

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-12/09-689  
 )  
Appeal of )

INTRODUCTION

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

Procedural History

The petitioner filed an appeal with the Human Services Board on December 31, 2009 disputing the December 23, 2009 Commissioner's Review upholding the Department's decision to substantiate petitioner for abuse based on an allegation that petitioner choked his son (D.B.) during December 2008 when his son was four years old.

A telephone status conference was held on February 2, 2010 in which the Department was given a deadline to turn over discovery materials to the petitioner. At that status conference, the Department raised potential evidentiary issues.

A series of telephone status conferences were scheduled to address evidentiary issues. It is not necessary to set out all the pre-hearing issues because the weight of the Department's evidence is not sufficient to sustain their case.

FINDINGS OF FACT

1. The petitioner is the father of D.B. who was four years old at the time of the alleged incident during December 2008. D.B. has two younger siblings.

2. On or about December 5, 2008, B.E. became the children's childcare provider. D.B. attended childcare daily. B.E. transported D.B. and his siblings to her childcare center.

3. On Monday, December 15, 2008, B.E. picked up D.B. and his siblings in the morning. B.E. noted that D.B. was clearing his throat. B.E. commented to D.B. that he must be coming down with a cold. D.B. responded that his daddy had choked him. D.B. was matter of fact in his comments.

4. As a childcare provider, B.E. is a mandatory reporter and she reported D.B.'s comments to the Department that same day.

5. B.E. did not see any bruises. B.E. testified that D.B.'s voice was raspy and he coughed as if coming down with

a cold but that he did not have a raspy voice or cough the previous Friday, December 12, 2008.<sup>1</sup>

6. The Department assigned the case to J.H. on December 15, 2008.

7. Dr. R.M. has been D.B.'s pediatrician since August 2007. According to Dr. R.M., she received a telephone call from J.H. on December 15, 2008. An appointment was made for D.B. that same day. D.B. came to the appointment with his mother.

8. Dr. R.M. testified that D.B. had a normal examination of the neck. D.B. had full range of motion, no bruises, no tenderness, and no pain complaints. She did not note whether D.B. had a cold. She did not prescribe any treatment.

9. J.H. interviewed D.B. at his childcare program on December 15, 2008 in the presence of B.E. J.H. testified that D.B. was active, easily distracted, hard to keep on task, not upset about the alleged incident, and did not offer a lot of specifics. As part of her interview, J.H. used examples to ascertain D.B.'s ability to distinguish what is

---

<sup>1</sup>The Department's assumption is that the alleged incident took place during the weekend of December 12, 2008.

real and truthful. She testified that he was not able to demonstrate an ability to distinguish the truth from a lie.

J.H. testified that D.B. told her that his father choked him. D.B.'s statements to J.H. on December 15, 2008 about the alleged incident are excluded as unreliable because D.B. was unable to demonstrate to J.H. on December 15, 2008 that he had an ability to distinguish truth from a lie.<sup>2</sup>

10. On or about January 20, 2009, Detective Sergeant J.C. of the Vermont State Police interviewed D.B. This interview was videotaped. As part of the interview, Detective J.C. used a series of questions to determine whether D.B. understood the difference between the truth and a lie. Detective J.C. testified that D.B. did not demonstrate an understanding of the difference between the truth and a lie. However, Detective J.C. believed D.B.'s statements that his father choked him.

The Department offered the videotape into evidence. After reviewing the videotape, the petitioner's objection to

---

<sup>2</sup>J.H. also interviewed D.B. on January 12, 2009 at which time D.B.'s description of the incident included his head coming off his neck and a doctor putting his head back on with glue and Band-Aids. The child's descriptions of the alleged incident to adults have not been reliable.

the evidence as hearsay was sustained. The interview occurred approximately five weeks after the alleged incident. The videotape showed a distractible child who was unable to answer accurately a series of questions based on flash cards used by the detective to elicit whether D.B. had an understanding between the truth and a lie. At times, D.B.'s speech was not intelligible. In addition, the child provided wrong information to questions regarding his family such as saying his younger brothers were older. The material in the videotape as well as Detective J.C.'s testimony regarding D.B.'s statements regarding the alleged incident is unreliable and excluded as hearsay.

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 pertinent sections of 33 V.S.A. § 4912 define abuse, harm and physical injury 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.

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

. . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

. . .

An appeal before the Human Services Board is a de novo hearing in which the Department bears the burden of proving that the petitioner's actions constitute child abuse. To prevail, the Department must show credible evidence that petitioner engaged in the alleged action and that those actions caused D.B. to have an "impairment of any bodily organ or function by other than accidental means". The allegations do not fit the other criteria in the above definition of physical injury.

At hearing, Dr. R.M. testified that it is possible, if slight pressure is used, to cause inflammation of the throat

without leaving bruises. Even assuming arguendo that D.B.'s raspiness was caused by inflammation of the throat and assuming arguendo that such inflammation is an impairment of function as contemplated by the above statute, there needs to be credible evidence to name petitioner as the cause of this inflammation.

The Department bases their case primarily upon statements D.B. made to others, but these statements are not admissible to prove the proposition that petitioner choked D.B.

Vermont Rules of Evidence (V.R.E.) generally preclude the use of hearsay evidence unless that evidence falls under a hearsay exception in the evidentiary rules or through Supreme Court rulings. V.R.E. 802. Hearsay is generally considered unreliable.

Fair Hearing Rule 1000.3(0)(5) incorporates the Vermont Rules of Evidence as follows:

The rules of evidence applied in civil cases by the courts of the State of Vermont shall be followed, except that the hearing officer may allow evidence not admissible thereunder where, in his or her judgment, application of the exclusionary rule would result in unnecessary hardship and the evidence is of a kind

commonly relied upon by reasonably prudent persons in the conduct of their affairs.<sup>3</sup>

V.R.E. 803(3) allows an exception for statements of then existing mental, emotional or physical condition. D.B.'s response to his childcare provider when going to childcare fit within this exception, but this exception cannot be bootstrapped to support a finding that petitioner abused his son.

The Department argues that D.B.'s statement to his childcare worker should be permitted as evidence through the excited utterance exception. V.R.E. 803(2) states:

*Excited utterance.* A statement related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

---

<sup>3</sup>The Board uses a relaxed hearsay rule in the cases before it (the majority of cases involve governmental benefits). In terms of appeals of Department decisions to substantiate child abuse, the Board's use of the relaxed hearsay rule has changed in response to the 1998 decision of the Vermont Supreme Court in *In re C.M.*, 168 Vt. 389, 395 (1998) that V.R.E. 804a applies to administrative proceedings and precludes the Board from using the relaxed hearsay rule in appeals of substantiations for sexual abuse of a minor under the age of ten years (now twelve years). The Board has given some leeway in other substantiation cases. But, a key finding before V.R.E. 804a can apply is that the "time, content, and circumstances of the statements provide substantial indicia of trustworthiness". A key component would be the child's reliability at the time the statements were made. The overall evidence does not support such a finding; V.R.E. 804a cannot be applied. The evidence in this case lacks a "substantial indicia of trustworthiness" regarding the child's statements to adults.

The Vermont Supreme Court defined the criteria needed before the excited utterance exception applies. In In re Estate of Peters, 171 Vt. 381, 391 (2000), the Court stated:

There are two essential requirements for the excited utterance exception: (1) a startling event or condition, and (2) a spontaneous utterance in reaction to the event or condition made under the stress of excitement and not as a result of reflective thought. ...The underlying rationale for the exception lies in the assumption that a person's powers of reflection and fabrication will be suspended when she is subject to the excitement of a startling event, and any utterances she makes will be spontaneous and trustworthy.

A key consideration is whether the person is still "subject to the excitement of the startling event". For example, the Court noted the evidence of Ms. Peters' "highly excited, agitated state". In re Estate of Peters, supra at pages 391 and 392. The testimony in this case does not show that D.B. was agitated or upset or emotionally reacting to the alleged incident. The child is described as matter of fact. The excited utterance exception does not apply.

The Department offered hearsay evidence from J.H. and Detective J.C. However, both testified that they attempted to elicit from D.B. whether he understood the difference between the truth and a lie. Both witnesses found that D.B. could not make that distinction. As a result, D.B.'s statements about the alleged incidents to both J.H. and

Detective J.C. are untrustworthy and cannot be used to support a finding that the petitioner abused his son.

The Department has not met their burden of proof that petitioner abused his son by choking his son. Accordingly, the Department's decision is reversed. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4(D).

# # #