

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. B-02/13-147  
 )  
Appeal of )

INTRODUCTION

Petitioner appeals her substantiation by the Department for Children and Families ("Department") for placing her two children at risk of harm, sexual. The substantiation determination was preceded by Child In Need of Supervision (CHINS) findings concerning allegations which overlap with the basis for the substantiation. The main issue is whether the CHINS findings and order warrant affirming the substantiation, without further hearing, under the doctrine of collateral estoppel. The Department filed a Motion for Summary Judgment to affirm the substantiation. Petitioner's counsel was given an opportunity to respond by September 20, did not respond by that date, and thus far has not responded. The following facts are adduced from the filing submitted by the Department.

FINDINGS OF FACT

1. Petitioner was party to two CHINS proceedings filed in December of 2011 concerning her two daughters, ages seven and thirteen at the time. The CHINS petitions were based on several allegations relating to the care and supervision of her children, including an allegation that petitioner had placed her children at risk through her relationship and contact with her current partner, who is not the father of the two children.

2. The CHINS petitions alleged that petitioner's partner had been substantiated for sexual abuse of a child, convicted of lewd and lascivious conduct with a child, and is on the sex offender registry. The petitions further alleged that the partner's illegal drug use exacerbated his risk of other sexual offenses, despite his participation in sex offender treatment. The petitions alleged that petitioner was aware of her partner's sex offender history and minimized this history, ignoring numerous recommendations that he not have unsupervised contact with her two children, particularly because her older daughter is the same age as one of the partner's previous victims (also a teenage girl).

3. The CHINS proceedings resulted in two stipulated findings that both children were in need of care and

supervision, based on the following factual finding: "At the time of the petitioner, [petitioner's partner] lived with [petitioner] and her children. [Petitioner's] lack of understanding about [his] untreated mental health and substance abuse issues put the children at risk."

4. A disposition order for both CHINS cases was issued by the court on October 30, 2012, maintaining the children in the legal custody of the Department and placing them with petitioner. The disposition order was based on the undisputed facts set forth in the case plan filed by the Department, which, among other things, provided that:

a. "On November 2, 2011, a safety plan was made with [petitioner] that she would not leave the kids alone with [her partner]. [Petitioner] indicated she was aware that [he] was on the Sex Offender Registry and as to why. At that time she agreed to follow the safety plan."

b. In November, 2011, despite denying current drug use, petitioner's partner "tested positive for cocaine, THC, opiates, benzodiazepines, and amphetamines."

c. The Department subsequently learned that petitioner had allowed her partner to live with her and have unsupervised contact with her two children, in November and December of 2011. This contact was acknowledged by petitioner despite her understanding that the Department had indicated it would be unsafe.

d. After another instance of unsupervised contact was reported between the children and petitioner's partner in January of 2012, the Department requested

and received an emergency pick up order for the children.

5. The Department issued a Notice of Substantiation and Intent to Place Name on Registry to petitioner on October 31, 2012, on the ground that petitioner had placed her children at risk of sexual harm. A Commissioner's Review meeting was held on January 7, 2013, and the substantiation was upheld by letter dated January 16, 2013. This appeal followed.

ORDER

Petitioner's substantiation is affirmed.

REASONS

The sole issue presented at this stage of the proceedings is the effect, in this appeal, of the prior court findings and orders related to petitioner placing her children at risk of sexual harm. This issue is generally governed by the doctrine of collateral estoppel, which has been applied before by the Board in substantiation cases. See Fair Hearing No. 20,476 (applying collateral estoppel in "risk of harm" substantiation appeal) and cases cited therein.

The Board is guided by the criteria for collateral estoppel outlined in *Trepanier v. Styles*, 155 Vt. 259 (1990):

- (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 of 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.

*Id.* at 265.

Here, issue preclusion is asserted against the same party in the earlier action, petitioner. Likewise, petitioner had a "full and fair" opportunity to litigate the CHINS proceeding. Applying preclusion is fair: petitioner had appointed counsel in the CHINS cases, the issue was resolved by a final judgment on the merits, the CHINS findings were stipulated, and the findings and disposition order were not appealed.

The remaining and principal question is whether the issue was the same in the CHINS proceeding as is raised here. Petitioner was substantiated for risk of sexual harm to her two minor daughters. The applicable legal standard is as follows:

- (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.

\* \* \* \*

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912.

Collateral estoppel is appropriate in this case. The CHINS court made a specific finding that petitioner placed her children at risk due to her "lack of understanding" of her partner's mental health and substance abuse issues. In its disposition order, the court relied specifically on facts that included her partner's sex offender history, his use of illegal drugs, and her failure to heed warnings that he not have contact with her children. Petitioner's substantiation was based on the same facts and issues, which was her failure to recognize or address the risk of sexual harm her partner posed to her daughters. See *In re P.J.*, 185 Vt. 606 (2009) (collateral estoppel applied to substantiation appeal where

petitioner was party to a stipulated determination in related CHINS proceeding).

Moreover, the findings of the CHINS court were central and necessary to its conclusion that petitioner's children were in need of care and supervision, as was the factual basis for the court's disposition order maintaining the children in Department custody. *See In re Catherine Harwood*, 2013 VT 89, ¶ 15 (reversing the Board's application of collateral estoppel in a substantiation appeal based on probate court findings, in part because the findings relied upon from the probate proceeding were not necessary to the court's order).

Under these circumstances, the prior court determinations mandate judgment for the Department affirming petitioner's substantiation. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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