

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. S-11/17-632
) Fair Hearing No. S-11/17-633
Appeal of)
)

INTRODUCTION

Petitioners appeal their respective substantiation determinations by the Department of Disabilities, Aging and Independent Living (DAIL or Department). The substantiations are based on the Department's determination that petitioners abused, neglected and financially exploited two vulnerable adults over the course of four years between 2012 and 2016, during which time the petitioners and the alleged victims lived together. A hearing was held on December 6th and 10th, 2018. The following findings are based on the evidence submitted at hearing and argument of the parties submitted in post hearing briefs.

FINDINGS OF FACT

1. Petitioners JP and MP (hereinafter referred to as P1 and P2 respectively) are husband and wife. The alleged victims in the case, RP and DP (hereinafter referred to as F

and M respectively) are the father and mother of P1, and thus the father-in-law and mother-in-law of P2.¹

2. In late August of 2011 Tropical Storm Irene destroyed the residence of F and M, who, though in their late 80's and 70's respectively, were at the time living on their own in a single-family home. P1 and P2 were living in an older mobile home on land they owned in the same geographic area as F and M.

3. F and M were eligible for monies from the Federal Emergency Management Agency (FEMA) and a community grant fund to acquire a new home. F and M, with the assistance of P2 applied for and received funds from these two entities in the amount of approximately \$80K.

4. In late 2011 and early 2012, petitioners and F and M decided that they would all live together in a new double wide mobile home to be purchased and installed on the land where P1 and P2 lived. The arrangement, agreed to by all four people, was that F and M would contribute all the FEMA and Community Fund monies (roughly \$80K) to the purchase and installation of the home, and P1 and P2 would contribute by

¹This appeal involves petitioners, alleged victims and other witnesses, many of whom are members of the same family and have identical initials, therefore an effort has made to identify all people in this case in a manner that will minimize confusion.

some funds of their own (roughly \$28K), and that the new mobile home would serve as residence for, and be owned by, all four people.

5. P2 testified that a mortgage was taken out on to pay for a portion of the purchase, along with a variety of site preparations costs associated with the new mobile home. The mortgage amount was approximately \$30K, and F, M, P1 and P2 were all on the mortgage. After F and M moved out in 2016, only P1 and P2 contributed to the monthly mortgage payment and that remains the case as of the date of the hearing.

6. The testimony of P2 was unclear as to whether the amount of the mortgage obligation was what she was considering the contribution of P1 and P2 to the purchase and installation of the mobile home, or whether P1 and P2 contributed \$28K in cash, in addition to the mortgage obligation. As of the hearing, no change in the legal ownership of the mobile home had occurred, even though F had died, M was no longer living there.

7. P1 and P2 were employed full time in 2012 when the shared living arrangement began, and they were also active volunteers in the community. It is undisputed that M and F were fully able to care for themselves and took care of all

their own needs at the commencement of the shared living arrangement.

8. The mobile home where petitioners, and F and M resided together was between 2 and 3 miles down the road from another property called "The Farm" that had been in the family for a long time and was generally used as a summer residence. After Tropical Storm Irene, F and M used the Farm to store all the possessions they had salvaged from their flooded home. Testimony also indicated that F and M made frequent visits to the Farm during the summer months after they began residing with P1 and P2, even though the Farm lacked electricity, telephone, indoor plumbing, and was not winterized.

9. Neither F nor M testified at the hearing. Testimony from other witnesses established that F had passed away and that M was still alive and residing in a Nursing Home.

10. P2 testified that her relationship with F and M deteriorated over the time that they lived together and that eventually she stopped communicating with F and M, though P1 continued to speak to them. She also noted that she had never agreed to serve as caretaker for F and M, and that the shared living arrangement was for their mutual benefit and

was intended to last only as long as F and M could continue to care for themselves. P2 testified that F and M did all their own cooking and cleaning and generally took care of their own affairs, but also testified that at some point, she understood that representatives from the local Visiting Nurses Association (VNA) came to look in on F and M, and that there may also have been assistance provided by other community resources, but that she had no involvement in the provision of such services, and that she was not home during the day when these visits occurred because she was at work. P2's testimony on these matters was credible and undisputed.

11. The new mobile home gave F and M a place to live in the community where they desired to reside, which was where they had lived all their lives, and it gave petitioners a larger, newer mobile home than the one they had lived in previously.

12. P1 testified that he never agreed to serve as caretaker of F and M and that the shared living arrangement was residential only and was designed solely to provide a place to live, which was to the mutual benefit of all parties. He stated that he worked full time and never contemplated that he would be the caretaker of F and M. He plainly stated his understanding that when F and M could not

care for themselves, alternative living arrangements would need to be made. P1 also testified that in the late autumn and early winter of 2015 he had attempted to communicate with his siblings that the time had come to explore alternative arrangements, based in part on the deterioration of P2's relationship with F and M, but also the decline in their health. He indicated that he received no response to this communication. P1's testimony was found to be credible.

13. The testimony of all witnesses taken together confirmed that the relationships between the adult siblings in this family are severely strained, that for years there had been and continues to be contested litigation between the siblings revolving around financial matters mainly having to do with property and resources that originally belonged to F and M.

14. The Adult Protective Services (APS) Investigator testified at hearing that she had interviewed F and M on two or three occasions in the Spring of 2016. Her visual observations were that F and M were both physically frail. She stated that she had administered a ten-question Short Portable Mental Status Questionnaire (SMPQ) test designed to assess cognitive impairment to M, and from that test concluded that M was suffering from mild cognitive

impairment. She did not administer a similar test to F, who she characterized as a man of few words. No other witness addressed the physical and mental health of F and M, nor was there testimony about what level of ability or competence they each had to provide for their own needs, or whether P1 or P2 or anyone else provided any assistance to them.

15. The APS investigator concluded that F and M were vulnerable adults, that P1 and P2 were the caretakers of F and M, and that P1 and P2 had abused, neglected and financially exploited F and M based on four different situations described below.

16. The first situation involved a restriction placed on F and M's use of the shared residence. P2 testified that P1 had requested that F and M remain in their bedroom during certain hours of the day and during one portion of each weekend so that P1 and P2 could have time alone in the kitchen and living room area of the home. According to P2, F and M were asked not to enter the kitchen and living room area between 5:30 p.m. and 7:00 p.m. on weeknights, after P1 and P2 got home from work, so that P1 and P2 could have some privacy while they fixed dinner and watched television together. P2 also stated that F and M were requested not to enter the kitchen and living room area until after 9:30 a.m.

on Sundays, so that P1 and P2 could have Sunday breakfast alone. P1 testified that M complied with this request, but that F did not.

17. The second situation involved the installation by P1 of surveillance cameras inside and outside of the shared residence. P1 and P2 both testified that two cameras were installed in the home: one that was usually focused on the living room area directed toward the front door; and one that was focused outdoors on the front yard, and that the purpose of the cameras was to check on their dogs. P1 and P2 testified that M had occasionally let the dogs outside during extremely cold weather and had failed to let them back in.

18. P1 and P2 acknowledged that the indoor camera could have been used to monitor other activities inside the home, but P2 said she never installed the app on her phone which would have enabled her to view the camera images. P1 testified that he moved the cameras occasionally and did monitor activities in the home through an app on his phone, mainly to check up on his dogs, but also to make sure his parents were alright. He stated that he had never put a camera in F and M's bedroom. There was also testimony that there was a sign on the exterior of the home that indicated

that surveillance cameras were in use. All P1's testimony concerning the surveillance cameras was found to be credible.

19. Neither P1 nor P2 denied that these restrictions were in place. However, as there was no testimony from F or M, it was not possible to understand whether F and M had agreed to these use restrictions or how they perceived these restrictions.

20. There was testimony from a Deputy of the Windsor County Sheriff's Department that in response to a Relief from Abuse Order, which had been filed in March of 2016 by the APS investigator in this matter, he visited the shared residence to remove the cameras, which he did without incident.

21. The third situation that the Department asserted as a basis for the financial exploitation component of the substantiation, was the actual purchase of the mobile home. As noted above, funds in excess of \$80,000 that had been the exclusive property of F and M, had been used to purchase the mobile home, which in addition to providing a new home for F and M, also provided significant benefits to P1 and P2, both in terms of their right to reside in a new, larger mobile home, as well as their 50 percent ownership interest in the mobile home.

22. An agreement signed by F and M and the petitioners with the Community Fund, in association with the grant, was admitted into evidence and contains a clause that states "Upon installation of the new mobile home, [P1 and P2] shall permit [F and M] to live continuously in their new mobile home for at least five (5) years at no charge, unless it became medically necessary for either or both F and M to live full time in a facility that provided full time medical care, such as a nursing home."

23. P2 testified that she had assisted M in applying for the various FEMA and Community grant funds that were eventually used to purchase the new mobile home, explaining that M would not have been able to submit the complicated financial forms and navigate the multiple application processes that were required to obtain the funds without P2's help.

24. There was no testimony to support the claim that F and M did not obtain these funds through their own volition or that the use of these funds to purchase the mobile home had been contrary to the wishes of F and M, or in any way accomplished through coercion or subversion. Similarly, there was no testimony to support the notion that petitioners had coerced F and M to use the funds to buy the mobile home,

or that F and M were in any way unhappy with the arrangement. P2 testified that the funds were restricted and could only be used to purchase a residence. They could not be used for any other purpose.

25. At hearing, P1 and P2 testified that the mobile home and the mortgage were both still in the names of the petitioners and F and M.

26. The fourth and final situation that the Department found to be evidence of abuse and neglect was the regular visits that F and M made to the Farm. The APS investigator never visited the Farm. The substantiation was based on the investigators conclusions that the Farm was an unsafe location for elderly persons, and that F and M were forced to go to the Farm against their will by P1 and P2. However, there was no testimony to support these two claims.

27. Instead several witnesses, including petitioners, other adult children of F and M, as well as a neighbor who lived across the street from the Farm, all testified that F and M liked to spend time at the Farm, and had done so all their adult lives. This testimony is found to be credible. Witnesses also testified that F and M, used their time there, after they lost their home to Tropical Storm Irene, to sort through their salvaged possessions. P1 testified that F and

M would spend only a night or two in a row at the Farm on weekends, that the visits never occurred in winter, and that he would always go by to check up on them when the visits took place. He further testified that he repaired the steps to the Farm dwelling during the time F and M resided with him after they lost their home. This testimony was not disputed by any other witness.

28. During their almost four year stay with petitioners, F and M were hospitalized on several occasions for a variety of medical situations that were not specifically described through testimony. However, multiple witnesses testified that after every hospital stay, both F and M voluntarily returned to the shared residence. This testimony was found credible and it was not disputed by any other witness.

29. Evidence was introduced at hearing concerning a prior APS investigation in July of 2014 initiated by the siblings of P1 into whether P2 was abusing, neglecting or financially exploiting F. The investigative report introduced into evidence reflected that a different APS investigator reviewed the restrictions imposed by petitioners on F and M's use at certain times, of certain rooms of the shared mobile home residence; the financial circumstances of

the shared living arrangements; as well as F and M's regular visits to the Farm. That investigator conducted multiple interviews with petitioners as well as F and M; documented the capabilities of F and M with respect to providing care for themselves and making decisions about their affairs; reviewed all bank account records of F and M; and even visited the Farm. While this prior investigation did result in a conclusion that F was a vulnerable adult, it also concluded that there was insufficient evidence to support a substantiation for abuse, neglect or financial exploitation against P2 arising out of any of the circumstances listed above.

30. At hearing, it was established that in late autumn or early winter of 2015, F and M filed a petition to have one of their other adult sons (not P1) appointed as their voluntary guardian. P1 testified that the existence of the guardianship proceeding took him by surprise, but that he attended the guardianship hearing in December of 2015 and was represented by counsel.

31. The December 17, 2015 Findings of Fact, Conclusions of Law and Order creating the guardianship of F and M states: "Their son [Guardian], is the named agent under durable powers of attorney for health care." The guardian was also

granted a variety of powers under 14 V.S.A. § 3069 that included supervision of F and M's financial, legal matters along with the right to determine the residence of F and M.

32. That order also includes a finding that F and M have been living with P1 and P2 since they lost their home as a result of Hurricane Irene and found that "[P1] believes that his parents [F and M] should find alternative housing for a variety of reasons. [Guardian] will be looking into alternatives." P1 testified credibly that the Guardian did not investigate alternative housing at that time.

33. Ultimately, in the summer of 2016, F and M vacated the shared mobile home residence and although the testimony was unclear, it appeared that when they left, which they did on separate occasions, it was to be hospitalized for some condition, and that when they were discharged from the hospital, they then took up residence in a nursing home.

ORDER

The Department's substantiation decision is reversed.

REASONS

The Department investigates allegations of abuse, neglect and exploitation concerning vulnerable adults. See 33 V.S.A. §§ 6901, *et. seq.* Names of individuals

substantiated for abuse, neglect or exploitation are placed on a registry maintained by the Department which may be disclosed to potential employers or volunteer organizations serving vulnerable adults. 33 V.S.A. § 6911(b). Appeals from a substantiation finding are reviewed by the Board de novo and the Department has the burden of establishing the substantiation by a preponderance of the evidence. 3 V.S.A. §3091; Fair Hearing Rule 1000.3(O)(4).

The evidence adduced at hearing was insufficient to establish that at the time of the allegations for which P1 and P2 were substantiated, that F and M were vulnerable adults, that P1 and P2 were caretakers of F and M, or that situations described above constituted abuse, neglect or financial exploitation. In order to affirm the Department's substantiation of petitioners, it is necessary to find all three elements, meaning that F and M were vulnerable adults, that P1 and P2 were caretakers, and that the conduct identified constituted abuse, neglect or exploitations. The evidence does not support the existence of the first two of the three elements in this case, obviating the need to reach the third issue about whether the above-identified situations constituted abuse.

A vulnerable adult is defined by 33 V.S.A. § 6902(14) as a person who is impaired due to brain damage, infirmities of aging, or a physical, mental, or developmental disability:

(i) that results in some impairment of the individual's ability to provide for his or her own care without assistance, including the provision of food, shelter, clothing, health care, supervision, or management of finances; or

(ii) because of the disability or infirmity, the individual has an impaired ability to protect himself or herself from abuse, neglect, or exploitation.

While the APS investigator concluded, based on her observations, that F and M were experiencing certain infirmities of aging, her testimony did not affirmatively establish that there was an impairment in either their ability to provide for their own care, or their ability to protect themselves from abuse, neglect or exploitation. That neither F nor M was available to provide testimony at hearing, and that there was no evidence by a medical professional, health care provider or other expert on these issues is the basis for this conclusion. There was some evidence indicating that F and M might have received some type of assistance from the VNA or another community service

provider but no detail on the nature and extent of this assistance was provided. Thus, the evidence at hearing was inconclusive as to whether they were impaired in their ability to provide care for themselves or to protect themselves from abuse, neglect or exploitation. Though it remains possible that F and M were vulnerable adults at the time of the APS investigation, inadequate proof was submitted at hearing to establish this fact. Furthermore, that F and M had agreed in December of 2015 to have one of their other children, an adult son, serve as their voluntary guardian, does not, in and of itself, establish that they were vulnerable adults.

The next issue in this appeal is whether petitioners were caregivers of F and M. Title 33 Section 6902(2) of Vermont Statutes defines caregiver as:

a person, agency, facility, or other organization with responsibility for providing subsistence or medical or other care to an adult who is an elder or has a disability, who has assumed the responsibility voluntarily, by contract, or by an order of the Court; or a person providing care, including medical care, custodial care, personal care, mental health services, rehabilitative services, or any other kind of care

provided which is required because of another's age or disability.

The evidence in this case did not support a conclusion that P1 and P2 were caregivers. First there was insufficient evidence that F and M needed care, nor any detailed evidence of what sort of care, if any, that they were receiving from any source. P1 and P2 both testified that their living arrangement with F and M was just that, a living arrangement. Furthermore, P1 and P2 affirmatively stated that they had never volunteered to be caregivers for F and M, and that it was not a condition or a component of the shared living arrangement. This is consistent with the fact that P1 and P2 did not believe they had time to act as caregivers given that they both worked full time and also spent many hours on volunteer activities.

In addition, given that F and M had voluntarily consented to have one of their other children appointed as guardian while they were living with petitioners, and the powers of that guardian included the ability to make decisions and effectuate actions with respect to the health care and living situations of F and M, it would be inconsistent to assert that P1 and P2 also had knowingly and voluntarily taken on caregiver obligations.

Given that the Department did not meet its burden of proof that F and M were vulnerable adults and also failed to meet its burden to establish that petitioners were caregivers, it is not necessary to reach the issue of whether the four situations identified above (the imposition of restrictions on F and M's use of shared residential space; the use of surveillance cameras in the shared residential space; requiring or permitting F and M to spend time at the Farm; or the question of financial exploitation of F and M in conjunction with the use of FEMA and Community Fund monies to purchase the mobile home that became the shared residence) constituted abuse, neglect or exploitation as those terms are defined in 33 V.S.A. § 6902(1), (7) (A) and (6). See Fair Hearing No. M-08/16-813.

As the Department's substantiation determination was not supported by sufficient evidence at hearing the determination is inconsistent with the applicable rules and statutes and must be reversed by the Board. See 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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