporter.

Petitioner was involved in a contested divorce and custody matter regarding P.J. The end result was shared parental rights and responsibilities. It should be noted that the existence of a parallel Family Court proceeding can go either way given the number of cases in our society involving family violence or drug and alcohol abuse versus the cases in which a report is made to gain an advantage in a Family Court proceeding. But, a more careful analysis would

consider these factors and be able to rebut claims about the reporter's motives.

In addition, seeking corroboration from disinterested witnesses would also dispel arguments. Petitioner was at a party with a number of guests. The investigator testified that petitioner told her he checked on P.J. every five to ten minutes while P.J. was asleep in the vehicle. Talking to the others attending the party could have provided information as to how P.J. was supervised during the party. The Department had an independent obligation to ask for this information.

The investigator made certain assumptions that petitioner would have relayed information without being asked specific questions. The petitioner testified that he answered only what he was asked. The petitioner was concrete in his responses to questions at hearing.

C.M.'s testimony is key; she corroborated that P.J. was supervised while asleep in the vehicle, in her room, and later during the night in the common room. She was detailed about the events and called petitioner to task by telling him not to drive after drinking. Her testimony was credible.

The investigator testified that even if petitioner checked on P.J. every five to ten minutes, P.J. was not supervised in the interim leading to risk of harm during

these periods because he may have woken and wandered off or someone could have taken him from the vehicle. The Board has indicated that speculation is not sufficient to substantiate risk of harm. Fair Hearing No. V-05/09-258.

The Department has not shown by a preponderance of evidence that petitioner failed to exercise a minimal degree of care or showed an indifference of duty towards P.J. The petitioner as well as others periodically checked P.J. and C.M. watched P.J. while he slept in the common room. The supervision may not have been optimal but it does not meet the criteria used by the Board in risk of harm cases.

The Department's decision to substantiate petitioner for risk of harm is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

# # #