

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-08/17-412
)
Appeal of)
)

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner appeals his substantiation by the Department for Children and Families ("Department") for alleged physical abuse of and risk of harm towards a child, his (at the time) fifteen-year-old son. The events at issue were reported in October of 2016, leading to the Department's investigation and ultimate substantiation of petitioner, as affirmed by a Commissioner's Review dated August 9, 2017. The Department has moved for summary judgment based on a Child in Need of Supervision ("CHINS") proceeding concerning the same child, and the sole issue is whether the adjudication in that proceeding determines the outcome here.¹

The following is based on several telephone status conferences (the last being on April 2, 2018), documents submitted by the Department, and arguments of the parties.

¹ It is noted for the record that petitioner was also substantiated for sexual abuse of his daughter; the Department has reversed this substantiation and proceeds solely on the physical abuse and risk of harm substantiation with respect to his son.

FINDINGS OF FACT

1. The Department received a report on October 27, 2016, that - as described in documentation submitted by the Department - he "would drink alcohol and become abusive with [his] then-fifteen-year-old son . . ." As a result of the investigation ensuing from that report, the Department determined that petitioner:

...had slammed [his son's] head onto a tile floor multiple times, punched and slapped him, and fractured his finger. On another occasion [petitioner] had pushed [his son] to the floor and twisted and pushed his head back by his jaw so that he could not breathe... [petitioner] was also observed hitting [his son] in his face.

2. In the August 9, 2017 Commissioner's Review decision, which forms the basis of this appeal, the Department's decision to substantiate petitioner was upheld, as per the following conclusion:

The documentation available for review indicates you were often verbally and physically aggressive towards [your] fifteen-year-old [son] and fourteen-year-old [daughter]. Many instances of physical abuse occurred when you were living out of state, although at least two were documented after you arrived here in Vermont. [Petitioner, his son and his daughter] described an incident which occurred at their grandfather's home in June 2016. The credible documentation indicates you grabbed [your son] by his neck and took him to the floor, twisting his head to the point where he could not breathe. You acknowledged drinking alcohol prior to the incident in order to relax and recalled that you had almost fallen asleep in a chair. You admitted that

grabbing [him] and taking him to the ground "was not the right thing to do, but [you weren't] awake yet."

Thus, the Department's decision to substantiate the allegations for physical abuse is supported. Your actions resulted in physical pain to [your son] and, when you choked him, restricted his breathing. Furthermore, your actions were intentional, and a reasonable person could have predicted harm would result.

Likewise, the decision to substantiate the allegations for risk of harm is supported. You were not provoked when you grabbed [your son] and choked him. [He] recalled having to yell at you to get you to stop. Your assertions that [petitioner's son] would not stop hitting [petitioner's daughter] and you only acted in order to intervene in a sibling squabble is not supported by the credible documentation. Your actions were egregious and resulted in significant risk of serious physical injury to [your son].

3. As noted above, petitioner's son (as well as daughter) was the subject of a CHINS proceeding. Petitioner was a party to that proceeding and represented by counsel. With respect to the son, the CHINS petition - filed on October 27, 2016 - alleged that he "is need of care or supervision as a result of having been abandoned or abused by his parents pursuant to 33 V.S.A. § 5102(3)(A). . . ."

4. The CHINS proceeding was heard in the Family Division of Vermont Superior Court (Chittenden Unit) and the court made extensive findings by a preponderance of evidence, following an evidentiary hearing. Selected findings of the

court are excerpted verbatim below (with the petitioner referred to as "Father"):

a. Father was the primary caregiver at the time the petition was filed and has raised [his son and daughter] alone since Mother left the family at a time unknown to the court.

b. Father allegedly physically abused [his son] on several occasions. While allegations of abuse were made regarding a time when the family lived in Florida, several incidents of abuse were also alleged to have occurred in Vermont during the summer and fall of 2016. The following findings of fact regard only those incidents which occurred in Vermont and are made by a preponderance of evidence.

c. When the family arrived in Vermont in June 2016, they lived in a tent and "camped" for a period of approximately two to four weeks in the yard of the children's paternal grandfather in Lyndonville, Vermont...While the family was living on the paternal grandfather's property, [petitioner's son] testified that Father hit and choked him. At the time, [the children] were helping to set up a garage sale and argued with each other over whether they would complete the work that night or the following day. Without notice or provocation Father approached [his son], said nothing, and began to hit [him]. Father was intoxicated. Father slurred his words, had red eyes, exhibited an overly exaggerated facial expression, and was limping. As Father yelled at [his son], [he] pushed [him] to the ground and hit [him] in the face. Father also put his hands around [his son's] neck and chin and forced [his] head to the left. During her testimony, [petitioner's daughter] corroborated this account of the incident. [She] screamed at Father to stop but did not intervene because she did not know what would happen if

she did. The court finds the children's accounts of the incident to be credible.²

d. Thereafter, the family stayed with other relatives for a short period of time until moving into the "Firehouse Shelter" and then a COTS shelter in Burlington, Vermont. It was during their stay in the COTS shelter that Father again hit [his son] . . . [The son] was resting his arm on a doorframe when Father inexplicably and without provocation told [him] that [he] needed to learn some respect. Father then hit [him] on the temple near his right eye with an open hand.³

e. Based upon the credible testimony of both [children], the court also finds that Father drove with both of the children in the car while intoxicated on more than one occasion. . . The court does not find [petitioner's] denial of drunk driving credible, but finds that he did drive drunk with the children in the car.

5. Included within the court's factual determinations is a recognition that petitioner had suffered a "traumatic brain injury" in November of 2014 which significantly affected his physical and mental state, rendered him unable to work, and exacerbated his alcohol abuse.

² While acknowledging that petitioner testified as to his version of the events and summarizing that testimony, the court did "not find Father's version of what happened to be credible except to the extent that he corroborates [his son's] account of being grabbed, taking [his son] to the ground, grabbing [his son's] head, and causing [the son] discomfort." In summary, petitioner had explained his actions by claiming he was trying to stop his children from fighting and escalation of his son's (alleged) behavior.

³ The court again found the son's account of this incident to be credible and petitioner's testimony to lack credibility.

6. Following upon its factual determinations, the court went on to consider whether petitioner's children should be adjudicated as CHINS; specifically whether either child "has been abandoned or abused by the child's parent" under 33 V.S.A. § 5102(3)(A), and/or "is without proper care or subsistence, education, medical, or other care necessary for his or her well-being" under 33 V.S.A. § 5102(3)(B).

7. The court first cites the factual determination that petitioner "physically abused [his son] on at least two separate occasions. While the family was living on the grandfather's property, [petitioner] hit and choked [his son] without provocation. When the family was living in the COTS shelter in Burlington, [petitioner] hit [his son] without provocation a second time." Going on to describe other behavior by petitioner that had a "detrimental emotional or psychological impact" on his son, and then also citing the fact that petitioner "drinks alcohol excessively and frequently, and his alcohol abuse has negatively affected [his son] . . . [petitioner] had been drinking when he hit and choked [his son] while the family was living with the grandfather," the court concluded that petitioner's son "is CHINS under both 33 V.S.A. § 5102(3)(A) or 33 V.S.A. § 5102(3)(B)."

8. In proceedings that following the CHINS adjudication, the court issued a disposition order, entered on June 22, 2017, as a final order.⁴

ORDER

The Department's decision 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. In an appeal of a substantiation, the hearings are de novo and the Department bears the burden of proof by a preponderance of the evidence.

The pertinent sections of the law, for the purposes of petitioner's substantiation for physical abuse and risk of harm, are as follows:

- (1) "Abused or neglected child" means a child whose physical health, psychological growth and development,

⁴ The record indicates that petitioner (on April 13, 2017) attempted to appeal the March 23, 2017 CHINS adjudication - the Department indicates this appeal was dismissed as "untimely"; while this assertion was undisputed, the statute specifically provides that the CHINS adjudication (prior to a final disposition order) is not a "final order" subject to appeal. See 33 V.S.A. § 5315(g). In any event, the record establishes that the disposition order on June 22, 2017 is final.

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 and a child who has died as a result of abuse or neglect. . .

(6) "Harm" can occur by:

(A) Physical injury or emotional maltreatment. . .

(11) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means...

(14) "Risk of harm" means a significant danger that a child will suffer serious harm by other than accidental means, which harm would be likely to cause physical injury, or sexual abuse, including as the result of:

(A) a single, egregious act that has caused the child to be at significant risk of serious physical injury...

(17) "Serious physical injury" means, by other than accidental means:

(A) physical injury that creates any of the following:

(i) a substantial risk of death;

(ii) a substantial loss or impairment of the function of any bodily member or organ;

(iii) a substantial impairment of health; or

(iv) substantial disfigurement; or

(B) strangulation by intentionally impeding normal breathing or circulation of the blood by applying

pressure on the throat or neck or by blocking the nose or mouth of another person.

33 V.S.A. § 4912.

The Department moves for summary judgment, and affirmance of petitioner's substantiation for physical abuse and risk of harm - based on the CHINS findings and adjudication by the Family Division court and under the principle of collateral estoppel. Collateral estoppel - long applied and recognized by the Board - may be appropriate under a five-part test:

1) preclusion is asserted against one who was 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 later action is fair.

In re P.J., 2009 VT 5, ¶ 8 (citing *Trepanier v. Getting Organized*, 155 Vt. 259, 265 (1990)).

Petitioner was clearly a party to the CHINS proceeding and it was resolved after an evidentiary hearing with a final judgment on the merits, meeting prongs one and two of the *Trepanier* test. Petitioner had counsel for this proceeding, and without doubt a "full and fair" opportunity to litigate the issue, and the finding by the CHINS court were made by a preponderance of evidence (the same standard here) - thus,

applying preclusion here is fair. The remaining question is whether the issue in this appeal is "the same" as that in the criminal case.

The Vermont Supreme Court has clearly affirmed the Board's application of estoppel in a substantiation case where there had already been a CHINS adjudication, and (stipulated) facts which were identical to those in the substantiation. See *In re P.J.*, 2009 Vt. 5 (allegations of medical and nutritional neglect). In *In re P.J.*, the court concludes that the facts - medical and nutritional neglect by the petitioner - as well as the legal determination of "neglect," were the same issue in both proceedings. See *id.* at ¶ 12. As further observed in *In re P.J.*, "it would be inconsistent for the family court to have determined that E.M. was CHINS at the time the petition was filed, and then for the Board to determine now there was no nutritional neglect." *Id.* at ¶ 14.

Here, the allegations and determination underlying the Department's substantiation - petitioner's physical assault and choking of his son while staying with the grandfather - was clearly a central factual and legal issue in the CHINS adjudication that the son had been "physically abused" and "abandoned or abused" in the context of 33 V.S.A.

§ 5102(3)(A).⁵ In addition, the court specifically rejects petitioner's claim that his assault towards his son was in any way justified by the circumstances. Finally, given that the overarching issue in both cases is whether petitioner "abused" his son, it is also appropriate here to conclude that the facts alone determined by the CHINS court meet the specific definition of abuse and risk of harm specified above. See 33 V.S.A. §§ 4912(1), (6), (11), (14), & (17).⁶ Therefore, the issue in dispute is clearly the same in both proceedings.

As such, petitioner is collaterally estopped from disputing his substantiation for physical abuse and risk of harm towards his son, and the Department's decision as to that substantiation decision must be affirmed by the Board. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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⁵ There is no specific definition of "abuse" in the CHINS statute. This is immaterial here, particularly where the Family Division court determined that the allegations at issue constituted "physical abuse."

⁶ While there is no question that the CHINS court made a determination of "physical abuse," as to "risk of harm," the substantiation statute provides that "strangulation...by applying pressure to the throat or neck. . ." *per se* constitutes risk of "serious physical injury."