

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. Y-01/08-22
)
Appeal of)

INTRODUCTION

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

The following decision is based on the evidence adduced at hearing and subsequent briefs. The parties are in agreement about the material facts.

FINDINGS OF FACT

1. The petitioner is the father of three children including seven year old twins, CaL and ChL, and a nine year old.
2. The precipitating incident occurred on September 8, 2007. The Department substantiated an incident of risk of harm by petitioner to CaL.

3. On Saturday, September 8, 2007, petitioner and the twins went hunting. After they finished hunting, they drove to K.M.'s home. K.M. is petitioner's grandmother and the children's great grandmother.

4. Petitioner left his hunting rifle on the front passenger seat of his car. The hunting rifle was unloaded. Petitioner left the box of ammunition on the console between the passenger and driver's seat. The car was left unlocked.

5. Petitioner and the twins visited with K.M. inside her home. At the close of the visit, the twins left the house before petitioner. Petitioner and K.M. estimate that the twins left the house approximately two to three minutes but no more than five minutes before the incident.

6. Petitioner and K.M. heard the rifle discharge. They rushed outside. Both children were upset. The twins gave conflicting stories. It appears that ChL fired the rifle. There was a bullet hole through the roof of the car. K.M. testified that she saw powder residue on one side of CaL's face and she saw small pockmarks. The petitioner testified that he did not see powder residue on CaL's face.

7. Sergeant R.B. of the Vermont State Police investigated the incident. He took photographs of petitioner's car, inside and outside views of the bullet hole

through the car's roof, the rifle and boxes of ammunition. He interviewed the twins on or about September 12, 2007. Sgt. R.B. did not see any powder burns or tattooing or other indications of injury on CaL on September 12, 2007, but he said the interview was several days after the event. He also verified that petitioner no longer had any firearms in his home.

8. Petitioner testified that he previously completed a hunter safety course offered by the state. He agreed that the rules include keeping firearms and ammunition beyond the reach of children. He also agreed with the Ten Basic Rules of Firearms Safety found in the Northeast Hunter Education Manual published by the International Hunter Education Association and used by Vermont for hunter safety courses.

9. Rule 9 of the Ten Basic Rules of Firearms Safety states:

Store firearms and ammunition separately in locked compartments and beyond the reach of children.

10. Prior to this incident, State Trooper J.S. visited the petitioner's household on or about April 2, 2007 and spoke with petitioner's wife. Trooper J.S. made the visit to discuss gun safety at the request of the children's school. She offered gun locks; petitioner's wife declined the gun

locks because they used a locked gun cabinet and would make sure that the guns were locked in the gun cabinet.

Petitioner was aware of this visit and its purpose.

11. On or about October 31, 2007, the Department gave petitioner notice of their intent to substantiate risk of physical abuse and place petitioner on the child abuse and neglect registry. Petitioner asked for an administrative review and the Department substantiated risk of harm on or about December 21, 2007. Petitioner appealed the substantiation to the Human Services Board.

ORDER

The Department's decision to substantiate risk of physical harm is reversed.

REASONS

To protect children, the Department for Children and Families is required by statute to investigate reports of child abuse. 33 V.S.A. §§ 4911, *et seq.* The specific purposes are set out in 33 V.S.A. § 4911 which state:

The purpose of this subchapter is to:

- (1) Protect children whose health and welfare may be adversely affected through abuse or neglect.

(2) Strengthen the family and make the home safe for children whenever possible by enhancing the parental capacity for good child care.

(3) Provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes require the reporting of suspected child abuse and neglect, an assessment or investigation of such reports and provision of services, when needed, to such child and family.

(4) Establish a range of responses to child abuse and neglect that take into account different degrees of child abuse or neglect and which recognize that child offenders should be treated differently from adults.

(5) Establish a tiered child protection registry that balances the need to protect children and the potential employment consequences of a registry record for persons who are substantiated for child abuse and neglect.

The Department is mandated to keep 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 administrative review results in a decision upholding the substantiation, 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, harm, risk of 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. . .

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

. . .

(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.

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

The material facts are not in dispute. The petitioner did not intend to place his children at risk of harm. It is highly unlikely that the petitioner will repeat what happened in this instance. The Department has not removed the children from petitioner's custody; they do not see petitioner as a threat to his children.

The dispute is whether petitioner's actions in leaving a rifle and ammunition in his unlocked car meet the requisites of "risk of harm".

Petitioner argues that he had no intent to harm his children and that his negligence does not rise to the level of inclusion on the child abuse and neglect registry.

The Board has considered the interplay of "by other than accidental means" with the abuse statute. Fair Hearings 17,588; 19,112; and 21,194. The Board has used gross negligence or reckless behavior in determining whether an individual's actions rose to the level of abuse or risk of harm. The Board referred to the definition of "gross negligence" found in Rivard v. Roy, 124 Vt. 32 (1963). In Fair Hearing No. 17,588 on page 19, 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 also Mullin v. Flood Brook Union School District, 173 Vt. 202 (2001).

Like many Vermont parents, petitioner took his twin boys hunting. While visiting with his grandmother (the children's great grandmother), petitioner inadvertently left the unloaded the rifle and the box of ammunition in his car. The incident occurred in the space of a few minutes. Petitioner's actions were an "error of judgment". As such,

his behavior does not rise to the level of the type of gross negligence or reckless behavior that characterizes risk of harm.

The Department has not met their burden of proof that petitioner placed his son at risk of harm. Accordingly, the Department's decision to substantiate risk of harm is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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