

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-10/17-507
)
Appeal of)
)

INTRODUCTION

Petitioner appeals her substantiation by the Department for Children and Families ("Department") for physical abuse and risk of harm to a child under her guardianship. The substantiation determination was made on July 31, 1992 and preceded family court Child In Need of Care or Supervision ("CHINS") findings regarding the same allegations which are the basis of the substantiation. The main issue on appeal is whether the substantiation should be affirmed under the doctrine of collateral estoppel.¹

FINDINGS OF FACT

1. Petitioner was a party to a CHINS proceeding filed on March 11, 1992 concerning a five-year-old child over whom she and her husband had guardianship. The child lived with petitioner and her spouse, along with two other children.

¹ Petitioner also appeals the denial of her petition for expungement of the substantiation. The expungement appeal is on hold pending resolution of the substantiation appeal.

2. The CHINS petition alleged that the child "is a child in need of care and supervision in that he was abused by his legal guardians" and included a police affidavit setting out allegations petitioner had slapped and hit the child with a belt and wooden paddle and that bruising was observed on his thigh and shins, as well as scratch marks on his face. In addition, petitioner allegedly pulled the child's hair and scratched him on his arms, chest and neck. The affidavit also included an allegation that petitioner did nothing to prevent a much older (17-year-old) friend of another child in the house from applying a "hickey" on the child's neck which left a prominent mark; and further specified that the 17-year-old persistently pressed his lips against the child's neck to create the "hickey" while petitioner "laughed."

3. The CHINS court issued a temporary order of detention of the child based on "reasonable grounds to believe that the child was in immediate danger from the child's surroundings, and that the child's removal was necessary for the protection of the child." Following that, a detention hearing was held on March 11, 1992, resulting in an order placing the child in protective supervision of the Department (then referred to as SRS) and in the physical

custody of his biological mother. The matter was set for final hearing on the CHINS petition on April 30, 1992.

4. In the meantime, petitioner was substantiated by the Department for child abuse. The Department provided a copy of a letter dated March 25, 1992 which was addressed to petitioner and notified her that she had been substantiated for child abuse. Although the letter is unsigned, the Department indicates that it is the file copy of the letter sent to petitioner at the time. Through counsel, petitioner indicates that she never received the letter or any other notice of the substantiation.

5. Ultimately, the court in the CHINS proceeding issued a final order regarding the petition - dated May 27, 1992 - determining that "the allegations of the [p]etition have been established" and that "the child is in need of care and supervision."

6. The records supplied by the Department establish that petitioner was a noticed party in each hearing, was represented by counsel, and either she or her husband (or both) attended the hearings.

7. Petitioner's substantiation recently became an issue when she applied to become a foster parent. The denial

of that application led her to appeal the substantiation (and request expungement).

8. The Commissioner's Review letter was dated September 26, 2017. This review described petitioner's substantiation for physical abuse and risk of harm, and the above-described allegations at the time - and affirmed the Department's decision. This appeal followed.

ORDER

Petitioner's substantiation is affirmed.

REASONS

The burden of proof in substantiation appeals is on the Department. The sole issue presented at this stage of the proceedings is the effect, in this appeal, of the family court findings related to abuse by petitioner of a five-year-old child under her guardianship. This issue is generally governed by the doctrine of collateral estoppel (also known as "issue preclusion"), which has been applied by the Board in prior substantiation cases. See Fair Hearing No. 20,476 (applying collateral estoppel in substantiation appeal) and cases cited therein.

The Board is guided by the criteria for collateral estoppel outlined in *Trepanier v. Styles*, 155 Vt. 259 (1990):

- (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 of 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.

Here, preclusion is asserted against the same party in the earlier action, petitioner. Likewise, petitioner had a "full and fair" opportunity to litigate the family court CHINS proceeding, and applying preclusion is fair.² The issue was resolved by a final judgment on the merits and the family court decision was not appealed by petitioner.

The remaining and principal question is whether the issue in the 1992 CHINS proceeding is the same as the issue raised in this appeal. The applicable legal standard at the time of petitioner's substantiation was as follows:

- (2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare or a child who is sexually abused by any person.

² Any issues about the passage of time between the events of 1992 and the current time, can be raised, to the extent relevant, in petitioner's expungement appeal.

(3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:

- (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury; or
- (B) Commits, or allows to be committed, against the child, sexual abuse; or
- (C) Fails to supply the child with adequate food, clothing, shelter or health care. For the purposes of this subchapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law. Notwithstanding that a child might be found to be without proper parental care under chapter 55 of Title 33, a parent or other person responsible for a child's care legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone; or
- (D) Abandons the child.

(4) "Threatened harm" means a substantial risk of physical or mental injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or mental health or protracted loss or impairment of the function of any bodily organ.

* * * *

(7) "Mental injury" includes a state of substantially diminished psychological or intellectual functioning of a child as evidenced by an observable and substantial impairment; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the parent or guardian to exercise a minimum degree of care toward the child.

33 V.S.A. § 4912, from 1992 Vermont Laws P.A. 141 (H.B. 216).³

Collateral estoppel is appropriate in this case. This is a clear instance where the issue raised here is the same issue resolved in the prior action. Application of collateral estoppel is consistent with precedent in other cases considering the collateral effect of a CHINS proceeding. See *In re P.J.*, 185 Vt. 606, 969 A.2d 133, 2009 VT 5 (2009) (determination in CHINS proceeding precluded, under collateral estoppel, subsequent appeal of substantiation). As in *In re P.J.*, the CHINS determination here that "the allegations of the petition have been established" necessarily means that the allegations of physical abuse (slapping, hitting and scratching the child, causing bruises and marks) and failing to protect the child from a much older child "were determined to be true." *Id.* at ¶12.

These facts clearly meet the above statutory definitions of physical abuse and "threatened harm," given the extensive description of hitting (with various instruments), scratching and bruising, and the plain failure of petitioner to protect a 5-year-old child under her care from the physical and

³ Changes to the statutory definitions applicable now would not change the outcome in this case.

emotional abuse of a 17-year-old. Petitioner does not specifically dispute the meaning and effect of the CHINS order (nor could she reasonably do so) but argues that the lack of notice of the substantiation compels reversal of the substantiation. However, regardless of any alleged notice issues, petitioner was able to file a Commissioner's Review as well as a Board appeal of her substantiation, to dispute the merits of her substantiation. It is the existence of the CHINS order - which petitioner was a party to and which dealt with the same issue as the substantiation - that independently compels affirmance of the substantiation. This was as true at the time of the order in 1992 as it is today - and whatever "harm" petitioner may allege from lack of notice (even assuming there was no notice), this does not compel reversal of the substantiation, which is based solely on the conduct of petitioner at the time.⁴

Under these circumstances, the prior CHINS determination mandates judgment for the Department affirming petitioner's substantiation. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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⁴ Although yet to be determined, it is possible that the notice issue is relevant to petitioner's expungement appeal.