

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. L-06/18-457
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Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiation by the Department for Children and Families ("Department") for medical neglect and risk of harm to his minor child. The substantiation determination was made on June 4, 2018 and was preceded by the issuance, on March 29, 2017, of a Temporary Care Order by the Windham Superior Court Family Division in conjunction with a Child in Need of Care or Supervision (CHINS) proceeding. The main issue on appeal is whether the substantiation should be affirmed under the doctrine of collateral estoppel.

FINDINGS OF FACT

1. Petitioner was a party to a CHINS proceeding that began on November 29, 2016 concerning his three-day-old son.¹

¹ The CHINS proceeding began with the Court's issuance of an Emergency Care Order on November 29, 2016, placing the child that is the alleged victim of abuse in this appeal, into DCF custody due to significant concerns over the mother's ability to care for the child. The mother had been afflicted with long term drug addiction problems, was on methadone

2. While the CHINS proceeding was initiated to address the ability of the child's mother to adequately provide necessary care, prior to the second day of the hearing, the child suffered a traumatic injury in the hospital, which occurred on the night of November 29th to November 30th, resulting in a delay of the CHINS hearing until March 2017.

3. It is the events associated with the traumatic injury the child suffered in the hospital that were the basis for the Court's March 2017 Temporary Care Order in the CHINS proceeding, and they also served as the grounds for the Department's substantiation of petitioner.

4. The Temporary Care Order (TCO) issued on March 29, 2017 followed a contested proceeding where petitioner, who was represented by counsel, objected to the placement of the child in DCF custody. At the conclusion of the contested proceeding the Court issued an Order which determined that: "Given the totality of the circumstances, the Court finds by a preponderance of the evidence that a TCO should issue because a return of [the minor child] to his parents' care

maintenance, and had not successfully completed treatment. [Eight days prior to the birth of this child, the mother had had her parental rights to her two older children terminated for related reasons.] From birth, the child was being monitored for Neonatal Abstinence Syndrome in the hospital, due to the mother's drug addiction problems. While petitioner participated in the proceedings from the onset, his paternity was not officially established until part way through the matter.

could result in substantial danger to his physical health, welfare and safety.”

5. The basis of the Court's Order was its conclusion that the child had suffered a skull fracture during the night of November 29th-30th, while in the hospital, during a period when both his parents were present, and that neither parent had informed medical staff of the event which caused the injury. Specifically, the Court found by a preponderance of the evidence that:

[the minor child] suffered the skull fracture while in his parents' care sometime after Nurse [R] departed and Mother called to report a bump. It is likely that this was caused by one of the parents dropping [the minor child]. This would be a far different case if the parents, after seeing their child had suffered an injury, had immediately notified hospital staff and *reported the source of the injury.* (emphasis in original). This would have ensured that [the minor child] would get the immediate attention he needed. Because no report was made about the cause of the injury, medical professionals were left to pursue a course of testing and treatment while unaware of the mechanism of the injury. A child whose parents set this

course of events into action are putting their child's health, safety and welfare at risk.

6. Ultimately, the Superior Court issued the Temporary Care Order regarding the CHINS petition - dated March 10, 2017 - determining that based on the facts outlined in the Order of State's Request for Temporary Care Order that the child was in need of care and supervision.

7. The records supplied by the Department establish that petitioner was a noticed party in each hearing, testified at the hearing, was represented by counsel, and either he or his attorney attended the hearings.

8. The Commissioner's Review letter was dated June 4, 2018. This review described petitioner's substantiation for medical neglect and the attendant risk of harm to the minor child, arising out of the above-described allegations 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 prior

family court findings related to medical neglect and risk of harm by petitioner of the then three-day old child. This issue is generally governed by the doctrine of collateral estoppel, 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, issue 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. The issue was resolved by a final judgment on the

merits and the family court decision was not appealed by petitioner.

The remaining question is whether the issue in the CHINS proceeding the same as is raised in the substantiation matter. Petitioner was substantiated for medical neglect and risk of harm to his infant son. This issue was the central matter in the Temporary Care Order CHINS proceeding.

Collateral estoppel is appropriate in this case. This is a clear instance where the issue raised here is the same as that 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 TCO, issued as part of the CHINS determination, was based on a preponderance of the evidence and premised upon the conclusion that "A child whose parents set this course of events into action are putting their child's health, safety and welfare at risk"; necessarily means that the allegations of medical neglect and risk of harm (failing to immediately obtain medical attention for the child and failing to provide complete and accurate

information about the mechanism and circumstances of the injury) "were determined to be true." *Id.* at ¶12.

33 V.S.A. § 4912 defines an abused or neglected child to be "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." Risk of Harm is defined by the same statute as "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. The substantiation at issue in this appeal is based on the risk of harm to the minor child based on petitioner's failure to immediately seek medical attention when his child was injured and to provide complete and accurate information about the injury to medical personnel attempting to treat the child for that injury.

Petitioner does not dispute the meaning and effect of the CHINS order (nor could he reasonably do so) but argues instead that he had ineffective assistance of counsel during the CHINS proceeding, and that this somehow compels reversal

of the substantiation. Not only is this an incorrect legal conclusion, but in addition, petitioner cites no factual basis for the ineffective assistance of counsel claim, other than the assertion that petitioner's counsel did not lodge an appeal of the Temporary Care Order. Petitioner, through counsel, actively participated in a multi-day contested hearing on the TCO over the course of four months. Petitioner, again through counsel, filed a Motion for Reconsideration of that Order, which was denied, and also had legal representation when he filed a request for a Commissioner's Review of his substantiation, when he participated in that review and when he filed his appeal of his substantiation with this Board.

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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