

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DIVISION OF FAMILY SERVICES)	FILE NO.: CN15-05688
(DFS))	
Petitioner/Appellant,)	CPI NO.: 15-31747
)	
v.)	
)	
J----- J---- (d.o.b. --/--/03),)	
Respondent/Appellee.)	

DECISION AND ORDER AFFIRMING COMMISSIONER'S ORDER

A request was filed on November 7, 2016 by Wendy Danner, Esquire, Deputy Attorney General, on behalf of the Division of Family Service (DFS), seeking a review by a judge of this Court of a decision and order dated October 11, 2016 on a petition for substantiation by a Family Court Commissioner. The transcript was prepared on January 18, 2017. An answer was filed by Respondent, J----- J----, on February 6, 2017.

Pursuant to 10 *Del. C.* §915(d)(1),

any party, except a party in default of appearance before a Commissioner, may appeal a final order of a Commissioner to a Judge of the Court by filing and serving written objections to such order, as provided by the rules of Court, within 30 days from the date of the Commissioner's Order. A Judge of the Court shall make a *de novo* determination of those portions of the Commissioner's Order to which objection is made. A Judge of the Court may accept, reject, or modify in whole or in part the Order of the Commissioner. The Judge may also receive further evidence or recommit the matter to the Commissioner with instruction.

On October 15, 2015, DFS filed a Petition for Substantiation of J----- J----, then twelve years old, requesting he be substantiated at Level IV for sexual abuse of his four-and-a half-year old cousin for placing his private part in his cousin's mouth.

After a hearing on March 22, 2016, the Commissioner issued a decision and order on April 17, 2016, denying the petition for substantiation on the basis that DFS had failed to establish jurisdiction in this matter as there was no evidence submitted as to where the alleged act of abuse occurred and as to any risk of future harm. DFS filed a motion to vacate order and/or motion for reargument on April 13, 2016. On May 11, 2016, the Commissioner denied the motion to vacate order and/or reargument.

DFS filed a request for a judge to review the Commissioner's decision dated May 11, 2016. In an interim order dated August 16, 2016, this judge reversed the Commissioner's holding that jurisdiction in New Castle County, Delaware, had not been established and then went on to find by a preponderance of the evidence that the Respondent had placed his penis in his young cousin's mouth. Because no evidence was presented as to the risk of harm, however, a supplemental hearing was ordered to be rescheduled to consider that evidence.

Such a hearing was held before a Commissioner on September 22, 2016 at which DFS failed to present any additional evidence. Instead, DFS argued that no evidence was needed since the statutory scheme required automatic placement at Level IV for a substantiation of an incidence of sexual abuse and that, in any event, the act was egregious enough to warrant placement at Level IV. The Commissioner rejected that argument and ruled that since no evidence was presented as to the risk of harm which the Respondent posed, he should be placed at the lowest level, Level I.

DFS has now filed another request for this judge to review that decision and order.

Argument

DFS restates the argument made before the Commissioner that essentially contends that Family Court is to play no role in deciding the appropriate level on which a respondent who has been substantiated should be placed.

Respondent's attorney argues in his response that because there was no conviction, the statutory scheme call for the Court to make an assessment of the risk of harm.

Role of Court

The role that Family Court plays in regard to substantiating individuals on the Child Protection registry has been the subject of previous court rulings and decisions.¹ Since those cases were decided, the statute has been amended.

The present statute, 16 *Del. C.* §925A,² appears to set forth a two step analysis in cases where there has been no conviction. First, the Court must find by a preponderance of the

¹ See *State v Griffin*, File No. CN10-06039, p.4 (Del. Fam. Ct. Sept. 30, 2011); *State v. R. R.*, Del. Fam. Ct., 2011 WL5346106, (DFS argument in those decisions that its regulations controlled in determining the appropriate substantiation level was rejected in both cases.)

² Sixteen *Del. C.* §925A(a) and (b) states:

- (a) Unless otherwise provided in this subchapter, no person shall be placed on the registry unless the Court finds by a preponderance of the evidence after a hearing on the merits, or accepts the agreement of the parties, that:
 - (1) The person committed an act of abuse or neglect; and
 - (2) The act of abuse or neglect was based on the same incident as alleged in the Notice of Intent to Substantiate.

evidence that the respondent committed an act of abuse or neglect that was based on the same incident as alleged in the notice of intent to substantiate. Then “the Court shall also determine by a preponderance of the evidence *after a hearing on the merits, the risk of future harm* the person poses to children and designate the person to the appropriate Child Protection Level set forth in §923. (Emphasis added). If a person is convicted of an enumerated crime, the level to which the person is assigned is automatic on the level designated in §923.

In this case, Respondent was never adjudicated delinquent of a crime. If the Family Court is to play no role in determining the level of risk in a case where there has been no conviction, one would have to ignore the specific wording of 16 *Del. C.* §925A (b) requiring Family Court to determine the risk of future harm the person poses to children after a hearing.

While the Court could possibly find that a similar act of sexual abuse by an adult against a young child could pose the highest risk of future harm to children, this Court will not presume that the Respondent in this case, being only eleven or twelve years old at the time, poses the same risk as a much older adult who molested a child would pose. The General Assembly has acknowledged the lower risk to reoffend sexual offenses by young juveniles in giving Family Court discretion to relieve juveniles under the age of fourteen who have been adjudicated of designated sexual offenses from registration as a sex offender or to reduce the tier level. See 11 *Del. C.* § 4123(c)(2).

DFS had the burden and an opportunity to present evidence that the circumstances in this matter rose to the highest level of risk and failed to do so. Such evidence could have included an assessment showing high risk, previous or subsequent incidences of sexual abuse by the Respondent, lack of remorse, absence of any treatment, etc. In fact, DFS chose to present no evidence, leading the Commissioner to conclude that the Respondent presented only a low risk of future harm to children.

Therefore, this Court affirms the order of the Commissioner dated October 11, 2016, J----- J----- is assigned to Level I on the Child Protection Registry.

IT IS SO ORDERED.

2/22/17

Date Written Order issued

/Barbara D. Crowell/

JUDGE BARBARA D. CROWELL

2/22/17

Date Written Order Mailed

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- (b) Should the elements of subsection (a) of this section be met, the Court shall also determine by a preponderance of the evidence after a hearing on the merits or accept the agreement of the parties, the risk of future harm the person poses to children and designate the person to the appropriate Child Protection Level set forth in §923 of this title. If the person is convicted of an enumerated crime when based on the same incident of abuse or neglect as alleged in the Notice of Intent to Substantiate, the person is automatically entered on the Child Protection Registry at the level designated by §923 of this title.

cc: Commissioner
Wendy Danner, Esquire, DAG
Thomas A. Foley, Esquire