

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. N-09/19-590
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Appeal of)
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INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL or Department) substantiating a report that she abused E.J., her disabled husband.

After the appeal was filed, DAIL filed a Motion for Summary Judgement on the basis that a prior Order of the Family Court Division of the Vermont Superior Court bars the petitioner from challenging the facts of the substantiation before the Human Services Board. Status conferences were held in this case on October 4, 2019 and January 10, 2019 (post filing of the Motion). At the final status conference, petitioner indicated that she opposed the Motion; no written response was filed. The following findings of fact are based on the evidence submitted by the Department.

FINDINGS OF FACT

1. The petitioner, age 53, is the wife and was the paid caregiver for her 80-year old husband, E.J. E.J. has a diagnosis of bi-polar disorder, dementia, and other medical problems.

2. Petitioner served as E.J.'s paid caregiver through the Choices for Care Medicaid Waiver program for the past three (3) years. E.J. has also received services from the Vermont Nurse Association (VNA) since at least 2016. E.J. also attends and receives services at The Meeting Place in Newport, a daytime adult care program.

3. A report of suspected abuse was made to the Department's Adult Protective Services Division (APS) on January 2, 2019. An APS investigation was conducted.

4. On March 28, 2019, a case worker with Pride Support Services assisted E.J. in the filing of a temporary restraining order in the Family Court Division of the Vermont Superior Court; an emergency order was granted that same day. And, on March 29, 2019, E.J. moved into an adult care provider's home.

5. In the affidavit in support of the *Request for Emergency Relief from Abuse/Neglect/Exploitation pursuant to 33 V.S.A. Chapter 69* (Request) E.J. stated that petitioner

had hit him with a closed fist in the back at the beginning of March 2018 and also had hit him in the head in the past, causing bleeding. Finally, E.J. reported that petitioner had just recently hit him on the hand with a backscratcher, causing a laceration and that the incident had been reported to APS.

6. A hearing on the restraining order was held on April 16, 2019 and petitioner was provided notice of the proceeding and advised of her right to have legal counsel represent her. Petitioner was present, along with E.J.; petitioner did not retain counsel. After the conclusion of the hearing, the Family Court issued a *Final Order Abuse/Neglect/Exploitation of Vulnerable Adult* and made the following findings: (1) petitioner was a vulnerable adult as provided by 33 V.S.A. §6902(14) on the basis that he has been receiving personal care services for more than one month, (2) that E.J. was abused by the petitioner as reported by petitioner, and (3) that E.J. would suffer serious and irreparable harm to his physical health unless relief was granted. Petitioner was ordered to refrain from abusing E.J. and was ordered to stay 300 feet away from E.J.

7. On April 22nd, APS completed its investigation and recommended that petitioner be substantiated for abuse of

E.J. based on the hitting reported in the restraining order as well as other actions of "emotional abuse" reported to the investigator.

8. On April 30, 2019, E.J. filed a Motion to Modify the restraining order reporting that petitioner was engaged in counseling and he wanted to return to their (formerly shared) residence. In this Motion, E.J. stated "{I} want the order to say that she and I can live together and if there is any physical (sic), I would (sic) the order come back into effect." The Motion to Modify was granted on that date and the restraining order was lifted.

9. Petitioner filed a request for a Commissioner's review of the substantiation. A hearing was held on June 21, 2019. By letter dated September 5, 2019, the Commissioner upheld the substantiation for abuse. Petitioner's request for fair hearing was filed with the Board on September 23rd.

10. Petitioner confirmed that she was present at the hearing on the Relief from Abuse Order and that she testified honestly that she did hit petitioner on the hand with the backscratcher, but that they were "playing around." Petitioner confirmed that after her testimony, the Court made a finding of abuse due to her hitting E.J.

11. Petitioner argues that despite the Court's Order, the substantiation should be overturned based on E.J. changing his story and also because he ultimately requested modification of the Order, leading to its termination.

12. However, despite the ultimate withdrawal of the Order, the Court had the opportunity to consider the testimony both of E.J. and the petitioner and entered a finding of physical abuse, due to petitioner's hitting of E.J., based on at least one of the same incidents that was reported to APS and that served as part of its substantiation. Petitioner was present and indicated that she testified at the hearing on the Order and had the opportunity to be represented by counsel. The Court Order was never reversed nor were the findings made at the time vacated; it remains a valid Order as entered at the time. Therefore, based on those circumstances, the Court's finding of abuse based on petitioner's hitting of E.J. is binding on the Board.

13. As of the date of the last status conference on January 10th, E.J. had moved out of their shared residence and petitioner was no longer serving as his caregiver.

ORDER

The Department's Motion is granted, with the result that the Board dismisses petitioner's appeal of the Department's substantiation.

REASONS

DAIL is required by statute to investigate reports of abuse of vulnerable adults 33 V.S.A. §6906(a)(1). If, upon completion of the investigation, a recommendation is made to place a substantiation in the registry, the person substantiated has a right to request a review before the Commissioner of DAIL within fifteen days and thereby stays any placement of her name in the registry. If the Commissioner affirms the decision to place the name in the registry, the affected person may appeal to the Human Services Board within 30 days of that decision and a fair hearing is held pursuant to 3 VSA § 3091(a). See 33 V.S.A. § 6906(d). The hearing before the Board is *de novo* and the burden is on DAIL to establish by a preponderance of the evidence that the facts they relied upon occurred and that those facts constitute abuse as set forth in the statute at 33 V.S.A. § 6902.

The statute at 33 V.S.A. § 6901 *et seq.* protects

"vulnerable adults" from abuse, exploitation and neglect.

"Vulnerable adult" is defined in the regulations, in

pertinent part, as follows:

(14) "Vulnerable adult" means any person 18 years of age or older who:

(D) regardless of residence or whether any type of service is received, is impaired due to brain damage, infirmities of aging, mental condition, or physical, psychiatric, 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.

33 V.S.A. § 6902(14).

DAIL substantiated the petitioner as the caretaker of her husband, finding that her actions met the following definitions of "abuse" found in the statute:

(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.

. . .

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress.

33 V.S.A. § 6902

The Department's Motion for Summary Judgment (Motion) argues that the Final Order issued by the Family Court on April 16, 2019 was a legal finding that petitioner abused vulnerable adult E.J. by hitting him and that the Order has the effect of petitioner being collaterally estopped from relitigating the substantiation of abuse for hitting E.J. in a hearing before the Board.

The Court's Order was issued pursuant to an application for abuse prevention for vulnerable adults as provided by 33 V.S.A. §6935. In order to issue a restraining order under this statute, the Court must find that the applicant is a vulnerable adult and the applicant can demonstrate by a preponderance of the evidence that he or she suffered abuse, neglect or exploitation. *Id.* The finding that abuse occurred was made based on E.J.'s submission of an affidavit and after the Court took evidence at the April 15th hearing, including testimony from petitioner.

The application of the doctrine of collateral estoppel is analyzed 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 a party to the restraining order proceeding, and it was resolved with finality and on the merits after a hearing, meeting prongs one and two of the *Trepanier* test. Petitioner was notified of her right to have counsel present for the restraining order proceeding. While she opted not to have counsel, she was present for the hearing and had the opportunity to litigate the issue of whether she engaged in "abuse" of E.J. - therefore, applying preclusion here is fair and prongs four and five of the test are met.

The remaining question is whether the issue in this appeal is "the same" as that in the restraining order case. Of critical importance here is the fact that the procedure provided by statute to obtain a restraining order was enacted specifically to protect vulnerable adults from abuse; this

statute is a part of the same statutory scheme as the Abuse Registry. 33 V.S.A. Chapter 69 [Reports of Abuse, Neglect, and Exploitation of Vulnerable Adults]. The Family Court was presented with the facts that petitioner is a paid caregiver for E.J., that she engaged in incidents of hitting E.J., and specifically a recent incident of hitting him on the hand, and the Court found that abuse, as defined by the statute had occurred. The statutory definitions applicable to issuance of the relief from abuse order are identical to the definitions applicable to petitioner's substantiation. 33 V.S.A. § 6931. Therefore, the fifth prong of the test is met.

While the APS investigator was also provided with information about incidents of "emotional" abuse, the Court was apparently not presented with evidence on these issues and found that the incident(s) of hitting sufficed to demonstrate abuse under the statute. Therefore, to the extent that the Department's substantiation considered information other than the incidents of hitting described by petitioner in the Court proceeding, those allegations are not considered as a basis for collateral estoppel in this appeal.

However, petitioner is collaterally estopped from disputing her substantiation for abuse (based on hitting

E.J.) and the petitioner's appeal must be dismissed by the Board. See 3 V.S.A. § 3091(d), Fair Hearing Rule 1000.4.D.

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