

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. Y-01/08-05  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Decision, to substantiate risk of harm to a child. The petitioner has raised two issues for consideration. The first issue is whether the Department is collaterally estopped from pursuing substantiation due to a Family Court dismissal of a Child In Need of Supervision (CHINS) action based on the same material facts. If the Department is not collaterally estopped, the second issue is whether the Department has shown by a preponderance of the evidence that the petitioner placed a child at risk of harm within the meaning of the pertinent statutes. The following decision is based upon the Stipulation of Facts and Stipulated Exhibits submitted by the parties and the written briefs.

FINDINGS OF FACT

1. The petitioner is the mother of D.G. who was born on November 7, 2006. The child's father is B.G.

2. The Department's decision to seek substantiation for risk of harm cannot be understood without first setting out an incident in which B.G. physically abused his son D.G.

3. On June 25, 2007, the petitioner and B.G. were not living together. B.G. was alone during a visit with D.G. who was then seven months old. After petitioner picked up D.G. and brought him home, she discovered a large red bruise in the shape of a handprint on D.G.'s back. The petitioner immediately reported the suspected abuse to the police. D.G. was later examined by a physician who found an abrasion to the child's back and who noted probable child abuse.

4. B.G. was charged with domestic assault and the District Court entered Conditions of Release on B.G. that prohibited B.G. from having contact with petitioner and D.G. On August 27, 2007, the Conditions of Release were amended to allow B.G. supervised visitation with D.G. provided B.G.'s mother supervised the visits. On September 24, 2007, B.G. pled guilty to domestic assault on D.G.

5. On August 18, 2007, the Department substantiated B.G. for physical abuse of D.G. As part of the

substantiation, the Department informed petitioner and B.G. in a letter dated August 28, 2007 that the Department recommended supervised visitation for B.G. to see D.G. either through a supervised visitation program or through the Department. The Conditions of Release were not changed to incorporate the Department's recommendations for supervised visitation.

6. There is no evidence of any other physical abuse of D.G.

7. There is no evidence that petitioner left D.G. unsupervised with B.G. after the June 25, 2007 incident.

8. On September 4, 2007, the petitioner allowed B.G. to visit with D.G. in her presence during a car ride. Petitioner's supervision of B.G.'s visit with his son was discovered when petitioner was pulled over by Trooper L for a defective tail light. D.G. was in his car seat in the backseat of the car. B.G. was in the front passenger seat. B.G.'s actions were not in conformance with his Conditions of Release. Petitioner was aware of the visitation limitations in B.G.'s Conditions of Release.

9. On September 5, 2007, the Department received a report that petitioner had supervised a visit between B.G. and D.G. The Department accepted the case for investigation

that same day due to an allegation that D.G. was at risk of harm due to petitioner's supervision of visitation between her son and his father.

10. On September 6, 2007, petitioner was interviewed by Department social worker E.A. Petitioner told E.A. that she would not agree to the Department supervising visitation between B.G. and D.G. unless there was a court order stipulating to Department supervision of visitation.

During that same interview, E.A. reported that petitioner told her that petitioner did not believe B.G. remained a danger to D.G. Petitioner explained that B.G. was now taking his bi-polar medications and that she did not believe B.G. was on his medications at the time of the June 25, 2007 incident. The report notes that petitioner said B.G. had received a "wake-up call".

The Department records indicate that D.G. was meeting his developmental milestones and that he was in good health.

11. On September 7, 2007, the Department filed a CHINS petition alleging risk of harm by petitioner and alleging abuse by B.G. On September 11, 2007, the Family Court issued a protective order that provided for Department supervision of B.G.'s visitation with his son.

12. On October 1, 2007, the Department substantiated petitioner for risk of harm.

13. Petitioner filed a Motion in the CHINS action that was treated as a Motion to Dismiss. The State contested the motion. The parties submitted stipulated facts including the affidavits of E.A. (Department Social Worker), Trooper L., Docket entries and other materials from B.G.'s District Court domestic abuse case. On November 20, 2007, Family Court Judge Toor dismissed the CHINS action against petitioner.

Judge Toor found:

The facts that [petitioner] questioned [B.G.'s] guilt, wished to reconcile with him, and had contact with him with the child present do not establish that she placed the child in danger. There is no evidence that there was any danger to the child when [petitioner] was present. The cases the State relies on, unlike this one, involve patterns of abusive behavior over a period of time, willfully ignored.

14. The material facts in the CHINS case and in this fair hearing are basically the same.

15. In terms of the substantiation, petitioner appealed to the Registry Review Unit who upheld the substantiation on December 21, 2007. This appeal followed.

ORDER

The Department's decision to substantiate petitioner for risk of harm is reversed.

REASONS

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

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the administrative review results in a decision upholding the substantiation, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse and risk of harm 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.<sup>1</sup>

The petitioner is arguing that the Board should adopt the Family Court's decision under the doctrine of collateral estoppel. Ordinarily, the Board sees cases in which the Department is arguing that the Board apply collateral estoppel in cases where the Family Court has upheld a CHINS action against a petitioner.

The Board has long recognized the doctrine of collateral estoppel in prior cases and has relied on the test articulated in Trepanier v. Styles, 155 Vt. 259, 265 (1990), to determine whether the Board is precluded by the findings in a prior court proceeding from making its own findings in an expungement case. Fair Hearing Numbers 11,444; 13,432; 13,517; 19,147; 19,692, and 20,476. The Trepanier ruling set out the following criteria at page 265:

- (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.

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<sup>1</sup>The Department has predicated its argument for risk of Harm upon the likelihood of physical injury. Physical injury is defined at 33 V.S.A. § 4912(6) as "death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means."

(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.

See also Alpine Haven Property Owners Assn., Inc. v. Deptula, 175 Vt. 559 (E.O. 2003) (ruling that collateral estoppel be applied when there was substantial overlap in evidence and argument between past and present cases, preparation from first trial covers issues in second proceedings, and the claims are closely related). In Mellin v. Flood Brook Union School District, 173 Vt. 202 (2001), the Court ruled on page 566 that:

An arbitration award will preclude relitigation of an issue in a subsequent judicial proceeding where the parties and issues in both proceedings are the same, the issues were resolved by a final award on the merits, the arbitration provided a full and fair opportunity to litigate the issues, and it is fair to preclude the subsequent litigation. . . . Issue preclusion applies to issues of fact as well as law. See Restatement (Second) Judgments § 27 (1982) (“When an issue of fact . . . is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.”). . . .

In this case, the parties were in privity with each other. The Department’s interests were represented by the State’s Attorney in the CHINS action. Both parties had a full and fair opportunity to litigate the issues. Each party was represented. They presented material facts that mirror

the stipulated facts and exhibits submitted in the within fair hearing.<sup>2</sup> The Family Court issued a final decision based on the merits.

The Department argues that the Board should not apply collateral estoppel but look at the facts separately due to the difference in the CHINS and Reporting Abuse of Children statutes. However, the underlying basis of the two cases is the same. The Department's argument is that petitioner placed her child at risk of harm by questioning B.G.'s abuse of D.G. on June 25, 2007, wanting to reconcile, and allowing one visit between B.G. and their child where she provided the supervision. One may question petitioner's judgment. But, there was no evidence of harm to the child.

In a CHINS action, a "child in need of supervision" is defined at 33 V.S.A. § 5502(a)(12); the pertinent section states:

"Child in need of supervision" means a child who:

(B) is without parental care or subsistence, education, medical, or other care necessary for the child's wellbeing;

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<sup>2</sup> The petitioner objected to two statements in stipulated Exhibit G because they were not part of the Department's investigative file. However, both statements were part of the record before the Family Court and will remain. Neither statement leads to a different result in this case.

The elements of "risk of harm", 33 V.S.A. § 4912(4), *supra*, are one way to demonstrate that a child is in need of supervision.

The issue is the same in both cases. It cannot be concluded that applying the decision by the Family Court is unreasonable or unfair.

Because this decision is based upon collateral estoppel, there is no reason to reach the issue whether the Department proved their case by a preponderance of evidence. However, it will be noted that the "risk of harm" standard includes a showing of significant danger that a child will be seriously harmed, not a potential danger. The stipulated facts do not rise to this level.

Accordingly, the Department's substantiation of petitioner for "risk of harm" is reversed based upon collateral estoppel.

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