

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. B-01/11-54  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate petitioner for risk of harm-sexual because petitioner allowed her daughter, S.L., to have unsupervised contact with her father, who is an untreated sex offender. The issue is whether the Department has shown by a preponderance of evidence that petitioner's conduct rises to risk of harm-sexual.

Procedural History

The petitioner filed for a fair hearing on or about January 26, 2011. A telephone status conference was held on March 8, 2011. The attorney for the Department disclosed that he had a conflict and the case would be transferred to another attorney. The Department was told to send petitioner their discovery packet.

A telephone status conference was held on April 5, 2011. The Department stated their intention to file a Motion for Summary Judgment. A briefing schedule was set. The matter

was set for a follow-up telephone status conference on May 10, 2011. The Board was not able to connect with petitioner for the May 10, 2011 telephone status conference.

The Department submitted a Motion for Summary Judgment with supporting documentation. The Department informed the Board on or about July 8, 2011 that their brief had not been served upon petitioner because they did not have petitioner's current address and they were resending their brief to petitioner. The Board informed the petitioner that her deadline to respond to the Department's brief was extended to July 29, 2011. Petitioner did not file a response.

The decision is based upon the evidence and argument submitted by the Department. Exhibits included (1) CHINS petition and supporting affidavit filed July 28, 2010 regarding S.L., (2) certified transcript of the August 31, 2010 status conference in the CHINS case, (3) Merits Stipulation and Order dated August 31, 2010 signed by petitioner and her attorney, and (4) January 13, 2011 Commissioner's Review of Substantiation.

FINDINGS OF FACTS

1. The petitioner is the mother of S.L. who was fifteen years old at the time of the substantiation.

2. T.A. is the father of S.L. T.A. is an untreated registered sex offender. T.A. has been substantiated for sexual abuse of a minor. The substantiations include (1) March 1999 substantiation for sexual abuse of fourteen-year-old girl and (2) November 2009 substantiation for sexual abuse of sixteen/seventeen year old girl. T.A. has been convicted of three counts of lewd and lascivious conduct with a minor.

3. The petitioner experienced problems with S.L. during the summer of 2010. S.L. left home on or about June 26, 2010 and went to T.A. Petitioner reached out to the Department for help.

4. S.M. is a social worker employed by the Department. She spoke with petitioner when petitioner contacted the Department about her daughter. S.M. met with petitioner and S.L. on July 2, 2010 when the Department and police met with T.A. and S.L. to keep S.L. from remaining with T.A. S.M. helped petitioner and S.L. come up with a plan to place S.L. with her maternal grandmother on or about July 2, 2010 when S.L. was taken from T.A. S.M. filed the intake report with

the Department on July 2, 2010 and signed the July 26, 2010 affidavit supporting the CHINS case.

5. On or about July 2, 2010, S.M. explained to petitioner and to S.L. that S.L. should not have unsupervised contact with T.A. due to his history of sexual abuse with minors.

6. On or about July 26, 2010, petitioner admitted to S.M. that she allowed S.L. to have unsupervised contact with T.A. when she allowed T.A. to drive S.L. without supervision to her paternal grandmother's home on July 24, 2010.

7. On or about July 28, 2010, the Department filed a CHINS (child in need of supervision) petition regarding S.L. with the Chittenden Family Court, *In re S.L.*, Docket No. 242-7-10 Cnjv.

8. A status conference was held on the CHINS petition on August 31, 2010. Petitioner was present with her attorney.

9. On August 31, 2010, petitioner signed a stipulation to the merits of the CHINS petitioner. The petitioner's attorney represented that signing the stipulation was difficult for the petitioner but that she wanted the Court's intervention. Petitioner signed the Merits Stipulation and Order that contained the following:

[Petitioner] allowed [S.L.] to drive unsupervised with [S.L.'s] father, despite being warned by DCF that she should not do so, because [S.L.'s] father was convicted of three counts of lewd and lascivious conduct with a minor and never participated in sex offender counseling. Permitting unsupervised contact with an untreated sex offender placed [S.L.] at risk of harm.

10. The following exchange took place between the judge and petitioner at the August 31, 2010 status conference:

The Court: [Petitioner}, the way I understand the stipulation, it-it states that-that you allowed [S.L.] to drive unsupervised with her father despite being warned by DCF that she should not do so because her father was convicted of three counts of lewd and lascivious conduct with a minor and he's never participated in sex offender counseling and that permitting unsupervised contact with an untreated sex offender placed [S.L.] at risk of harm.

Do you agree with that?

[Petitioner]: I do.

11. At the August 31, 2010 status conference, S.L.'s attorney challenged the legal conclusion that S.L. being alone with her father constituted risk of harm. The Judge answered this objection as follows:

And based upon the expert witnesses that I have heard in the past, the training that I've received, I don't see that there is much doubt in the science of sex offender counseling and treatment that someone that is untreated poses a continuous rask (sic)-risk to minors. That is, it's not a situation that changes-that your attitude, that your predisposition does not change. The treatment is required to limit your risk but it's not something that over time will change.

So the Court will make the legal conclusion that allowing [S.L.] unsupervised contact with her father without him completing sex offender treatment did place her at risk of harm.

12. The Department substantiated petitioner on September 16, 2010 for risk of harm based on the same facts that supported the CHINS action.

ORDER

The Department's Motion for Summary Judgment is granted and the decision to place petitioner on the child protection registry is affirmed.

REASONS

The Department is required by statute to investigate reports of abuse, neglect, or risk of harm. 33 V.S.A. §§ 4914 and 4915.

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.

. . .

(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.

The Department promulgated regulations pursuant to the Vermont Administrative Procedures Act. Section 2010.06 of the Response to Child Abuse and Neglect provides further guidance by stating:

Risk of sexual abuse substantiated when:

1. the alleged perpetrator's history of sexual abuse or offenses, the nature of the abuse or offense and the history of treatment indicate that he or she is still a substantial risk to the alleged victim; and/or,
2. the person responsible for the child's welfare is unable or unwilling to protect the child from harm.

The perpetrator is considered to be the person whose behavior or history poses a risk to the child. However, the person responsible for the child's welfare may also be substantiated as a perpetrator of risk of sexual abuse if through his or her acts or omissions he or she knowingly places the child at substantial risk of sexual abuse.

The Board has found that summary judgment is appropriate when material facts are not in dispute and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56, Fair Hearing Nos. V-04/10-189, Y-01/09-28, S-11/08-522.

The Department relies on collateral estoppel in their Motion for Summary Judgment arguing that the Board should apply collateral estoppel to this case. The Department relies

on the petitioner's admission in the CHINS case that she allowed S.L. to ride with T.A. without any supervision after being put on notice by the Department of T.A.'s history of sexual abuse towards minor girls, his lack of sex offender treatment, and the Department's concerns for the safety of S.L. if unsupervised contact was allowed.

The Board has long recognized the doctrine of collateral estoppel and has relied on the test articulated in Trepanier v. Styles, 155 Vt. 259, 265 (1990), to determine whether the Board is precluded by the findings in a prior court proceeding from making its own findings in a case. Fair Hearing Numbers 11,444; 13,432; 20,476 and Y-01/08-05. The Trepanier ruling set out the following criteria at page 265:

- (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 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 action is fair.

The Vermont Supreme Court stated, "[i]ssue preclusion applies to issues of fact as well as Law". Mellin v. Flood Brook Union Sch. Dist., 173 Vt. 202, 209 (2001).



The Trepanier criteria are met in reference to the factual and legal issues, as follows:

(1) Petitioner was a party to the CHINS case.

(2) The factual issue was resolved by a final judgment on the merits in the CHINS case when the petitioner elected to enter into a stipulation. The trial court was asked whether the facts supported the legal conclusion that petitioner placed S.L. at risk of harm and answered that her behavior did so.

(3) The factual issue in the CHINS case was the same factual issue that the Department considered when they substantiated petitioner for risk of harm-sexual. The legal issue of risk of harm was addressed.

(4) Petitioner had a full and fair opportunity to litigate the issues in the CHINS case. Petitioner was represented by counsel. She knowingly entered into a stipulation rather than litigate the case.

(5) It is fair to apply collateral estoppel to this case. Collateral estoppel prevents inconsistent results as well as saving legal resources.

The petitioner did not submit a response to the Department's argument. The facts are not in issue and the facts support a finding of risk of harm-sexual.

Based on the above, the Department is granted their Motion for Summary Judgment and their decision to substantiate petitioner is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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