

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. N-12/20-813
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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 her for financial exploitation of a vulnerable adult for whom she was the representative payee.

The following findings of fact in this case are based on the evidence presented at video hearings held on July 19, August 23, and August 31, 2021, along with the documentary evidence submitted by DAIL.

FINDINGS OF FACT

1. R.L. is an adult male who has an intellectual disability. It is undisputed that R.L. is a 'vulnerable adult' as that term is defined in the Vermont Reports of Abuse, Neglect and Exploitation of Vulnerable Adults statute. It was also undisputed that one of the facets of his disability is that R.L. does not have the ability to manage money, although he greatly enjoys having spending money and

shopping. He receives income from Social Security and must have a representative payee to manage those funds.

2. During the period of July 2018 through June 2020, petitioner's Social Security income fluctuated. In the beginning, his income was averaging slightly over \$800 but toward the end of 2018 and until September 2019 there was an 11-month period where his income decreased to between \$552-\$566/month. Then, from October 2019 through 2020, R.L.'s Social Security income increased to approximately \$855/month. During this period, petitioner also received two (2) stimulus checks from the government, one for \$1,200 and one in an unspecified amount.

3. This appeal involves the issue of whether petitioner financially exploited R.L. while she served as his representative payee from July 2018 to June 2020. The Department substantiated petitioner for financial exploitation on the basis that she (1) did not pay all of R.L.'s rent, and (2) more broadly, that she used some of R.L.'s Social Security funds for her own or another's benefit. Petitioner is R.L.'s aunt (although he refers to her as his sister); petitioner's mother is R.L.'s sister. R.L. previously lived in Connecticut and petitioner's mother moved him here to be closer to family.

4. From June 28, 2018, to present, R.L. has resided in an apartment on the second floor of a building in Newark, Vermont that is managed by Northeast Kingdom Human Services (NKHS) which provides 24/7 staffing. In managing the home where R.L. lives, NKHS provides a Residential Manager/Service Coordinator to oversee staffing and a Team Leader who is responsible for scheduling staff, buying groceries, and managing R.L.'s medication. Prior to living in this NKHS home, R.L. lived in other homes in the area including with his sister and the woman who is his current NKHS Team Leader. R.L. also has a legal guardian who is responsible for overseeing that his needs are met (e.g., that he is attending doctor appointments, therapy, and having community access).

5. In May 2020, the Department's Adult Protective Services (APS) Division received a report of potential financial exploitation of R.L. by petitioner in her capacity as the representative payee. The basis for the complaint was that NKHS reported that it had not been paid by petitioner for all of R.L.'s rent. The APS investigator obtained bank records for R.L.'s account to review rental payments and, as a second aspect of the investigation, looked to determine if all other checks or payments that had been issued from the account were for R.L.'s benefit. When he learned that some

purchases had been made from Walmart, the investigator then also obtained account records from Walmart to determine what was purchased. The investigator next interviewed various witnesses, including petitioner, about the records. At hearing, the investigator flagged the following items as deserving review as they did not appear to have been for R.L.'s benefit:

- the alleged overdue rent to NKHS
- 9/5/18 payments of \$11.87 and \$22.98 to Walmart for dog food/treats (as R.L. did not have a dog at his home)
- 6/8/20 payment to Walmart for \$49 for Shark cleaner (that the investigator confirmed was not at R.L.'s residence)
- 4/9/19 payment to Walmart for \$4.71 for 3 curtain rods
- 7/19/18 a \$75 check to an individual for Avon products
- 7/28/18 a \$96.12 check to Eastside Restaurant
- 11/17/18 a \$35 check to Tavern on the Hill restaurant
- a \$77 check to Blanchard Oil
- checks written by petitioner to three or four individuals (for respite or other costs).

The definition of financial exploitation contains the requirement that the conduct be willful and that the party that is acting is taking the action to wrongfully benefit

herself or another. Each of the transactions noted above must be reviewed under that standard.

Purchases in question

6. When interviewed by the investigator, petitioner denied any financial exploitation and offered explanations for the purchases as follows: the Eastside Restaurant bill was one that R.L. asked her to pay for his and his sister's (L.O.) dinners (while petitioner paid for her own meal as did another person present); the Tavern on the Hill bill was for a meal for R.L.; the dog treats were for the dog R.L. jointly owns with his sister (that lives at his sister's home); petitioner purchased the cleaner at her mother's request to be left at her mother's home because R.L. regularly visited her mother and R.L. had problems with incontinency and the cleaner was necessary to clean up after his visits; the curtain rods were something she purchased for R.L's apartment; the Avon products were toiletries for R.L. Petitioner stated that she gave R.L. family items when he moved in and purchased items for him for the apartment. In addition, she said that R.L. would speak to his sister daily and tell her things he wanted, and petitioner stated that she would purchase the items and leave them at her mother's for R.L. or a staff person to pick up.

7. Petitioner testified that while NKHS did provide groceries to R.L. as part of his rent (room and board), she bought him additional food items that he requested, clothes, and entertainment items on a regular basis, typically weekly, and also gave him spending money (either in case or in gift cards). Regarding the two (2) stimulus checks that R.L. received (first stimulus payment received on May 28, 2020, for \$1,200 and second amount unspecified), petitioner stated with the first check, at R.L.'s request, she bought him a stereo and CDs and some clothes and gave the remaining \$400 from that check to NKHS. Petitioner stated that the entire second stimulus check was delivered to NKHS for petitioner's use. NKHS witnesses did not contest that petitioner provided these funds to them.

8. Of all the other "questionable" payments that were flagged by the investigator, petitioner had explanations for the payments. Although all may not have been wise, the evidence did not demonstrate that the funds were spent with the intent to wrongfully profit petitioner or another party. Arguably the purchase of the cleaner for R.L.'s sister's house is questionable, but on the other hand, the evidence was that R.L. went to his sister's house on a regular basis, that they shared a dog who lived at the sister's home, and

that R.L. had incontinence issues at the sister's house that required her to clean up after him.

9. Therefore, the evidence is insufficient to demonstrate that petitioner's purchase of the items noted above was done with the willful intent to profit herself or another.

Non-payment of R.L.'s rent

10. With respect to the non-payment of R.L.'s rent to NKHS, initially, NKHS had reported that for the time period of July 2018 through July 2020, R.L. owed over \$2,000 in back rent. However, after a review of their records during the hearing¹, it was determined that only \$147 in rent was unpaid during the July 2018 - June 2020 period in question.

11. Petitioner argued that she had done nothing inappropriate with respect to the rent payments. Her testimony was as follows: NKHS was very unorganized and short staffed when they opened the residential home in July 2018 where R.L. now lives; she had a few conversations with the Service Coordinator about when rent would be due at the

¹Because of questions raised about the amount of back rent owed that came up during the hearing, the Department reviewed past NKHS invoices and R.L.'s social security income and determined that because R.L.'s social security income had been decreased for 11 months during the period in question, R.L. had been overbilled for rent. Therefore, NKHS new calculation of back rent was that R.L. was only \$147 in arrears for the period in question.

outset of R.L.'s stay and he told her "not to worry about it" and that she would get a bill from NKHS. The first bill that she received was for \$6,500 for 10 months of rent (\$650/month except for the 11-month period when R.L.'s Social Security was decreased when the rent was a lower amount). Petitioner testified that she paid a portion of that bill and then began to pay off the arrearage in smaller amounts over time.

Neither the Department or NKHS contested that NKHS did not send a rent invoice to petitioner for approximately 10 months after R.L. moved in nor was it contested that the arrearage under discussion stemmed from that initial bill. A review of the checks issued by petitioner to NKHS after the date of that original invoice show that petitioner issued checks to NKHS for R.L.'s rent on, at a minimum, a monthly basis.

According to the evidence prepared by the Department, petitioner wrote checks to NKHS for R.L.'s rent as follows:

-6/26/19	\$500
-7/16/19	\$500
-8/6/19	\$500
-9/9/19	\$2,200
-11/15/19	\$650
-12/10/19	\$700
-1/18/20	\$650

-2/14/20	\$800
-3/17/20	\$800
-4/6/20	\$400
-4/18/20	\$200
-5/13/20	\$800
-6/20/20	\$800

12. It cannot be said from that record of payments that petitioner was willfully failing to pay NKHS for R.L.'s rent. She was making monthly payments, along with additional payments to pay the arrearage from the original 10-month bill. As noted above, on the third day of hearing, the Department amended its allegation about back rent and stated that only \$147 in back rent was owed for the period July 2018 - June 2020 when petitioner was the representative payee. In sum, while the failure to pay the \$147 in rent arrearage may have been negligent, there is no evidence that petitioner did so to wrongfully profit herself or another.

Respite payments

13. Another area of petitioner's use of R.L.'s Social Security funds was, according to petitioner, for paying providers for respite care for R.L. or to repay them for costs they had incurred for R.L. Petitioner argued that one reason for having to repay the rent arrearage in small

amounts was that after R.L. moved into the NKHS apartment in July 2018, NKHS did not always have full staffing and the Service Coordinator would call her and plead with her to find someone to do respite care. The Department presented evidence that petitioner issued several checks dated between July 2018 to December 2018 to individuals in amounts ranging from \$20 to \$200. Most of the checks were written to R.L.'s sister (L.O.) but also to R.L.'s current Team Leader (A.C.) whom he formerly lived with and who also provided him home care prior to July 2018². Petitioner testified that the \$200 payments were the standard daily rates for care providers. Petitioner's mother (R.L.'s sister) testified that she did provide respite care for R.L. either at the direct request of the Service Coordinator or petitioner, however, she could not be definite about the dates of care. NKHS argued that it never asked petitioner to provide respite care after July 2018. A.C., who is R.L.'s current Team Leader at the NKHS apartment, also testified that R.L. had lived with her prior to July 2018 and she was paid \$200/day for his care. She also testified that when R.L. lived with her petitioner would

²Checks were for dates of payment as follows (date of check may not be for date of care): 7/11/18 to A.C. for \$150, 8/7/18 to L.O for \$200, 8/7/18 to B. for \$200, 8/7/18 to B. for \$200, 8/9/18 to A.C. for \$150, 8/9/19 to Z. for \$100, 9/5/18 to L.O for \$100.

write her checks to reimburse her for items that she had purchased or costs she had covered for R.L. Other than petitioner's testimony that this would have been repayment either for respite or costs incurred by R.L., there was no explanation for why two checks for \$150 would have been issued to A.C. after July 2018. NKHS acknowledged that they had used outside respite providers prior to July 2018, but not after. The Service Coordinator and his supervisor testified that their recollection (business records that would have addressed this point were destroyed) was that the house was fully staffed after July 2018 and any respite care would have been arranged by NKHS and the individuals would have been paid via ARIS (third party paying respite providers) from NKHS respite funds available for that purpose, and not from R.L. social security funds. Thus, the parties' testimony was in total conflict on this point. However, given petitioner's testimony that she paid these individuals because they told her they had not been paid for respite care they provided or for costs they had incurred for R.L. and the fact that at least two of the providers testified that they did provide care to R.L. or incur costs for R.L. at some time in 2018 it cannot be concluded that

petitioner paid these funds for any wrongful purpose or that she profited from these payments.

Check to Blanchard Oil

14. The one remaining item under review is the check that petitioner wrote to Blanchard Oil. Petitioner readily admitted, both to the investigator and at hearing, that she wrote a check to Blanchard Oil for \$77 to pay her own bill. Petitioner's explanation was that she was out of the house and realized she had to pay her bill that day and the company's office was about to close but she did not have her own checkbook with her only the checkbook for R.L.'s account. Therefore, she wrote "loan" in the notation line of the check and paid the bill and then paid R.L. back in cash (although not in one installment as he was not able to handle larger sums of money as noted below). The question is whether this act, which petitioner argues was remedied, meets the standard of exploitation. The Department argues that petitioner showed no proof of the repayment; petitioner was offered the opportunity to show proof of repayment but indicated that she had just repaid R.L. in cash. It is troubling that this action would not have been discovered absent the original complaint about the back rent and that petitioner claimed but had no accounting of any repayment of the "loan" to R.L.

15. Petitioner's use of R.L.'s funds to pay her bill was done willfully and it was done to benefit her therefore, this act meets the standard for financial exploitation. Petitioner argues that her action should not be seen as exploitation because she "flagged" this act by noting on the check that it was a "loan" and repaid the money. However, the responsibility of being a representative payee carries with it the obligation to use the payee's funds only for the payee's own benefit and petitioner's action in this instance was improper and meets the statutory definition of exploitation.

ORDER

The Department's decision substantiating petitioner for financial exploitation is affirmed.

REASONS

Under 33 V.S.A. § 6906(a) the Department is required to investigate reports of abuse, neglect, or exploitation of a vulnerable adult. Reports are substantiated if the DAIL Commissioner, or designee, determines that there is accurate and reliable information sufficient for "a reasonable person to believe that the vulnerable adult has been abused, neglected, or exploited." 33 V.S.A. § 6902(12). The

Commissioner is required to maintain a registry of all such reports that are substantiated. 33 V.S.A. § 6911(b). Any individual against whom such a report has been substantiated may make a timely appeal to the Human Services Board. 33 V.S.A. § 6906(d). The Board's review of the decision to substantiate is de novo and the burden is on the Department to establish the substantiation by a preponderance of the evidence.

It was undisputed that R.L. is a vulnerable adult. See 33 V.S.A. § 6902(14).

The allegation in this case is financial exploitation. "Exploitation," in pertinent part, is defined as:

(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;

33 V.S.A. §§ 6902(6).

In arguing that the petitioner's substantiation should be upheld, the Department states that petitioner willfully misused R.L. funds. The term "willful" has been interpreted by the Vermont Supreme Court, in both the civil and criminal context, to be a "wrong purposefully done." *Judd v. Ballard*, 66 Vt. 668 (1894) (internal citations omitted); *State v. Bean*, 202 Vt. 361, 367. And, to find that "exploitation"

occurred the petitioner's actions would also have to have been done for her own, or another's, profit or advantage.

Petitioner clearly was not as diligent as she should have been in her record keeping as to the specific reasons for each expenditure during her term as representative payee and it is also clear that she may not have been the best choice to manage this financial task. However, of the many areas that were questioned petitioner had some explanation for the purchases or payments, and while not all the purchases or payments may have been prudent, there was insufficient evidence to demonstrate that petitioner took those actions for her own wrongful profit or the wrongful profit of another.

However, petitioner's use of R.L.'s Social Security funds to pay her own bill was done willfully and for her own direct benefit. Petitioner's failure to positively establish that she repaid R.L. these funds further aggravate the circumstances. Petitioner had other alternatives; she could have paid her bill the next day or, if she did not have the funds, she could have paid in installments. Instead, she opted to wrongfully access R.L.s' funds, which is a violation of her responsibilities as the representative payee and a violation of the DAIL statute.

Therefore, for all these reasons, the evidence presented at the hearing supports a finding that petitioner acted willfully for her own benefit in taking money for herself from R.L.'s bank account. Therefore, DAIL's decision substantiating the petitioner for financial exploitation of a vulnerable adult must be affirmed. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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