STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. A-08/08-384
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate risk of harm of a child. The issue is whether the Department has shown by a preponderance of the evidence that the petitioner placed a child at risk of harm within the meaning of the pertinent statutes.

The parties stipulated to the admission of the following exhibits:

A. March 17, 2008 transcript from Family Court Case, Docket No. 57-3-08 Frfa. This case was consolidated with Docket No. 59-2-08 Frdm.

B. March 17, 2008 transcript from Family Court Case, Docket No. 57-3-08 Frfa (post recess).

C. April 2008 transcript from Family Court Case, Docket No.57-3-08 Frfa.

D. Psychological Evaluation of petitioner dated May 20, 2008.

E. September 22, 2008 transcript from Family Court Case, Docket No. 59-2-08 Frdm.

F. October 1, 2008 Family Court Order, Docket No. 59-2-08 Frdm.

The Department filed a pre-hearing Motion for Preliminary Ruling seeking preliminary findings of fact and seeking a declaration that petitioner's actions constitute risk of harm as a matter of law. The Hearing Officer granted the request for preliminary findings of fact regarding the events on March 8, 2008 and the subsequent Family Court hearing on March 17, 2008. It should be noted that the underlying facts are not in dispute although the legal conclusions to be drawn from the facts are in dispute.

The decision is based on the admitted exhibits, testimony, and legal argument of the parties.

FINDINGS OF FACT

1. The petitioner is the parent of three minor children. The incident involves her youngest child, J.H. The petitioner is a supervisor at an answering service and has a home-based business providing small business support. The petitioner served on her local school board for four years. Until this incident, petitioner was an involved parent volunteer at the school helping with science instruction, banking classes, and coordinating a preschool summer camp. She was also involved in her children's extracurricular activities.

2. The incident occurred on March 8, 2008. J.H. was then three years old.

3. At that time, R.H. was petitioner's husband. He initiated divorce proceedings on or about February 15, 2008. The parties remained in the marital home until shortly after this incident. Prior to this incident, they intended to share physical and legal rights and responsibilities for the children with the petitioner remaining in the marital home with the children.

4. On March 2, 2009, the petitioner and J.H. went out of state to visit family while R.H. took the older two children on a ski vacation.

5. Petitioner returned from her family vacation on the evening of March 7, 2008. Her plane was delayed and she did not arrive at Logan Airport until 9:30 p.m. She was not on the road to Vermont until a couple hours later. She was scheduled to be at work at 8:00 a.m. on March 8, 2008.

6. Petitioner had a GPS system belonging to a friend. She made arrangements to stop at her friend's home in South Burlington. She wanted to return the GPS system. She wanted to give her computer to her friend to install safeguards since her brother-in-law discovered during her family visit that R.H. had installed spy ware on her computer.

7. The petitioner's friend lived in a condominium development. She arrived at his condominium at approximately 3:00 a.m. When petitioner arrived, J.H. was asleep in the van. Petitioner intended to stay at her friend's for a few minutes in order to drop off the GPS and computer. Petitioner left her daughter asleep in the van when she went into her friend's condominium. She did not want to wake J.H. and believed that J.H. would be all right for a few minutes.

8. The petitioner ended up staying in her friend's condominium for approximately an hour.

9. At 3:30 a.m., the local police department received a telephone call that a suspicious vehicle was parked at this condominium complex.

10. The local police department responded at approximately 4:00 a.m. Officer S.S. was one of the officers who responded to the call and who later testified in Family Court.

11. Officer S.S. shone a light on the van and saw a small head pop up. She found J.H. in the van. The van was unlocked and the keys were in the van. Parking lights and a radio were on. The heat was not on; the outside temperature was 32 degrees. J.H. was dressed in a light winter jacket and boots; she did not have on gloves or a hat. Officer S.S.

testified in Family Court that J.H. was frightened, asking for her Mommy, saying she was scared, and shivering. Officer S.S. put J.H. in the police cruiser. Officer S.S. noted that J.H.'s hands were cold. Petitioner came out of the condominium and picked up J.H. who was happy to see her mom.

12. The police officers, petitioner, and J.H. went to the police station. The police had contacted the Department and had contacted R.H. J.H. was turned over to her father at the police station.

13. On or about March 10, 2008, R.H. filed a Relief from Abuse Action on behalf of their children. He told petitioner that he filed an action. He spent part of that day helping petitioner. He and the children also had dinner together with petitioner and spent time together with petitioner. Petitioner picked up the Temporary Order the next day and learned that she was not to have contact with the children.

14. The Family Court heard the Relief from Abuse Action on March 17, 2008. The primary testimony came from R.H., Officer S.S., and the petitioner. Officer S.S.'s testimony is noted above.

15. R.H. testified on March 17, 2008 that the petitioner's actions were out of character for her and that those actions scared him.

16. The petitioner testified on March 17, 2008 that she made a terrible mistake, that she was sorry how her actions frightened J.H., and that the mistake would not happen again. She testified that she was exhausted and scared when she stopped at her friend's home, she was getting moral support, and that she lost track of time. She was in counseling due to the stress from her marital relationship.

17. The Judge granted an Abuse Order for three months and a corresponding Order in the Divorce case. The Order granted R.H. temporary legal and physical rights and responsibilities for the children, liberal supervised visitation for petitioner, and that supervision could be removed upon a report from a mental health professional that petitioner could supervise visitation on her own.

The Judge stated on the record:

> [t]he abuse order will be granted because this act of severe neglect by [petitioner] to leave this three year old, alone in a car, during winter at 3:00 in the morning for what strikes the Court as almost an hour of duration to the point where the child's hands were cold and the child was not properly clothed and the car was unlocked, this is a severe neglectful act by [petitioner] and it supports a finding of abuse under Title 15, Section 1101 under Chapter 49 of Title 33.

18. Petitioner underwent a psychological evaluation on May 20, 2008. The evaluation was done by Dr. W.N., a clinical and forensic psychologist. He noted that petitioner admitted to making a horrible use of judgment on that occasion. He concluded there was no evidence of emotional, cognitive or psychological problems that would interfere with petitioner's ability to care for her children. There was no evidence of risk to her children. Her history was consistent except for this one unique act.

19. Petitioner and R.H. were back in Family Court on September 27, 2008 for petitioner's Motion to Establish Parent Child Contact and to Vacate the Relief from Abuse Order. Dr. W.N. testified that supervision was not necessary and that there was nothing to suggest that next time petitioner was upset or under stress that she was any more likely to place her children at risk than the average person. The local school principal testified about petitioner's service as a past school board member, active parent volunteer, and her belief that petitioner did not pose a risk to children.

20. On October 1, 2008, the Family Court issued an Order vacating the Abuse Prevention Order and lifting any requirements for supervised visitation. The parties

subsequently finalized their divorce and share physical and legal parental rights and responsibilities of the children.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse and risk of harm as follows:

> (2) An "abused or neglected child" means 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. An "abused

> or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.
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> ...
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> (4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.
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> ...

The Department argues that the Board is collaterally estopped from determining whether the above facts constitute risk of harm based on the Family Court Judge's oral recitation on March 17, 2008 when he referenced Chapter 49 of Title 33.

The petitioner argues that collateral estoppel does not apply for several reasons. The petitioner argues that relief under the Abuse Prevention Act is temporary relief and should be looked at in same light as a preliminary injunction. La Vanway v. Moye, 146 Vt. 649 (mem. 1985). In fact, the Family Court vacated the Relief from Abuse Order several months later. Further, petitioner argues that the Family Court Judge did not indicate the section of Chapter 49 of Title 33 upon which he relied; thus, his oral ruling is not dispositive. Finally, petitioner argues that the Abuse

Prevention Act and Reporting Abuse of Children Act have different purposes.

The Abuse Prevention Act allows a Court to issue a Relief from Abuse Order when there is "abuse to children as defined in subchapter 2 of chapter 49 of Title 33". 15 V.S.A. § 1101(1)(C). Ordinarily, Orders issued under the Abuse Prevention Act are time limited responses to an emergent situation.

The Abuse Prevention Act has a more limited purpose to give certain people such as family or household members the ability to seek protection when they have experienced abuse and face further abuse. In contrast, the purposes in Title 33 include protection of children and strengthening of the family. The statute was recently amended to include a tiered response to better calibrate the relief to the continued threat of harm.[1] 33 V.S.A. § 4911. The petitioner argues that the evidence shows she is not a continuing risk of harm to children and that her family is not strengthened if she is prevented from participating in her children's school and extracurricular activities.

[1] Although the Department has not appeared to exercise discretion in what cases to substantiate in the past, the Department has had the type of discretion contemplated by the recent changes to the statute.

In Fair Hearing No. 19,126, the Board found that they were precluded from litigating facts already litigated in a Child in Need of Supervision (CHINS) action but found that the facts did not fit the definition of abuse in the abuse registry statute. In particular, the Board found part of their function is to interpret the meaning of an "abused or neglected child".

When determining whether collateral estoppel applies, the Board has relied on the five part test articulated in Trepanier v. Styles, 155 Vt. 259, 265 (1990) that include:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
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> (2) the issue was resolved by a final judgment on the merits;
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> (3) the issue is the same as the one raised in the later action;
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> (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
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> (5) applying preclusion in this action is fair.

In petitioner's written argument, she asks the Board to supply "balance"; her argument is that applying collateral estoppel in this case is not fair given the different purposes of each act and the evidence that her action on March 8, 2008 was unique and unlikely to occur again. Applying collateral estoppel is not fair in this case.

Although collateral estoppel does not apply, the issue remains whether the petitioner should be substantiated for risk of harm to a child. The facts are not in dispute.

In risk of harm cases, the Board has used a gross negligence or reckless behavior standard to determine if a person's actions rise to the level of risk of harm. The Board referenced the definition of gross negligence found in Rivard v. Roy, 124 Vt. 32 (1963). On page 19 of Fair Hearing No. 17,588, the Board stated that gross negligence or reckless behavior is whether:

> ...the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

See Fair Hearing No. Y-01/08-22.

Petitioner left her three year old daughter asleep in an unlocked van at 3:00 a.m. on a cold morning. The heat was not on in the van. Although petitioner intended to be gone a few minutes, she was gone for an hour. Leaving a child alone in a vehicle whether for a minute to dash into a store or for a longer period is negligent. There are many potential risks to children who are left alone in vehicles; the news too often has tragic stories when children have been left alone in vehicles. Petitioner's actions are more than an error of

judgment but show a failure to exercise a minimal degree of care.

Even if gross negligence is found, the issue remains whether placement on the registry is appropriate given this one incident. The situation as a whole needs to be considered. The Board has stated that harm includes a wide range of events but these events do not require a finding of abuse in each and every case. Fair Hearing Nos. 10,687 (bruise from spanking not sufficient to justify placement in registry given caring parents who did not normally use spanking for punishment, would not do so in the future, and child not believed to be at risk of future harm from parents), Fair Hearing No. 19,112 (abuse not found when petitioner grabbed child by hair and bumped child's head against wall during crisis situation at residential care facility), and Fair Hearing No. 21,194 (abuse not found when child sustained scratches when petitioner trying to restrain child who was physically acting out).

Petitioner has resumed her custodial role with her children. There is no evidence that petitioner is a threat to her children or to other children. The evidence is that this incident was unique and out of character. She has taken responsibility for her actions. It happened at a stress

filled time coinciding with marital problems. She received counseling to deal with her marital issues.

Petitioner's past history is filled with volunteer activities at her children's school and their extracurricular activities. These activities have now stopped because of the proposed substantiation. She would like to resume these activities and feels that not being involved in this part of her children's lives impacts her family.

The registry gives employers and organizations working with children notice that a particular person is a risk to children and should be prevented from interacting with children through either paid employment or volunteer activities. That purpose would not be served in this case.

Accordingly, the Department's decision to substantiate risk of harm is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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