

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial
FACT,
of the License of Cherry Kay
DeMarais to Provide Family
Day Care under Minn. Rules,
Parts 9502.0300 to 9502.0445.

FINDINGS OF
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 10:00 a.m. on Monday, December 16, 1991 at the Wright County Government Center, Buffalo, Minnesota. The record on this matter closed on December 23, 1991, the date of receipt of the last post-hearing submission.

Brian J. Asieson, Assistant Wright County Attorney, Courthouse, Buffalo, Minnesota 55313, appeared on behalf of Wright County Human Services. Cherry Kay DeMarais, Box 642, 1017 Seventh Avenue, Howard Lake, Minnesota 55349, appeared, pro se-

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Human Services shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Natalie Steffen, Commissioner of Human Services, Second Floor Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the denial of Ms. DeMarais' application for a family day care license should be upheld.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Cherry Kay DeMarais is a 44-year-old female who resides with her

three-year-old son, Gregory, in Howard Lake, Minnesota. Ms. DeMarais was divorced in December 1986 and has remained single since that time. In addition to Gregory, Ms. DeMarais has a son, Dennis, age 26; a daughter, Shelly, age 22; and a daughter, Janelle, age 17. Both Dennis and Shelly are married and live with their spouses and Janelle has been living with her father since age 17.

2. Ms. DeMarais' marriage to her ex-husband, Duane DeMarais, was quite volatile and there were many instances of physical abuse committed by each upon

the other. Duane DeMarais seriously injured Cherry on several occasions and life became quite unbearable for her. During this period of time, the entire DeMarais family, including in-laws, were experiencing continual conflict which oftentimes resulted in physical confrontations.

3. On October 11, 1981, Cherry and Duane DeMarais were visiting in-laws, Cindy and Duane Hickman, in Waverly, Minnesota. At that time, Dennis DeMarais was residing with the Hickmans because of problems he was causing at home. An argument arose concerning appropriate care for Dennis, and Cherry DeMarais assaulted Cindy Hickman. As a result, Ms. DeMarais was charged with fourth degree assault and arrested by a Wright County Deputy Sheriff. She later plead guilty to this charge.

4. In August of 1982, when Shelly and Janelle were still residing at home, Ms. DeMarais reacted to a problem that Shelly was causing with Janelle by striking Shelly on the arm four or five times with a curling iron she had been using. Shelly sustained bruises and cuts as a result of being hit with the curling iron. As a result of this incident, Shelly was placed in a foster home for approximately one year. Shelly was 13 years old at this time.

5. In May of 1985, Cherry DeMarais could not take any more abuse from her husband and contacted the father of a friend to arrange for Duane's murder. The friend's father called the Minnetonka Police Department who sent a decoy killer to meet with Cherry DeMarais. When the two met, Ms. DeMarais gave \$200 to the decoy as a downpayment for her husband's murder and agreed on a total price of \$1,000. Ms. DeMarais told the decoy that she would give him an additional \$300 the following week along with a picture of her husband. Based upon this transaction, Cherry DeMarais was charged with attempted murder in the first degree and conspiracy to commit murder, both felonies. Both of these charges were dismissed, however, in November of 1985.

6. Cherry DeMarais is a certified nurses aide, an occupational license issued to her by the Minnesota Board of Nursing in 1980. In 1986, Ms. DeMarais was employed by Optional Care Systems in St. Paul, Minnesota, doing home-care nursing for elderly recipients. In addition, from July of 1988 to July of 1989, Ms. DeMarais worked as a night-time security guard at a residential facility for senior citizens in Minneapolis. Ms. DeMarais' employment with Optional Care Systems was terminated in August of 1991 and she quickly found part-time employment as a nurses aide at the Delano Nursing Home. At the

present time, Ms. DeMarais works approximately 21 hours per week and receives reduced AFDC benefits based upon her monthly income.

7. In late 1990, Cherry DeMarais applied for a family day care license with Wright County so she could be employed on a full-time basis and remain at home with her toddler son. Ms. DeMarais suffers from a bladder disease which requires that she work in the general proximity of a bathroom.

8. Ms. DeMarais has engaged in counseling and therapy sessions in the past. The last counseling she received was in 1986 and 1987 after her arrest for attempted murder. Since her divorce from Duane in 1986, the DeMarais family has had much less friction and there has been no physical abuse by any family member in the last three years. Ms. DeMarais is now experiencing a harmonious family life and feels she is ready to assume the responsibilities of a family day care provider.

9. On January 9, 1991, Keith Gilbertson, Wright County day care coordinator, sent a letter to the Commissioner of Human Services recommending that Ms. DeMarais' application for a family day care license be denied. This recommendation was based upon the physical abuse which had occurred in the DeMarais family as documented in Wright County social service records, the foster placement of Shelly and Dennis, the assault arrest in 1981, and the felony arrest in 1985. On August 19, 1991, the director of the licensing division at the Department of Human Services sent a letter to Cherry DeMatais informing her that her application to provide family day care was denied. This denial was based on the reasons set forth in Mr. Gilbertson's letter and the licensing standards set forth in Minn. Rule 9502.0335, subpart 6E. and F. Cherry DeMarais filed a timely appeal of this denial.

10. The Department of Human Services adopted new rules governing disqualifying factors on March 11, 1991. 15 State Register 2043. These rules, codified as Minn. Rules 9543.3000 to 9543.3090, and the repealer accompanying these rules became effective March 29, 1991. 15 State Register 2048. The new rules were in effect when the Department of Human Service's Notice of Hearing was served on Ms. DeMarais.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSION\$

I. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 245A.01 to 245A.16,

2. The Notice of Hearing in this matter cited rules which had been superceded or repealed as the basis for this action, but was proper in all other respects and both Wright County and Department have complied with all substantive and procedural requirements of law and rule.

3. Pursuant to Minn. Stat. 245A.08, subd. 3, an applicant for a license bears the burden of proof to demonstrate by a preponderance of the evidence that all applicable laws have been complied with and that the application should be approved and a license granted.

4. Minn. Rule 9502.0335, subp. 6 requires that an applicant be denied a license if the applicant is disqualified under Minn. Rule 9543.3070.

5. A person is disqualified under Minn. Rule 9543.3070 if that person is convicted of an assault under Minn. Stat. 609.2231; or murder, attempted murder, or conspiracy to commit murder under the Minnesota Criminal Code, Minn. Rule 9543.3070, subp. 1(A).

6. A person is disqualified under Minn. Rule 9543.3070 if that person "has admitted or a preponderance of the evidence indicated the individual has committed an act which meets the definition of a crime" listed as a disqualification factor. Minn. Rule 9543.3070, subp. 1(B).

7. Any person "identified as the perpetrator in a determination that maltreatment of minors has occurred" which meets the statutory definition of

maltreatment committed by that person which is recurring or serious is disqualified under Minn. Rule 9543.3070, subp. 1(C).

8. A disqualification may be set aside if the information relied upon to disqualify the person is incorrect, or the person does not pose a risk of harm to those in her care. Minn. Rule 9543.3080, subp. 3.

9. Cherry Kay DeMarais has not proved by a preponderance of the evidence that she is in full compliance with the rule provisions set forth above. The Findings of Fact contained herein show clearly that Ms. DeMarais has physically abused her daughter in the past and she has admitted arranging for her husband's death in 1985. Additionally, a preponderance of the evidence shows that she committed an assault upon her sister-in-law in 1981. Ms. DeMarais has not shown that she poses no risk of harm to any person under her care.

10. Citing out-of date rule provisions does not violate Ms. DeMarais' right to due process in this proceeding, since the underlying basis for denial of her application is identical under either rule. The old and new rules are virtually the same and the Judge would reach the same result under either rule.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services affirm the decision to DENY Ms. DeMarais' application for a family day care license.

Dated this 26 day of December, 1991.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail .

Reported: Taped, No Transcript Prepared.

MEMORANDUM

The record in this matter shows quite clearly that Cherry DeMarais does not meet the necessary qualifications to be licensed as a family day care provider. However, all of the disqualifying events took place prior to 1986 and Ms. DeMarais went through counseling subsequent to that time. There is

nothing in the record to show that, at the present time, her life has not changed as she asserts. The disqualifying characteristics shown by Ms. DeMarais prior to 1986 are quite serious. However, the Judge believes that most of these "problems" were the direct result of a very abusive husband. The Judge suggests that the Commissioner and Wright County may want to reconsider Ms. DeMarais' application if she can obtain a satisfactory evaluation from a mutually agreed-to counselor or psychologist. The Judge is convinced that Ms. DeMarais went through an unbearably stressful period during her marriage and suffered serious physical injury and mental anguish as a result. It has been several years since those problems have subsided and Ms. DeMarais appears to be leading a normal life with her remaining family. She should be entitled to show, by the report of a psychologist or counselor, that she is now able to perform the responsibilities of a family day care provider.

The Notice of Hearing contained superceded rule provisions and purported to rely upon those provisions in this action. The cited rule provisions are virtually identical to the new provisions with respect to this proceeding. Were there any meaningful differences between the provisions, however, this erroneous citation may have constituted a lack of notice and thereby violated Ms. DeMarais' constitutional right to due process.

P.C@ E.

I/ Minn. Rule 9502.0335, subp. 6.E. specifically lists as a "disqualification factor" that the Applicant "has admitted to, or there is substantial evidence indicating - . . . physical abuse . . . Minn. Stat.

626.556, subd. 2(d) defines "physical abuse" as "any physical or mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means" Minn. Rule

9502.0335, subp. 6.F. lists as a "disqualification factor" that an applicant "has admitted to, or there is a preponderance of the evidence indicating the commission of any crime listed in . . . sections 609.18 to 609.21 or 609.221 to 609.378 These include the crimes of murder and assault.

