

BEFORE THE
DEPARTMENT OF SOCIAL SERVICES
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

VIRGIE and ZACHORY¹ HARRIS,

Respondents.

Case No. CDSS 3714246201

OAH No. 2015050752

PROPOSED DECISION

This matter came on regularly for hearing on August 5, 2015, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Diego, California.

Harry Skaletsky, Senior Staff Counsel, represented complainant Pamela Dickfoss, Deputy Director, Community Care Licensing Division, Department of Social Services, State of California.

Virgie Harris and Zachory Harris represented themselves.

The matter was submitted on August 5, 2015.

PROTECTIVE ORDER

The name of a non-minor dependent in this matter is subject to a protective order. No court reporter or transcription service shall transcribe the name of the non-minor dependent but shall instead refer to the non-minor dependent as VM as used in this decision.

SEALING ORDER

Exhibits were admitted into evidence that contain confidential information about VM. It was not practical to delete this information from some of these exhibits. To protect privacy and confidential personal information from inappropriate disclosure, a written Protective Order Sealing Confidential Records was issued on August 5, 2015, and provided

¹ The caption was amended at the hearing to correct the spelling of respondent Zachory Harris's first name, which had been erroneously spelled "Zachary."

to the parties on the record. It has been marked and admitted as Exhibit 6. After the hearing, the administrative law judge determined that the Confidential Name List attached to Exhibit 1 contained confidential information and was required to be sealed. The Confidential Name List was removed from Exhibit 1 and marked and admitted as Exhibit 5. An Amended Protective Order Sealing Confidential Records was issued and served on the parties on August 28, 2015. It has been marked and admitted as Exhibit 7. The Amended Protective Order supersedes the Protective Order issued August 5, 2015, and lists all of the exhibits that are ordered sealed. The Amended Protective Order governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order, provided that such documents are protected from release to the public.

FACTUAL FINDINGS

1. Respondents have been licensed² to operate a foster family home for children since August 11, 1993. Their license allows them to provide care for two ambulatory children ages 2 to 17 and no non-minor dependents.

2. On April 28, 2015, complainant signed the accusation in case number CDSS 3714246201. The accusation alleged that, between October 1, 2013, and May 1, 2014, respondents withheld money from a non-minor dependent (VM) who had been, but was no longer, in their care. The accusation seeks an order revoking respondents' foster family home license and requiring respondents to pay \$6,560 to the department.

3. VM was placed in respondents' foster home in late 1993 when she was two weeks old. VM had physical and emotional challenges. She remained in respondents' home until she left to reside in a college dormitory in October 2013 when she was almost 20 years old. At the time of the hearing, VM was almost 22 years old.

4. Although eligibility for foster care normally ends when a foster child turns 18 years old, effective January 1, 2012, Assembly Bill 12 extended foster care to the age of 21 under certain conditions, including when the foster child is attending a college or university. VM was accepted to the University of California, Berkeley. She attended UC Berkeley for a short time and then transferred to University of California, San Diego. Because she attended the universities, she qualified to receive extended foster care benefits. Extended foster care and support may be provided in a number of placements, including in a foster home or in independent living housing.

² San Diego County licenses foster family homes through an agreement with the department.

Funds to Provide for VM at College

5. On July 1, 2012, VM left respondents' foster home to attend the summer bridge program at UC Berkeley; however, she left the program on July 18, 2012, and returned to the foster home. VM transferred to UCSD in or around August 2012 and commuted to school from respondents' home until September 2013, when she moved to a dormitory on UCSD's campus. Under extended foster care provisions, the UCSD dormitory was a Supervised Independent Living Placement (SILP).

6. Before VM left respondents' foster home to live in the UCSD dormitory, respondents received approximately \$2,200 per month from San Diego County to provide extended foster care for VM. In October 2013, when VM left the home, respondents were no longer entitled to receive any money for VM's care, but VM personally was entitled to receive extended foster care benefits of \$820 per month (SILP payment) for her basic needs and expenses. Mrs. Harris, VM, and Jennifer Elkins³, VM's social worker, met several times to discuss VM's transition to UCSD. Because of a concern that transitioning to college and managing a budget could prove overwhelming to VM and hamper her assimilation, it was agreed that Mrs. Harris would be the assigned payee for VM's monthly SILP payments from San Diego County until VM was able to handle her own finances. The SILP checks were made payable to "Virgie Harris for [VM]."

VM created a budget and determined that she required \$188 in cash each month for incidentals, including snacks, health and beauty supplies, and entertainment. Following their discussions, Ms. Elkins and VM believed that Mrs. Harris had agreed to provide VM \$188 from the \$820 SILP payment each month VM was attending the university. Ms. Elkins also believed it was understood amongst the three of them that the remainder of each SILP payment was to be used for VM to travel "home" on weekends, to pay phone charges, for things she needed when she was at home, and other expenses that may arise and that money left at the end of the month was to go into a savings account for VM. Ms. Elkins denied that she told Mrs. Harris that the SILP payment was compensation to respondents for keeping a bed available for VM in the foster home if VM wanted to go "home." Ms. Elkins stated it was discussed and understood between herself, Mrs. Harris and VM that Mrs. Harris would remain the payee on the SILP payment only until VM adjusted to college life and could handle her finances independently. None of this "agreement" was reduced to writing.

7. On October 7, 2013, VM signed a document acknowledging that she received \$1,003 from Mrs. Harris. The document states "Jennifer (Social Worker) stated this is my part of the money that Virgie Harris is required to give (VM) during the time she is at college." The document was not signed by respondents. No explanation was provided for the lump sum payment.

³ Ms. Elkins is employed by the County of San Diego and testified at the hearing. Respondents did not cross examine Ms. Elkins. [One does not examine or cross examine testimony. One examines or cross examines a witness.]

8. In May or June 2014, Ms. Elkins met with VM. Ms. Elkins reported that, although she was very reluctant to discuss financial matters, VM told Ms. Elkins that she was not receiving any of the agreed upon and budgeted money from respondents. She also told Ms. Elkins about other financial issues involving respondents; however, VM did not testify at the hearing, and those matters are not alleged in the accusation.

9. In June 2014, VM became the payee for the SILP payments she received from the County.

Department's Investigation

10. Ms. Elkins referred the matter to the County's licensing division for investigation. Patricia Olivia⁴, a licensing program analyst employed by San Diego County, was assigned to investigate VM's complaints.

11. Ms. Olivia made multiple attempts to contact VM beginning on June 10, 2014. On June 16, 2014, Ms. Olivia spoke to VM about Ms. Olivia's investigation. During their conversation, VM asked Ms. Olivia to "not proceed with any further investigation as far as her foster parents" were concerned. VM told Ms. Olivia that everything was fine.

12. Ms. Olivia was obligated to continue the investigation. On August 5, 2014, she made an unannounced visit to respondents' home. A four year old foster child and an 18 year old adoptive child were present in the home watching television. Ms. Olivia noted that Mrs. Harris was cooking dinner for the children, and the home smelled "great." The home appeared neat and organized.

Mrs. Harris said she recalled the meeting to discuss VM's income and how it was to be distributed, but she did not recall agreeing to provide a monthly allowance to VM from money received from the County. She recalled only that someone told her to give VM a lump sum of \$1,003, which she did. Mrs. Harris told Ms. Olivia that she understood the \$820 was paid to her, not VM, in consideration of respondents' saving a bed in their home for VM and not taking in other foster children. Mrs. Harris stated that the last payment she received from the County was deposited to her account on November 1, 2013. She denied receipt of any payments related to VM after that date. Mrs. Harris told Ms. Olivia she believed the payments stopped because VM was no longer living in the home. Other financial issues were discussed which are not alleged in the accusation.

13. On August 8, 2014, VM contacted Ms. Olivia by email and telephone. She again asked Ms. Olivia to stop investigating respondents. She told Ms. Olivia that she loved Mrs. Harris, that Mrs. Harris was a wonderful foster mother and that she would never testify against Mrs. Harris. She "begged" Ms. Olivia to stop the investigation.

⁴ Ms. Olivia testified at the hearing. Respondents did not cross examine Ms. Olivia except to confirm that Ms. Olivia did not speak to Mr. Harris.

14. On August 12, 2014, Ms. Olivia spoke to Mrs. Harris and confronted her with the information proving respondents received \$820 monthly from the County for VM until May 2014. Mrs. Harris responded, “Well, if they say they paid me, then they did.” Mrs. Harris did not tell Ms. Olivia that respondents gave any money to VM other than the \$1,003. Mrs. Harris did not say she had spent money on clothes or other items for VM.

15. Madeline Croft⁵ is employed by the County of San Diego as a Human Services Specialist, Foster Care Eligible Department, Health and Human Services Department. She determines eligibility for foster care payments. She reviewed copies of checks sent to respondents for VM’s care from the County Fiscal Department. She confirmed that checks were sent to respondents every month until June 1, 2014, when the payee was changed. The canceled checks returned to the County contained a signature that purported to be Mrs. Harris’s and showed that the funds were deposited in a credit union account. Ms. Croft testified that respondents had not reported to the County that they were not receiving their checks.

Respondents’ Testimony

16. At the hearing, Mrs. Harris did not deny she received \$820 from the County each month from October 2013 through May 2014. However, Mrs. Harris denied that there was an agreement that a specific amount of that money was to “go to any particular place.” She stated that no written document described what the \$820 was for or provided a breakdown of how the money was to be distributed. She asserted that there was “room for interpretation” regarding how the money was to be used.

17. Mrs. Harris testified that, despite the fact that VM had “lots of problems,” she had stood by VM since she was two weeks old. Mrs. Harris stated that even if no money was involved, she would have taken care of VM. She stated she bought clothes and shoes for VM and paid for her to have her hair done. When VM needed to go to doctor appointments, Mrs. Harris took her. When VM had surgery or was otherwise hospitalized, Mrs. Harris was with her. Mrs. Harris stated that VM did not want for anything; respondents provided her with everything she needed. She did not treat VM as a foster child but as her own child. Mrs. Harris is concerned for VM and has not seen her in one year.

Mrs. Harris agreed that, during the period of October 2013 through May 2014, when the department alleged she wrongfully withheld money, VM was living in a dormitory at UCSD. Mrs. Harris acknowledged receiving \$820 each month from the County until May 2014. She confirmed that she gave VM \$1,003 because VM asked for it. She testified that she “probably” spent the money received from the County for VM’s books, to buy her clothes, to have her hair done and other things for VM’s care and benefit. She did not have

⁵ Ms. Croft testified at the hearing.

receipts for any expenditures. She stated she did not tell the social workers what she did with the money because “it was not their business” and she did not think at the time to tell them that she spent money on VM.

Mrs. Harris also stated she believed that, since she was licensed to have only two foster children, the money from the County was intended to compensate her for keeping a bed available for VM if she wanted to return to the foster home.

In closing argument, Mr. Harris agreed that any money owed to VM should be paid to VM.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. Each party asserting a claim or defense has the burden of proof of establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 500.) Complainant bears the burden of proving that the charges in the accusation are correct and that grounds exist to revoke respondents’ foster family home license. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789.) If complainant meets her burden of proof, respondents bear the burden of establishing their defense to the charges.

The standard by which each party must prove those matters is “the preponderance of the evidence” standard. (Health & Saf. Code, § 1551, subd. (b); Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Statutory Authority

2. Health and Safety Code section 1550 provides:

The department may deny an application for, or suspend or revoke, any license, or any administrator certificate, issued under this chapter upon any of the following grounds and in the manner provided in this chapter, or may deny a transfer of a license pursuant to paragraph (2) of subdivision (b) of Section 1524 for any of the following grounds:

[¶] . . . [¶]

(c) Conduct which is inimical to the health, morals, welfare, or safety of either an individual in, or receiving services from, the facility or the people of the State of California.

[¶] . . . [¶]

(f) Engaging in acts of financial malfeasance concerning the operation of a facility or certified family home, including, but not limited to, improper use or embezzlement of client moneys and property or fraudulent appropriation for personal gain of facility moneys and property, or willful or negligent failure to provide services.

Definitions

3. West's Encyclopedia of American Law, edition 2. Copyright 2008, The Gale Group, Inc., defines “malfeasance” as:

The commission of an act that is unequivocally illegal or completely wrongful.

Malfeasance is a comprehensive term used in both civil and **Criminal Law** to describe any act that is wrongful. It is not a distinct crime or TORT, but may be used generally to describe any act that is criminal or that is wrongful and gives rise to, or somehow contributes to, the injury of another person.

Malfeasance is an affirmative act that is illegal or wrongful. In tort law it is distinct from misfeasance, which is an act that is not illegal but is improperly performed. It is also distinct from nonfeasance, which is a failure to act that results in injury.

The distinctions between malfeasance, misfeasance, and nonfeasance have little effect on tort law. Whether a claim of injury is for one or the other, the plaintiff must prove that the defendant owed a duty of care, that the duty was breached in some way, and that the breach caused injury to the plaintiff. One exception is that under the law of Strict Liability, the plaintiff need not show the absence of due care. The law of strict liability usually is applied to Product Liability cases, where a manufacturer can be held liable for harm done by a product that was harmful when it was placed on the market. In such cases the plaintiff need not show any actual malfeasance on the part of the manufacturer. A mistake is enough to create liability because the law implies that for the sake of public

safety, a manufacturer warrants a product's safety when it offers the product for sale. (Emphasis in original.) <<http://legal-dictionary.thefreedictionary.com/malfeasance>> (as of September 2, 2015)

Evaluation

ISSUE RELATING TO REVOCATION OF LICENSE

4. Cause exists to revoke respondents' license to operate a foster family home pursuant to Health and Safety Code section 1550, subdivision (f), because respondents committed the wrongful act of retaining money that was to be used for VM's expenses and other needs while she resided in a college dormitory.

5. Cause exists to revoke respondents' license to operate a foster family home pursuant to Health and Safety Code section 1550, subdivision (c), because Mrs. Harris engaged conduct inimical to VM's health, morals, welfare, or safety when she falsely stated she had not received money from San Diego County for VM since November 2013. The evidence proved conclusively that respondents received \$820 each month from the County of San Diego from October 2013 until May 2014, during which time VM did not reside in the foster home. The checks received bear an endorsement signature purporting to be Mrs. Harris's and, at the hearing, she did not deny receipt of the checks.

6. Children placed in foster home settings, and non-minor dependents reliant upon the foster care system, are a particularly vulnerable population. The department must exercise extreme caution to avoid children being exposed to individuals who are untruthful and dishonest and who may be prone to take financial advantage of those within their care.

7. The facts in this case are unusual, and the determination as to whether respondents' license should be revoked requires an evaluation of the entirety of the facts and circumstances presented. Respondents provided care and support for VM from the time she was 2 weeks old. No evidence suggested that respondents failed to properly provide and care for VM during the time she resided in the foster home. When Ms. Olivia made an unannounced visit to respondents' home, she noted the home smelled "great;" things were neat and organized; and the two children in the home were content.

VM left the foster home in July 2012 to attend UC Berkeley. When VM left that program in less than three weeks, she returned to respondents' foster home and transferred to UCSD, a local option. She remained in respondents' home until she left in October to reside in a dormitory. No evidence suggested respondents objected or complained that VM returned to their home after she left UC Berkeley or that they did not provide appropriate care and support for VM during this time.

When VM was to leave the foster home and reside in a dormitory at UCSD, and because there was a concern that VM would not be able to adjust to living in a dormitory and

managing her finances, Mrs. Harris was made the payee of the money from the County. There does not appear to have been any clear guidelines for the distribution of the money to VM, although it is undisputed that the money was to be spent for VM's benefit, not respondents' benefit. It is not entirely unreasonable, given VM's history, that respondents would believe the money was to hold a bed for VM until it could be determined that VM had adjusted to her new living situation. However, Mrs. Harris' credibility on this point was undermined by her initial statement to Ms. Olivia that she thought payments had stopped in November because VM no longer lived in the foster home. Mrs. Harris's testimony regarding her understanding of what the money was for changed during the hearing.

Mrs. Harris contended that she spent the monthly payments from the County of San Diego on VM; however her testimony was vague, and she did not produce any receipts for her claimed expenditures. It is not unreasonable that respondents, who cared for VM since she was 2 weeks old, would have continued to support her and spend money on her behalf during the time she was living at school. However, Mrs. Harris testified only that she "probably" spent the money on VM. Respondents did not offer corroborative evidence of any specific items they paid for. The evidence does not support a finding that respondents used the SILP payments received while VM was residing in the UCSD dormitory entirely for VM's benefit. On the other hand, no evidence was offered to show that VM was unable to obtain books and other necessary items for school, or that she did not have proper clothing or was otherwise unable to care for her needs.

It is particularly troublesome that Mrs. Harris falsely told Ms. Olivia that she had not received any money from the County for VM since November 2013. Mrs. Harris provided no explanation for this falsehood. Honesty and candor are mandatory when accepting the responsibility of caring for foster children. A department licensee is a mandated reporter who must self-report violations of laws and regulations, even when doing so may jeopardize his or her license. Mrs. Harris's dishonesty and untruthfulness indicates an inability to fulfill the obligations and responsibilities of a licensed foster parent. However, no evidence was presented that, other than the issue presented here, respondents failed to fulfill their obligations and responsibilities.

8. Upon consideration of the entirety of the facts, including that respondents had been responsible foster parents for 22 years and that the circumstances presented in this matter are unlikely to reoccur, the evidence established that respondents require some discipline for their violations, but that a revocation is not warranted or necessary to protect foster children who might be placed in their care. A period of probation with appropriate terms and conditions is sufficient to protect the public and any child in their care.

PAYMENT OF FUNDS

9. The department requested that respondents be ordered to pay the money they received on VM's behalf from October 2013 to May 2014 to the department. The amount requested was \$6,560 which represents \$820 for eight months. The amount does not include

a deduction for the \$1003 respondents paid to VM in October 2013. Any award of money must be reduced by this amount.

The \$820 monthly SILP payment was paid by San Diego County for VM's benefit. Neither San Diego County nor VM are parties to this matter. The department provided no legal authority for the proposition that this tribunal may order respondents to pay money to the department or that the department is entitled to receive payment of funds that are owed either to the County or to VM. The request for an order requiring respondents to pay money to the department is denied.

ORDER

1. The license issued to respondents Virgie Harris and Zachory Harris to operate a foster family home is revoked. However, the revocation is stayed and the license is placed on probation for a period of three years, subject to the following terms and conditions:

A. Virgie Harris and Zachory Harris shall obey all federal, state and local laws, and all applicable rules and regulations related to the operation and maintenance of a foster family home.

B. Virgie Harris and Zachory Harris will cooperate in responding to all inquiries made by any state, county or federal governmental agency relating to the receipt and distribution of money received for the use and benefit of any foster child.

C. If Virgie Harris or Zachory Harris violates any term or condition of probation, the department may revoke probation and carry out the disciplinary order that was stayed. That action shall occur only after the filing of a Petition to Revoke Probation and a hearing upon due notice.

D. If Virgie Harris and Zachory Harris successfully complete the terms and conditions of probation, the conditions imposed upon their license shall expire and their foster family license shall be restored in full.

2. The request for an order requiring respondents to pay money to the department is denied.

DATED: September 4, 2015

_____/s/_____
SUSAN BOYLE
Administrative Law Judge
Office of Administrative Hearings