

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-03/18-182
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Appeal of)
)

INTRODUCTION

Petitioner appeals a determination by the Department of Disabilities, Aging and Independent Living ("Department" or "DAIL") substantiating her for abuse, neglect and exploitation of a vulnerable adult. The following is based on an evidentiary hearing held March 12, 2019. Proposed Findings of Fact and Conclusions of Law were filed by the Department on April 19, 2019. No response was filed by petitioner.

FINDINGS OF FACT

1. Petitioner lives out-of-state and is the daughter of the alleged victim (also referred to as "LF") in this substantiation. The events at issue occurred on March 1-3 in 2017, when petitioner was visiting Vermont, primarily (or ostensibly) to see LF.

2. LF lived in a licensed long-term care nursing facility at the time of petitioner's visit (at the time of hearing she was still living there). She suffered a stroke prior to entering the facility. The evidence establishes

that LF has significant cognitive issues and memory problems, and that she had such issues at the time of petitioner's March 2017 visit.

3. LF's cognitive decline and memory lapses cause her - and caused her at the time of the events at issue - to need assistance with her activities of daily living. This includes - and relevant to this matter - her ability to appropriately and safely feed herself. In particular, LF has trouble chewing and swallowing, and any food she eats must be of a particular viscosity to be safely consumed. In the case of liquids, a thickener must be added to avoid "aspiration" (when something swallowed goes into the lungs), which can result in severe respiratory issues such as pneumonia and the possibility of death. For LF to safely consume most food items, they must be pureed to avoid the risk of choking.

4. LF has suffered episodes of aspiration. Due to her diminished memory, she is not able to follow instructions to safely feed herself, and thus always requires direction and supervision in feeding, as well as the proper preparation of her meals as described above.

5. It is specifically found that LF's dietary restrictions and resulting meal protocol were reasonably in place to address a substantial risk of serious harm or death to her. These restrictions were a material element of her

plan of care and were critical to maintaining her health and safety.

6. LF's cognitive decline and memory lapses also cause her - and caused her at the time of the events at issue - to need assistance with the management of her financial affairs. LF's sister (petitioner's aunt) serves as her appointed power of attorney.

7. Petitioner (along with her spouse) visited LF at the facility on March 1, 2 and 3, 2017. She indicated her desire to take LF for an outing into the community, which could include meals. Petitioner was informed about LF's dietary restrictions by staff, and specifically about the necessity of adding thickener to certain food and drink, as well as the requirement of pureeing solid food. Petitioner was also informed not to administer LF's medications with Jello, because Jello reverts to liquid form as it is consumed.

8. On both March 1 and March 2, 2017 petitioner and her spouse took LF out of the facility for outings. After returning LF to the facility on March 1, petitioner disclosed that she had given LF her medication with Jello, had fed her chicken wings (without pureeing) and that her mother "may" have had some water (without thickener). Petitioner was again informed by nursing staff of the importance of using a

thickener with any liquid foods, as well as pureeing other food items, to ensure her mother's safety. Petitioner was allowed to take LF out again on March 2.

9. During the March 1 and March 2 outings, petitioner visited her aunt (LF's sister and power of attorney) and disclosed that she had fed LF a ham sandwich and hamburger, without pureeing them, and had given her popcorn. In response to her aunt's concern about this, petitioner acknowledged that she was aware of LF's meal restrictions but responded that her mother should be allowed to eat what she wished to eat and "if she dies, she dies."

10. During the March 2, 2017 outing, petitioner also took LF to the home of LF's ex-husband's (where LF still had belongings) and retrieved LF's social security card, which petitioner used to obtain a state ID card, which in turn petitioner used to open up a credit card account in LF's name with petitioner as an authorized user.

11. Petitioner also took LF to her bank, where they withdrew \$200 from LF's account. Petitioner used some of these funds to buy a meal for LF, herself and her spouse. Petitioner did not return the remaining funds to LF or to LF's power of attorney.

12. LF's power of attorney did not authorize petitioner to open up the credit card account or to withdraw any funds from LF's bank account.

13. Due to the reports of petitioner not following LF's plan for the provision of meals, the nursing facility informed petitioner that she could not take LF on any further outings, although petitioner was permitted to visit LF in the facility.

14. On March 3, 2017, petitioner came to visit LF at the nursing facility. During the visit, she gave LF a can of soda (without thickener), which LF began to consume before nursing staff could intervene.¹

15. Petitioner presented evidence from her spouse, who has medical training, that there are alternatives to thickeners to prevent aspiration and that he was present to observe LF while they were in the community. However, her spouse acknowledged that he is not LF's treatment provider, is not familiar with the details of her medical record, nor did he (or petitioner) speak with nursing staff about such alternatives. This evidence has marginal relevance and little weight in comparison to the well-established evidence

¹ While the record also establishes that petitioner became upset when informed (on March 3, 2017) that she could not take her mother out of the facility, and that a verbal argument of sorts ensued (with law enforcement called to the scene), this is immaterial to the issues and outcome.

of LF's plan of care and the risks of not following her meal protocol.

16. Petitioner acknowledges saying "if she dies, she dies" in response to her aunt's concern about the foods she was giving to LF but indicates that she added to the end of that statement "eating what she loves." Petitioner denies being informed by the nursing home staff that she was told not to give LF medication with Jello, and there was evidence that "Jello" may have been confused with "pudding." However, the evidence from the record is clear that petitioner was aware of and disregarded LF's food restrictions and meal protocol.

17. As such, it is specifically found that petitioner acted recklessly if not intentionally in failing to follow LF's meal protocol, subjecting LF to a substantial risk of harm and possibly death. It is also specifically found that petitioner had assumed caregiver responsibilities when she took LF into the community and, in addition, was given specific directions for following LF's meal protocol. There is no evidence that petitioner's actions were pursuant to specific wishes of LF, even if she were capable of consenting.

18. With respect to the credit card she opened up in LF's name, petitioner indicates that all bills were mailed to

her and she took responsibility for paying such bills. There is no evidence that petitioner ever returned any of the \$200 she had LF withdraw from her bank account.

ORDER

DAIL's substantiation of petitioner is affirmed.

REASONS

The Department of Disabilities, Aging and Independent Living 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 DAIL which may be disclosed to potential employers or volunteer organizations serving vulnerable adults, see 33 V.S.A. § 6911(b), potentially affecting an individual's employment, livelihood, and associations. Appeals from a substantiation finding are reviewed by the Board *de novo* and DAIL has the burden of establishing the substantiation by a preponderance of the evidence.

There is no apparent dispute that the LF was a vulnerable adult - nor can there reasonably be any dispute, as she was "a resident of a facility required to be licensed under chapter 71 of this title." See 33 V.S.A. § 6902(14) (A) (Chapter 71 of Title 33 referring to regulation of long-term

care facilities). It is also the case that the evidence establishes that - regardless of her residence - LF was "impaired due to brain damage" and "mental condition" that interfered with her ability to "provide for her own care without assistance." See 33 V.S.A. § 6902(14)(D). The evidence further establishes that petitioner was a "caregiver" for LF under the applicable law, as she had assumed the responsibilities of providing medical, custodial and other "necessary" care of LF while taking her into the community and interacting with her during the time at issue. See 33 V.S.A. §6902(2).

The sole remaining issue is whether petitioner's actions and conduct meet the definition of abuse, neglect and exploitation under the law. The following statutory definitions apply:

(1) **"Abuse"** means:

(A) Any treatment of a vulnerable adult which places life, health, or welfare in jeopardy or which is likely to result in impairment of health.

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain, or unnecessary suffering to a vulnerable adult...

(7) (A) **"Neglect"** means purposeful or reckless failure or omission by a caregiver to:

(i) provide care or arrange for goods or services necessary to maintain the health or safety of a vulnerable adult, including food, clothing,

medicine, shelter, supervision, and medical services, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or his or her representative, or an advance directive, as defined in 18 V.S.A. § 9701...

...(iii) carry out a plan of care for a vulnerable adult when such failure results in or could reasonably be expected to result in physical or psychological harm or a substantial risk of death to the vulnerable adult, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or his or her representative, or advance directive, as defined in 18 V.S.A. § 9701. . .

...(6) "**Exploitation**" means:

(A) willfully using, withholding, transferring, or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another;

(B) acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, duress, or fraud. .

33 V.S.A. § 6902 (in pertinent part) (emphasis added).

The preponderance of evidence establishes that petitioner recklessly (if not intentionally) failed to follow LF's meal protocol - specifically the pureeing or thickening of food or liquid items - which by any reasonable standard placed LF's health and life in jeopardy or was likely to result in an impairment of her health. Thus, the evidence establishes that petitioner "abused" LF under the law.

For the same reasons, the preponderance of evidence also establishes that petitioner failed to provide care that was necessary to maintain LF's health and safety, as well as

failed to carry out a plan of care (which had been entrusted to her) which failure could reasonably be expected to result in physical harm or substantial risk of death to LF. Thus, the evidence establishes that petitioner "neglected" LF under the law.

Finally, the evidence establishes that petitioner willfully acquired LF's funds by taking her to withdraw cash from her bank account, for her own (petitioner's) advantage and benefit, without any legal authority to do so. Petitioner also acquired control of an interest in LF's funds (a credit card) through the use of undue influence or fraud - as she had no legal authority to open up the credit card account, and did so through a series of deliberate steps and while LF was under her direction and physical control in the community.

For these reasons, DAIL's substantiation of petitioner must be affirmed under the applicable law. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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