

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. V-02/10-92  
 )  
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 of physical abuse to his son, B.B-B., based on a single egregious act. S.B. is the mother of B.B-B. S.B. was holding their child when petitioner assaulted her.

On March 9, 2011, the Human Services Board entered an Order denying the Department's Motion for Summary Judgment based upon collateral estoppel.<sup>1</sup> The Department based their first Motion for Summary Judgment upon the petitioner's conviction for domestic assault upon S.B. The Board found that collateral estoppel was not appropriate because the issue before the Vermont District Court was not the issue facing the Board. However, the Board found that they could take notice of the admissions petitioner made during said Vermont District Court case.

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<sup>1</sup>A copy of the March 9, 2011 Order is attached for the Board's review.

The Department has filed a subsequent Motion for Summary Judgment. The petitioner opposes this Motion.

DISCUSSION

Factual Basis

The petitioner and S.B. were romantically involved. They are the parents of a minor child, B.B-B., born on August 8, 2009. The Department determined that petitioner placed B.B-B. at risk of physical harm because S.B. was holding B.B-B. while petitioner assaulted her on September 20, 2009. B.B-B was then one month old.

The petitioner was charged with domestic assault upon S.B. The petitioner entered a guilty plea to domestic assault<sup>2</sup> of S.B. on March 24, 2010. Petitioner was represented by counsel during the criminal case.

The following exchange is found in the colloquy between the Court and the petitioner:

The Court: Do you agree that the affidavit of Officer-- Trooper [A] provides a factual basis from which a jury could find each of the essential elements?  
[Petitioner}: Yes, sir.

The Court: All right. The Court will find that there is a factual basis; the Court will find that the plea is

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<sup>2</sup> Domestic assault is defined at 13 V.S.A. § 1042 as "[a]ny person who attempts to cause or willfully or recklessly causes bodily injury to a family or household member, or willfully causes a family or household member to fear imminent serious bodily injury. . .".

made knowingly and voluntarily after a voluntary and intelligent waiver. The Court will enter adjudication of guilt, deferred acceptance, until we have a sentencing hearing.

(Certified transcript of March 24, 2010 Jury Draw/Change of Plea.)

Trooper A's affidavit contains statements by both petitioner and S.B. Petitioner admits to slapping S.B. on the back of the head and grabbing S.B. around the neck during an argument. S.B. was holding B.B-B. during the domestic assault.

Petitioner received a deferred sentence on April 14, 2010. The petitioner's attorney indicated that petitioner agreed to the proposed sentencing agreement and that petitioner admitted to hitting S.B. on the back of her head but disputed other allegations. (Certified transcript of April 14, 2010 Sentencing Hearing.)

#### Legal Discussion

The Department is required by statute to investigate reports or 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.

Risk of harm can be substantiated for a single egregious act that places a child at risk for being seriously injured. Response to Child Abuse and Neglect § 2010.06 (adopted May 26, 2009).

The Vermont Supreme Court addressed risk of physical harm based on a single egregious act by stating that an individual not be placed on the registry for a single incident "absent relatively extreme circumstances". In re R.H., 2010 VT 95 at ¶30 (2010). The Court adopted the Department's approach by stating:

[Department] looks to the degree of misconduct involved in the action of the parent or the caretaker and reserves registry inclusion in single incident cases for misconduct that is egregious—that is, outrageously bad or reprehensible. We believe that DCF's approach is consistent with the statute which requires that risk of harm to the child be "substantial," 33 V.S.A. § 4912(2), and create "significant" danger, *id.* § 4912(4). In re R.H., *supra* at ¶30.

See also In re D.McD., 2010 VT 108 (E.O. 2010).

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 Board held in their prior decision that petitioner's admissions can be used as undisputed material facts. Petitioner admitted hitting S.B. on the back of her neck and grabbing her neck during a domestic assault during which S.B. held their one-month old son.

The Department relies on collateral estoppel in their Motion for Summary Judgment arguing that the Board should apply collateral estoppel to the facts in this case. The Department defines those facts to include the statements S.B. made to Trooper A noting that petitioner, during his colloquy, admitted that Trooper A's affidavit provides a basis for finding the elements of domestic assault.

However, the petitioner, in his criminal case, disputed S.B.'s statements at the same time as he took responsibility for hitting S.B. on the back of the neck and grabbing her neck. In addition, petitioner disputed the statements attributed to S.B. in his response to the Department's prior Motion for Summary Judgment and incorporated his dispute in the response to the current Motion for Summary Judgment.

Statements attributed to S.B. cannot be used as a basis for the Board's ruling on this Motion for Summary Judgment.

However, the question remains based on the facts before the Board whether petitioner's behavior on September 20, 2009 constitutes risk of harm based upon a single egregious incident. The question is whether a reasonable person would conclude that petitioner placed his infant son at significant risk of serious physical injuries when he assaulted S.B. while she held their one month old son.

The Department's argument is that during the domestic assault, the petitioner could have struck the infant or his actions could have caused S.B. to lose control over the infant and drop him. The petitioner argues that the Department's contentions are speculative as to whether the infant was placed at risk of serious physical injury, and, that the infant was not injured during the domestic assault.

The material facts are that S.B. was holding their infant son during an argument in which the petitioner admitted hitting petitioner on the back of the head and in which the petitioner admitted to the police officer that he grabbed S.B. around the neck. The material facts include the age of the child. The Board can take notice of a one-month

old child's motor development and the potential for serious physical harm if the mother lost control and the child fell.

A reasonable person can conclude that petitioner placed his one-month old son at risk of physical injury and the physical injury could be serious when petitioner assaulted S.B. as she held their one-month old son.

ORDER

Based on the foregoing, summary judgment is granted and the Department's decision to substantiate petitioner is affirmed.

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