STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. A-06/08-237
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate abuse 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.

Procedural History

The petitioner filed a request for fair hearing on June 3, 2008. The case was set for a telephone status conference on July 8, 2008. On July 8, 2008, the petitioner asked for a continuance indicating he was represented by legal counsel who was not available that day. The Department had no objection to the continuance.

The telephone status conference was reset for August 5, 2008; notice was sent to both petitioner and the attorney he designated as his representative. On August 5, 2008, the attorney notified the Board that she did not represent

petitioner. The attorney noted that she had provided representation for petitioner in his family court matters but that the Franklin County Family Court allowed her to withdraw as petitioner's attorney some time ago.

A telephone status conference was held on September 2, 2008. The case was continued to October 6, 2008 to allow petitioner time to obtain counsel. Prior to the October 6, 2008 telephone status conference, the Department sent petitioner a copy of his file and their proposed witness list.

A telephone status conference was held on October 6, 2008. The petitioner did not obtain counsel. At this conference, the petitioner was given a deadline to submit his witness list to the Department. The hearing was held on December 23, 2008.

Post-Hearing Motion to Introduce Evidence

The Department filed a Motion to Reopen Evidence on December 31, 2008 asking the Board to allow the entry into the record of a self-authenticating Franklin Family Court Order dated December 7, 2007.[1] The petitioner opposed the

[1] The petitioner and his ex-wife have been involved in protracted litigation involving petitioner's parent/child contact (visitation) with the parties' minor child.

Department's Motion. Oral argument was recorded on February 4, 2009 during a telephone hearing.

The Department argued that their attorney had not known that said Family Court Order was received in Waterbury a few days prior to the hearing because he was not working out of his Waterbury office during that time frame. He did not discover that the Department received said Order until after the evidentiary hearing. The Department argued that said Order contains relevant information bearing on their case for substantiation.

The petitioner argued that the Department had ample time to prepare their case and obtain documentation prior to the scheduled hearing and that they did not exercise due diligence. He noted that Family Court records are public records and easily obtainable.

The fair hearing rules address whether evidence can come into the record post-hearing. Fair Hearing Rule No. 1000.4(B) states:

> A motion to present additional evidence must identify good cause why the evidence was not presented during the initial fair hearing.

This is not a case of newly discovered evidence. The Department had requested said Order prior to the evidentiary hearing although it appears this was done close to the

hearing date. The Department had six months to prepare for hearing. In addition, the Department could have informed the hearing officer of their outstanding request for pertinent Family Court Orders or asked at hearing to keep the record open to allow for entry of this evidence.

The Department's Motion fails to identify the requisite good cause for allowing this material to be admitted as evidence. The Department's Motion is not granted.

The following decision is based on the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is the father of M.H. (child) who was born on May 23, 2005.

2. An incident occurred on April 14, 2007 which led to a report and investigation of the petitioner by the Department. The child was then twenty-three months old.

3. R.G. is the paternal grandfather of the child. During spring 2007, the petitioner and his ex-wife had joint physical and legal rights and responsibilities (custody) of their child. Each parent had the child with him/her for 3.5 days. R.G. picked up the child from petitioner on Saturday mornings at 9:00 a.m.

4. R.G. is a long distance trucker and was given permission to testify by telephone at the hearing.

5. R.G. testified that he arrived at petitioner's apartment at approximately 9:00 a.m. on Saturday, April 14, 2007. He knocked on the front door to petitioner's apartment. The front door of the apartment opens into the kitchen. R.G. heard nothing. He then hollered and banged on the door. R.G. testified that he was surprised since the petitioner normally had his grandchild ready to be picked up by him. He testified that he could see into the kitchen and saw that his grandchild was awake and running around in the kitchen. He did not see petitioner. R.G. spoke to his grandchild and knocked again. R.G. testified that petitioner came to the door and that petitioner looked and seemed out of it. R.G. testified that he smelled a dirty diaper and that the diaper was saturated. He testified that there was a knife, lighter, and cigarettes on the kitchen table and that he thought it was unsafe for his grandchild to be around these objects without supervision. R.G. testified that the petitioner had a difficult time finding the child's socks, shoes, coat, and a difficult time dressing the child. R.G. testified that petitioner appeared to be under the influence

of drugs and that he was concerned about petitioner's use of drugs. R.G.'s testimony was credible.

6. The Department received a referral on April 28, 2007. The case was accepted for investigation on May 2, 2007 and assigned to J.F. J.F. was an investigator for the department for nine years. J.F. is now the chief of Adult Protective Services.

7. As part of her investigation, J.F. interviewed the child's mother, R.G., and the petitioner. J.F. focused her investigation on risk of harm due to allegations of petitioner's drug use and anger issues. J.F. had difficulty arranging an interview with petitioner. She went to his apartment three times. On the third occasion, she left a note for petitioner and he came to see her. Petitioner refused J.F.'s request for drug screening. On one occasion, J.F. cut short an interview with petitioner because she felt his anger was out of control.

J.F. testified that the child's mother gave her information regarding petitioner's use of pain medications including copies of pain prescriptions for overlapping periods. J.F. had petitioner's prescription profile from two pharmacies covering the period of November 2004 to May 2007 showing prescriptions from twenty-four doctors.

According to her report, petitioner was prescribed multiple pain medications including ibuprofen TB, Percocet, Hydrocodone, Oxycodone, and Hydromorphon. Petitioner was also prescribed various psychotropic medications including Amitriptyline, Loraxepam, Seroquel, Depakote, and Clonazepam.

J.F. also looked into a report that petitioner left his child alone in the car at the local hospital.

8. During the investigation, J.F. learned through the local newspaper that petitioner was in a car accident on or about June 18, 2007. J.F. spoke to a Vermont State Police Trooper and was told the state police believed petitioner was under the influence of drugs during the accident. The police investigation report was submitted into evidence. The trooper noted that petitioner was not coherent, that his head went forward as if he was asleep several times. The trooper called an ambulance for petitioner due to the trooper's concern that petitioner was under the influence of an "unknown substance". Petitioner was hospitalized for several days at the local hospital and then admitted to the Brattleboro Retreat.

9. J.F. recommended substantiation for risk of harm because petitioner's substance abuse issues placed his child

in an unsafe environment. J.F. believed that petitioner is unable to properly supervise his child.

10. J.G. testified for the department. J.G. explained that petitioner was married to her ex-sister-in-law. J.G. is a state correctional officer. J.G. testified that petitioner contacted her this fall and asked her to testify that he never abused his child but was a loving father and that his ex-wife was making up allegations. J.G. testified that she felt petitioner was asking her to lie for him.

11. The petitioner testified. Petitioner testified that he fell from a ladder on November 3, 2004 while working and broke his kneecap. He has had two surgeries, physical therapy, and pain treatment covering an eighteen month period. Petitioner admitted that he was addicted to oxycodone in 2005 prior to his child's birth. He testified that the number of doctors was misleading as some worked in practice with each other and would cover each other's patients and some were consultants. He was questioned about suboxone and stated suboxone was prescribed for pain. Suboxone is a regulated substance that has only been approved by the Food and Drug Administration for treatment of opiate addiction.

Petitioner testified that he was not criminally charged for the car accident. He was hospitalized for several days after the accident and subsequently sent to the Brattleboro Retreat due to a mental breakdown.

Petitioner testified regarding the incident where he left his child in the car. He testified that he took a friend to the hospital and left his daughter in the car for a minute while he took his friend to the entry. He stated that his daughter was under his visual supervision.

12. The petitioner testified about the April 14, 2007 incident. Petitioner testified that he works for his parent's heating company and sometimes performs service calls during the night. Petitioner indicated he may have been on a service call that night. However, in petitioner's cross-examination of R.G., he prefaced a question saying he was sleeping in because he was unemployed as a reason to explain why he was not awake when R.G. came for his grandchild. There have been a number of inconsistencies in petitioner's presentation of his case that call into question his credibility.

ORDER

The Department's decision to substantiate child abuse is affirmed.

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 substantiation is upheld by the administrative review, 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. 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 question is whether the Department has shown by a preponderance of evidence that petitioner has placed his child at risk of harm. The petitioner's behavior raises a number of red flags, notably his history of drug usage and questions about his credibility.

The Department has shown that they had sufficient reason to investigate petitioner based on the April 14, 2007 incident. R.G.'s testimony is credible especially his observations of petitioner's demeanor which he described as being out of it or being on drugs. R.G. had to yell and knock loudly repeatedly to get the petitioner's attention. R.G.'s grandchild was not quite two years old during this incident. R.G. found his grandchild running around the kitchen. Once he entered the kitchen, he saw a knife, cigarette lighter, and cigarettes on the table; he was concerned that these objects were within reach of his grandchild while her father was asleep.

The Department need only show that substantiation is warranted by a preponderance of evidence. This incident

demonstrates a lack of supervision that placed the child at risk of harm. Accordingly, the Department's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4(D).

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