

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Berks County Children and Youth Services,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Department of Public Welfare,	:	No. 1238 C.D. 2010
Respondent	:	Submitted: December 10, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 6, 2011

Berks County Children and Youth Services (CYS) appeals the May 27, 2010 final order of the Department of Public Welfare (DPW) adopting in its entirety the recommendation of an Administrative Law Judge (ALJ) sustaining R.B.’s appeal of CY’s rejection of him as a kinship foster care resource. The issues presented for this Court’s review are: (1) whether DPW erred in failing to permit CY to present testimony concerning all of the reasons that R.B.’s application was denied, and (2) whether DPW erred in determining that CY’s licensing policy serves no rational purpose. For the reasons set forth below, we affirm the order of the DPW.

In February of 2009, R.B. moved into the home of L.B, his estranged wife¹ as part of a safety plan established by CY for her children, including R.B.’s

¹ R.B. and L.B. are still legally married but they have been separated for the past seven years.

niece J.S. On August 25, 2009, CYS received a kinship care licensing request from R.B. for J.S. CYS rejected R.B.'s application on the basis that he was involved in an open case with DPW. R.B. appealed CYS' decision. A hearing was held before an ALJ, and on May 19, 2010, the ALJ recommended that R.B.'s appeal be sustained and his application be processed by CYS. On May 27, 2010, DPW adopted the ALJ's recommendation. CYS appealed to this Court.²

CYS argues that DPW erred in failing to permit CYS to present testimony concerning all of the reasons that R.B.'s application was denied. Specifically, CYS contends that a remand is warranted because the ALJ refused to incorporate the evidence contained in DPW's record pertaining to the denial of L.B.'s provisional license and the removal of J.S. from L.B.'s home. We disagree.

At the pre-hearing conference, the ALJ specifically asked Jennifer L. Grimes, the representative for CYS, what was the specific reason that R.B.'s application was denied, and Ms. Grimes stated: "Number 7 is the specific reasoning, that the applicant not be open for services with public child welfare agencies in any jurisdiction within the past 12 months." Reproduced Record (R.R.) at 15. In addition, at the beginning of the actual hearing, the ALJ stated on the record: "All right. [R.B.], you agree that the issue we're talking about today is whether or not on September 10, 2009, the county correctly denied you as a foster care resource specifically because your household was open for services within the preceding 12 months." R.R. at 38. Moreover, Edith Stull, the Kinship Unit Supervisor for CYS, testified that the main reason R.B.'s application was denied was "because he was involved in an open case with the agency." R.R. at 50. Furthermore, when Ms.

² Our scope of review in an appeal from a DPW adjudication is limited to a determination of whether constitutional rights were violated, errors of law were committed, or necessary findings of fact were not supported by substantial evidence. *Burroughs v. Dep't of Pub. Welfare*, 606 A.2d 606 (Pa. Cmwlth. 1992).

Grimes questioned Ms. Stull about any other reasons for denying the application and she said yes, the ALJ specifically asked Ms. Stull: “Further, were any of these reasons presented to [R.B.] or is this something recent you thought of?” R.R. at 63. Ms. Stull then responded: “No. At this point it was because [he] was open for services within the last 12 months.” R.R. at 63. The ALJ again reiterated at that time: “Based on that, that’s our scope of review” R.R. at 63.

It is clear that based on the record, evidence concerning reasons other than the fact that R.B. had an open case within the last 12 months would have been irrelevant since this was the reason relied upon for the denial of R.B.’s application throughout the entire process. “The trial court may exclude evidence that is irrelevant, confusing, misleading, cumulative or prejudicial.” *1st Steps Int’l Adoptions, Inc. v. Dep’t of Public Welfare*, 880 A.2d 24, 34 (Pa. Cmwlth. 2005). Thus, DPW did not err in precluding CYS from presenting testimony concerning any other reasons that R.B.’s application was denied. Accordingly, a remand is not warranted to incorporate the evidence contained in DPW’s record pertaining to the denial of L.B.’s provisional license and the removal of J.S. from L.B.’s home, as this evidence was not relied upon in the denial of R.B.’s application.

CYS next argues that DPW erred in determining that CYS’ licensing policy serves no rational purpose. We disagree. We hold that CYS’ licensing policy, specifically Requirement Number 7, does not serve a rational purpose because it inappropriately excludes otherwise potentially qualified foster care applicants while attempting to address concerns already covered by applicable laws.

The licensing policy in question is CYS’ seventh requirement for consideration to license an approved foster parent (Requirement Number 7), which states: “Not open for services with public child welfare agencies in any jurisdiction

within the past 12 months.” Supplemental Reproduced Record at 1. At the hearing Ms. Grimes asked Ms. Stull to explain the rationale behind this policy. Ms. Stull responded:

When they started the kinship care unit in August of 2004, initially I was getting a lot of requests to license people who had open cases with the agency and I went to my director and I said, what is this all about? Honestly, our perspective of someone that is a licensed foster parent is someone who is – has their own life under control, they’re not involved in any serious child welfare situations or child safety situations. We should not have to be concerned that they need protective services for children within their household.

And so it was as though it was – the two things didn’t match up. If you’re open for protective services and there are issues going on in your home with your family, with your children, there are concerns there that preclude you from meeting the requirements to do a foster home. . . .

R.R. at 51.

Notably, DPW Regulation 3700.2, governing Foster Family Care Agencies, 55 Pa. Code § 3700.2, provides:

The goal of this chapter is to reduce risk to children in placement; to protect their health, safety and human rights; to establish minimum requirements for the operation of a foster family care agency; and to establish minimum requirements to be applied by foster family care agencies when approving and supervising foster families.

However, the Office of Children, Youth and Families Bulletin 3140-04-02, titled Approval/Licensing of Foster Family Homes and Residential Facilities for Title IV-E Reimbursable Placements, establishes that a county agency has the authority to establish additional requirements regarding the licensing of foster and kinship care homes.

It must also be noted that Section 1303(b) of the Public Welfare Code³ specifically states:

If a child has been removed from the child's home under a voluntary placement agreement or is in the legal custody of the county agency, the county agency shall give first consideration to placement with relatives. The county agency shall document that an attempt was made to place the child with a relative. If the child is not placed with a relative, the agency shall document the reason why such placement was not possible.

Here, once it was determined that R.B. had an open case within the last 12 months, he was not given any consideration, let alone first consideration, to be a licensed foster parent and no attempt whatsoever was made to place J.S. in his home.

We note that Section 6344(d)(2) of the Child Protective Services Act (Act), 23 Pa.C.S. § 6344(d)(2), provides a very specific list of considerations to be used when assessing a prospective foster parent. Section 6344(d)(2) of the Act specifically states:

In the course of approving a prospective foster parent, a foster family care agency shall require prospective foster parents and any individual over the age of 18 years residing in the home to submit the information set forth in subsection (b) for review by the foster family care agency in accordance with this section. If a prospective foster parent, or any individual over 18 years of age residing in the home, has resided outside this Commonwealth at any time within the previous five-year period, the foster family care agency shall require that person to submit a certification obtained within the previous one-year period from the Statewide central registry, or its equivalent in each state in which the person has resided within the previous five-year period, as to whether the person is named as a perpetrator of child

³ Act of June 13, 1967, P.L. 31, *as amended*, added by Section 1 of the Act of September 30, 2003, P.L. 169, 62 P.S. § 1303(b).

abuse. If the certification shows that the person is named as a perpetrator of child abuse within the previous five-year period, the foster family care agency shall forward the certification to the department for review. The foster family care agency shall not approve the prospective foster parent if the department determines that the person is named as the equivalent of a perpetrator of a founded report of child abuse within the previous five-year period. In addition, the foster family care agency shall consider the following when assessing the ability of applicants for approval as foster parents:

- (i) The ability to provide care, nurturing and supervision to children.
- (ii) Mental and emotional well-being. If there is a question regarding the mental or emotional stability of a family member which might have a negative effect on a foster child, the foster family care agency shall require a psychological evaluation of that person before approving the foster family home.
- (iii) Supportive community ties with family, friends and neighbors.
- (iv) Existing family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships, especially as they might affect a foster child.
- (v) Ability of the applicant to accept a foster child's relationship with his own parents.
- (vi) The applicant's ability to care for children with special needs.
- (vii) Number and characteristics of foster children best suited to the foster family.
- (viii) Ability of the applicant to work in partnership with a foster family care agency. This subparagraph shall not be construed to preclude an applicant from advocating on the part of a child.

Furthermore, DPW Regulation 3700.64, 55 Pa. Code § 3700.64, provides an additional list of very specific considerations to be used when assessing potential foster parents, including:

(1) The ability to provide care, nurturing and supervision to children.

(2) A demonstrated stable mental and emotional adjustment. If there is a question regarding the mental or emotional stability of a family member which might have a negative effect on a foster child, the FFCA [(Foster Family Care Agency)] shall require a psychological evaluation of that person before approving the foster family home.

(3) Supportive community ties with family, friends and neighbors.

(b) In making a determination in relation to subsection (a) the FFCA shall consider:

(1) Existing family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships, especially as they might affect a foster child.

(2) Ability of the applicant to accept a foster child's relationship with his own parents.

(3) The applicant's ability to care for children with special needs, such as physical handicaps and emotional disturbances.

(4) Number and characteristics of foster children best suited to the foster family.

(5) Ability of the applicant to work in partnership with an FFCA.

All of these mandatory considerations help to prevent children from being placed into homes where there are already problems in the home. Thus, Requirement Number 7 is both cumulative and superfluous.

Certain of CYS' policy requirements have obvious rational purposes, such as the age requirement, the steady income requirement and that of immediate access to transportation. Even the specific policy requirement at issue, automatically excluding anyone with "an open case" within the past 12 months, appears at first

blush to have a rational purpose. However, as demonstrated by the present case, the requirement at issue eliminates applicants who are tangentially related to an open case without any assessment as to whether that applicant actually presents a safety risk. If CYS would have looked past R.B.'s indirect connection to an open case, it would have found that R.B. had specifically moved into his home to abate any safety risk. Since CYS had made a previous determination that R.B.'s presence in the home would facilitate the children's safety, it seems illogical for CYS to now conclude that his serving as a foster parent creates a safety risk. And yet, because of Requirement Number 7, there is no recourse for R.B., other than to wait until 12 months after the case with which he is associated is closed. We agree with the ALJ and DPW finding that Requirement Number 7 serves no rational purpose, and that CYS improperly failed to consider R.B. as a potential kinship care resource for J.S. utilizing the considerations outlined in the applicable statutes and regulations.

This Court notes that even if Requirement Number 7 was enforceable, CYS did not prove at the hearing that R.B. had "an open case" in the past 12 months. CYS based the open case argument on the fact that L.B. had a case opened against her, and the fact that R.B.'s name was included on the family service plan simply because he was married to L.B. and the biological father of M.B. Further, R.B. testified that he never received notice that a case was opened against him, and CYS could not provide proof that he was notified. Accordingly, CYS should have considered R.B. as a potential kinship care resource, notwithstanding Requirement Number 7.

For all of the above reasons, the final order of DPW is affirmed.

JOHNNY J. BUTLER, Judge

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Youth Services,	:	
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	:	
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Department of Public Welfare,	:	No. 1238 C.D. 2010
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ORDER

AND NOW, this 6th day of January, 2011, the May 27, 2010 final order of the Department of Public Welfare is affirmed.

JOHNNY J. BUTLER, Judge