

## Non-Adoption Options

C. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

The decision is adopted with additional factual findings as follows:

The Pioneer Home resident, H.E. has advanced dementia.

Although H.E.'s interactions with Mr. T were friendly and she gestured for Mr. T's attention, due to H.E.'s advanced dementia, she would have been unable to recognize Mr. T or consent to receiving a massage from him.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of February, 2017.

By: Signed  
Deborah Erickson, Project Coordinator  
Office of the Commissioner  
Alaska Department of Health and Social Services

[This document has been modified to conform to the technical standards for publication.]

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )  
 )  
J T ) OAH No. 17-0966-DHS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

On August 2, 2017, the No Name Pioneer Home (Pioneer Home) Administrator imposed visitation restrictions on J T whose wife is a resident of the facility. Pioneer Home claims Mr. T inappropriately contacted another resident by touching her back, shoulder, and chest without permission, and the restrictions are necessary to ensure the health, safety, and welfare of all Pioneer Home residents. Mr. T appeals the administrator’s decision and objects to the restrictions that have been imposed.

Although the physical contact at issue in this case was irregular and arguably unduly familiar, the preponderance of the evidence does not support a conclusion that Mr. T poses a risk to Pioneer Home residents. And thus, the visitation restrictions imposed do not strike a proper balance between Pioneer Home resident security and Ms. T’s right to have her husband visit her at the Pioneer Home. Accordingly, the restrictions are partially overturned.

However, the Pioneer Home Administrator does have the authority to instruct Mr. T not to touch other residents. Accordingly, the restrictions imposed regarding physical contact with other residents are affirmed. Mr. T is instructed not to touch any other Pioneer Home residents without their express permission.<sup>1</sup> And he is instructed not to go near H.E. If H.E. approaches him, he must leave the area and call a staff member for assistance.

**II. Facts**

J T and his wife D have been married for 58 years.<sup>2</sup> After retirement, they moved to Town A, where they lived together for about 15 years.<sup>3</sup> Some time after their move to Town A, Ms. T was diagnosed with Lewy body dementia.<sup>4</sup> After Ms. T’s diagnosis, the Ts continued to

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<sup>1</sup> This is not intended to prohibit Mr. T from customary physical contact, such as hand-shakes.  
<sup>2</sup> Testimony of K U.  
<sup>3</sup> U Testimony.  
<sup>4</sup> U Testimony.

live in Town A, and Mr. T provided all of Ms. T's care.<sup>5</sup> But as Ms. T's disease progressed, her condition deteriorated to the point that the Ts' adult children, K U, N L, and J T, Jr. (G), became concerned about their parents' welfare and Mr. T's ability to manage Ms. T's care in Town A by himself.<sup>6</sup> Although Mr. T wanted to continue taking care of his wife, in January 2016, the family decided to move Ms. T to the No Name Pioneer Home.<sup>7</sup>

The move to Pioneer Home was very difficult for Ms. T.<sup>8</sup> She felt abandoned, and missed having someone stay with her at night.<sup>9</sup> Mr. T's time with Ms. T is important for her well-being.<sup>10</sup>

Although Mr. T still lives in Town A and his visits are varied, he tries to spend as much time with Ms. T as possible.<sup>11</sup> He travels back and forth, spending a couple of weeks in Town A and then one to two weeks in No Name.<sup>12</sup> Initially, Mr. T spent long hours at Pioneer Home sitting with Ms. T in her room, eating meals with her, and doing various activities with her.<sup>13</sup> When he was in town, he tried to visit Ms. T daily.<sup>14</sup> Indeed, Mr. T spent the night with Ms. T on several occasions, either sleeping in a chair or squeezing into bed with her.<sup>15</sup> Sometime in early 2017, Ms. T fell and suffered a big gash by her eye.<sup>16</sup> Because Ms. T is prone to falling, Mr. T stayed overnight, sleeping in a chair by Ms. T's bed, so that he could be there to prevent Ms. T from trying to get out of bed and injuring herself again.<sup>17</sup> Although Pioneer Home has no specific visiting hours, Pioneer Home staff told Mr. T not to stay overnight, and he stopped.<sup>18</sup>

Over time spent visiting his wife at Pioneer Home, Mr. T has become friendly with other residents.<sup>19</sup> One resident, in particular, H.E. has been especially friendly to Mr. T.<sup>20</sup> H.E. misses her husband and enjoys the company of older gentlemen.<sup>21</sup> Mr. T regularly visited with H.E.,

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<sup>5</sup> U Testimony.

<sup>6</sup> U Testimony.

<sup>7</sup> U Testimony.

<sup>8</sup> U Testimony; Testimony of N L.

<sup>9</sup> U Testimony.

<sup>10</sup> U Testimony; L Testimony

<sup>11</sup> J T Testimony; U Testimony.

<sup>12</sup> Testimony of J T; U Testimony.

<sup>13</sup> J T Testimony; U Testimony.

<sup>14</sup> J T Testimony; U Testimony; Testimony of Hanna Cinco.

<sup>15</sup> J T Testimony; U Testimony.

<sup>16</sup> J T Testimony; U Testimony.

<sup>17</sup> J T Testimony; U Testimony.

<sup>18</sup> J T Testimony; *see also* Testimony of Administrator.

<sup>19</sup> J T Testimony.

<sup>20</sup> J T Testimony; U Testimony; L Testimony.

<sup>21</sup> Cinco Testimony; Administrator Testimony.

whom he described as a kind, friendly, older lady.<sup>22</sup> He and H.E. enjoyed talking about Town B, where H.E. is from.<sup>23</sup> Although H.E. has Alzheimer’s and does not remember her caregivers on a day-to-day basis, she expresses familiarity and fondness when she sees Mr. T.<sup>24</sup> H.E. does not address Mr. T by name; however, she initiates contact and approaches him for attention whenever she sees him.<sup>25</sup> She has asked Mr. T for kisses and has tried to hold his hand.<sup>26</sup> Mr. T, who took a massage training class, also frequently massaged H.E.’s neck, shoulder, and trapezoid muscles (the muscle from the neck to shoulders).<sup>27</sup> Mr. T testified that based on her body language, he believed that H.E. liked the massages.<sup>28</sup> He did not believe the massages were inappropriate and never tried to conceal them from Pioneer Home staff.<sup>29</sup>

Physical contact between Pioneer Home residents and visitors was common.<sup>30</sup> No one at Pioneer Home told Mr. T that the massages were inappropriate or that he was not allowed to touch other residents.<sup>31</sup> And there is no rule prohibiting a visitor from touching a resident.<sup>32</sup>

On June 29, 2017, Pioneer Home Certified Nursing Assistant, Hannah Cinco observed Mr. T rub H.E.’s back and move his hand to the front part of her “chest” under her clothing protector (i.e. a bib to protect the resident’s clothing from food, etc.).<sup>33</sup> Ms. Cinco, who was behind H.E. and Mr. T, could only see that Mr. T’s hand went under the clothing protector.<sup>34</sup> She could not see where Mr. T’s hand was.<sup>35</sup> Ms. Cinco, who receives annual training on preventing sexual abuse, was uncomfortable with Mr. T’s contact with H.E.<sup>36</sup> Consistent with her training—which instructed her to use her judgment and follow her instinct—Ms. Cinco reported Mr. T’s contact to her supervisor, Maria Miller and the Pioneer Home Administrator.<sup>37</sup>

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22 J T Testimony.

23 J T Testimony.

24 J T Testimony; U Testimony; L Testimony.

25 J T Testimony; U Testimony; L Testimony.

26 J T Testimony; U Testimony; L Testimony.

27 J T Testimony.

28 J T Testimony.

29 J T Testimony.

30 J T Testimony; U Testimony; L Testimony.

31 J T Testimony; Administrator Testimony.

32 R. 000018-21.

33 Cinco Testimony.

34 Cinco Testimony.

35 Cinco Testimony.

36 Cinco Testimony.

37 Cinco Testimony.

Specifically, Ms. Cinco reported that she saw Mr. T rub H.E.'s chest and that he immediately removed his hand when Ms. Cinco approached.<sup>38</sup>

The Administrator reviewed Pioneer Home's security recording and concluded that Ms. Cinco's report was correct.<sup>39</sup> From the video, the Administrator observed Mr. T rub H.E.'s back several times, slide his hand under H.E.'s clothing protector, and rub H.E.'s "chest" a couple of times until Ms. Cinco entered the room.<sup>40</sup> Later that afternoon, the Administrator met with Mr. T to discuss the incident.<sup>41</sup> She asked Mr. T whether H.E. had asked him for help and whether she gave him permission to rub her back and chest.<sup>42</sup> According to the Administrator's notes, Mr. T responded that H.E. neither asked for help nor gave him permission to rub her back and chest.<sup>43</sup> According to the Administrator, Mr. T responded that he has always rubbed H.E.'s shoulders, and that he did not remember touching her chest.<sup>44</sup> The Administrator instructed Mr. T to never touch any resident other than his wife.<sup>45</sup> She prohibited him from rubbing other residents' shoulders, arms, or chests or any other touching.<sup>46</sup> And she instructed him to move away and report to staff if any residents go near him.<sup>47</sup> Mr. T agreed not to touch any other residents and informed the Administrator that he was leaving to Town A for a few weeks.<sup>48</sup> The Administrator informed Mr. T that she would give him further instructions about his future visitation when he returned from Town A.<sup>49</sup>

Based on her conclusion that Mr. T's contact with H.E. was inappropriate, the Administrator reported Mr. T's massage to the Central Registry—which are forwarded to adult protective services and the assisted living home licensing authorities.<sup>50</sup> She also reported the incident to the No Name Police Department and H.E.'s granddaughter.<sup>51</sup> She instructed Pioneer Home staff not to leave any residents alone with Mr. T and to be extra vigilant when he visits.<sup>52</sup>

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<sup>38</sup> R. 000001.  
<sup>39</sup> R. 000001; Administrator Testimony.  
<sup>40</sup> R. 000001; Administrator Testimony.  
<sup>41</sup> R. 000001; Administrator Testimony.  
<sup>42</sup> R. 000001; Administrator Testimony.  
<sup>43</sup> R. 000001; Administrator Testimony.  
<sup>44</sup> R. 000001; Administrator Testimony.  
<sup>45</sup> R. 000001; Administrator Testimony.  
<sup>46</sup> R. 000001; Administrator Testimony.  
<sup>47</sup> R. 000001; Administrator Testimony.  
<sup>48</sup> R. 000001; Administrator Testimony; T Testimony.  
<sup>49</sup> R. 000001; Administrator Testimony.  
<sup>50</sup> R. 000003, 000031; Administrator Testimony.  
<sup>51</sup> R. 000003, 000031; Administrator Testimony.  
<sup>52</sup> R. 000003, 000031; Administrator Testimony.

On July 19, 2017, the Administrator met with Ms. U, Ms. L, and Mr. G T.<sup>53</sup> Although there is some dispute over some of the discussion that occurred during that meeting,<sup>54</sup> there is no dispute that the Administrator showed the security video to Mr. T's children and informed them of her concerns about their father's contact with H.E.<sup>55</sup> The Administrator informed them that she still needed to meet with Mr. T to discuss visitation restrictions.<sup>56</sup>

On July 24, 2017, at Ms. U's request, the Administrator met with Ms. U to explain why Adult Protective Services was involved in the situation.<sup>57</sup> The Administrator explained that as a licensed assisted living home, Pioneer Home is required to report incidents like what happened on June 29 to Centralized Reporting and that those reports go to the assisted living home licensing authorities and adult protective services.<sup>58</sup> Ms. U informed the Administrator that if Pioneer Home limited Mr. T's visits with Ms. T, it would result in less quality time for her parents to visit.<sup>59</sup> Ms. U cautioned Mr. T might decide to move Ms. T to a different assisted living home, and although they believe Pioneer Home is the best place for Ms. T, she and Ms. L would have to support Mr. T's decision.<sup>60</sup> The Administrator responded that they would discuss the visitation restrictions with Mr. T when he returned to town from Town A.<sup>61</sup> On July 26, 2017, Ms. U advised the Administrator that Mr. T was back in town, and she requested more information about the visitation restrictions in writing.<sup>62</sup>

On August 2, 2017, The Administrator sent Mr. T a letter imposing the following visitation restrictions:<sup>63</sup>

- If unaccompanied, Mr. T may only visit Ms. T in the Pioneer Home Great Hall, Monday through Friday, 9:00 a.m. to 12:00 noon and 2:00 p.m. to 5:00 p.m.

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<sup>53</sup> R. 000004-000005; Administrator Testimony; U Testimony; L Testimony; Testimony of J T, Jr. ("G" T Testimony).

<sup>54</sup> Administrator Testimony; U Testimony; L Testimony; G T Testimony. Ms. U, Ms. L, and Mr. G T allege that the Administrator insinuated that Mr. T groped H.E. and narrated the video with her own spin about what happened—which the Administrator denies. And the Administrator alleges that Mr. T's family agreed with her interpretation of the video—which they deny. Ms. U, Ms. L, and Mr. G T disagree with the Administrator's characterization of Mr. T's message.

<sup>55</sup> R. 000004-000005; Administrator Testimony; U Testimony; L Testimony; Testimony of J T, Jr. ("G" T Testimony).

<sup>56</sup> R. 000005; Administrator Testimony.

<sup>57</sup> R. 000006.

<sup>58</sup> R. 000006.

<sup>59</sup> R. 000006.

<sup>60</sup> R. 000006.

<sup>61</sup> R. 000006.

<sup>62</sup> R. 000006.

<sup>63</sup> R. 000009-000010.

- If he is accompanied by another family member, his visitation days and times are unrestricted, and he can visit in Ms. T's shared room and all common areas of the Pioneer Home. However, a family member must accompany him at all times, and he is not permitted on the other side of the shared room which belongs to another resident.

- He is not permitted to go near any other female residents of the Pioneer Home. If a female resident approaches him, he is required to leave the area immediately and call a staff member for assistance.

On August 28, 2017, Mr. T appealed those restrictions.<sup>64</sup> Mr. T disputes both the factual basis for the visitation restrictions and the restrictions themselves.<sup>65</sup> In particular, Mr. T disagrees that his contact with H.E. was inappropriate, and he claims that the restrictions imposed are unreasonable and punitive and that they deny him the opportunity to maintain a loving and meaningful relationship with his wife.<sup>66</sup>

A hearing was held on November 20, 2017. The entire record, including the security video, was admitted into evidence. In addition to testimony from Mr. T, Ms. U, Ms. L, Mr. G T, Ms. Cinco, and the Administrator, the Pioneer Home security video was presented at the hearing.<sup>67</sup>

The video, which has different views and allows viewing from different angles, shows the following:

- Throughout the interaction at issue in this case, a janitor was buffing the floors in the hallway, leading from the Waterside dining room.
- Mr. T entered the Waterside dining room.
- H.E. and another resident were sitting in their wheelchairs at a table when Mr. T entered the room.
- As Mr. T walked past H.E., she reacted to his presence and reached her arm out, gesturing to get his attention.

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<sup>64</sup> R. 000007-000008.

<sup>65</sup> R. 000007.

<sup>66</sup> R. 000007.

<sup>67</sup> Hearing Recording; R. 000030. The undersigned viewed the video at the hearing and after the hearing. However, the original DVD provided with the record became corrupted, and this office requested a new copy to be included in the record.

- After spending some time across the room, Mr. T approached H.E. at the table. The recording does not contain any audio, but it appears that there was some discussion or interaction between Mr. T, H.E., and the other resident.
- Mr. T walked around the table and bent over H.E. He removed something sticky from H.E.'s face and shook it off his finger onto a napkin or something on the table.
- The other resident touched H.E.'s arm, and H.E. pulled her arm away.
- Mr. T glanced to his side towards the direction where the janitor was buffing the floors. There is no way to determine from the video what Mr. T was looking at.
- Mr. T rubbed H.E.'s back and shoulder. He then slid his hand under H.E.'s clothing protector—but not under her clothing—and rubbed H.E.'s “chest” or front part of her shoulder area near her clavicle.
  - He then moved his hand from H.E.'s clavicle, and rubbed her arm.
  - H.E. did not pull her arm away or otherwise move away from Mr. T.
  - Mr. T's physical contact lasted only a few seconds.
  - CNA, Hanna Cinco approached and pulled H.E. away from the table and away from Mr. T.
- Mr. T did not noticeably react to Ms. Cinco or her approach to the table. His demeanor appeared calm and casual. And as Ms. Cinco approached, Mr. T continued to touch H.E.'s arm. Mr. T stood there and watched Ms. Cinco move H.E. for a couple of seconds, and then he left the area.

While Mr. T's appeal was pending, Ms. T fell and broke her hip.<sup>68</sup> Because Ms. T is bedridden and cannot go to the Great Room unless they move her whole bed there, the only time Mr. T could visit her was when accompanied by a family member.<sup>69</sup> As a result, Mr. T's visitation time with Ms. T was reduced significantly.<sup>70</sup> During the hearing, the family testified that they planned to hire a caregiver to sit with Ms. T at night.<sup>71</sup> Accordingly, Pioneer Home agreed that if accompanied by that caregiver, Mr. T's visitation days and times are unrestricted, and he can visit Ms. T in her private room and all common areas of the Pioneer Home.

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<sup>68</sup> U Testimony; L Testimony; T Testimony.

<sup>69</sup> U Testimony; L Testimony; T Testimony.

<sup>70</sup> U Testimony; L Testimony; T Testimony.

<sup>71</sup> U Testimony; T Testimony.



Since the hearing, Ms. T has been moved to a private room, and Pioneer Home has revised Mr. T's visitation restrictions. Specifically, Mr. T is now reportedly allowed to visit Ms. T in her private room unaccompanied Monday through Friday, 9:00 a.m. to 12:00 noon and 2:00 p.m. to 5:00 p.m. But Mr. T must still be accompanied by a family member or designee to visit Ms. T after 5:00 p.m. week days, and at all times on weekends and state holidays. Mr. T asked to supplement this appeal to include his appeal of the revised restrictions. And the Pioneer Home moved to strike Mr. T's supplement to the appeal. Pioneer Home is technically correct that the new notice of restrictions on Mr. T's visitation is the basis for a new appeal and is outside the scope of this appeal.<sup>72</sup> However, the parties did present evidence of the changed circumstances at the hearing, and the findings and conclusions in this decision will likely resolve any subsequent appeal of visitation restrictions imposed because of the June 29 incident.

### **III. Discussion**

Pioneer Home has an obligation to ensure the health, safety, and welfare of all of its residents.<sup>73</sup> Accordingly, the Pioneer Home Administrator must take steps to prevent abuse, neglect, exploitation, or mistreatment of Pioneer Home residents.<sup>74</sup> She may implement house rules and restrict visitation when there is evidence that residents may be at risk or if a guest's presence upsets residents or staff.<sup>75</sup> But any visitation restrictions must be balanced against a resident's right to visit with whomever he or she chooses.<sup>76</sup>

In this case, the Pioneer Home staff felt uncomfortable with Mr. T's physical contact with H.E. Based on the information they had, they concluded that the contact was inappropriate. Accordingly, they erred on the side of caution, and took appropriate action to remove any potential risk.

But after closely reviewing the video and considering all the testimony presented, the preponderance of the evidence does not support a conclusion that Mr. T's presence poses a risk to or upsets H.E. or any other Pioneer Home residents. Although the physical contact at issue in this case was irregular and perhaps unduly familiar, Mr. T's contact with H.E. was harmless. It

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<sup>72</sup> See Memorandum of Agreement for Adjudication Services, dated September 22, 2017 (limiting these proceedings to J T's August 28, 2017 appeal of the Pioneer Home decision restricting his visitation).

<sup>73</sup> See AS 47.33 and 7 AAC 75.220.

<sup>74</sup> See AS 47.33.005 and 7 AAC 75.220.

<sup>75</sup> See AS 47.33.060; 7 AAC 75.220; Division of Alaska Pioneer Homes, *A Matter of Rights* at 7 (R. 000019).

<sup>76</sup> AS 47.33.300(a)(4); Division of Alaska Pioneer Homes, *A Matter of Rights* at 3 (R. 000015).

was not abusive. It was not sexual in nature.<sup>77</sup> Nor did it appear to be unwelcome. On the contrary, the preponderance of the evidence establishes that H.E. enjoys Mr. T's company and attention.<sup>78</sup> Although H.E. has Alzheimer's and does not remember her caregivers on a day-to-day basis, she is fond of Mr. T, and she approaches him for attention whenever she sees him.<sup>79</sup> Indeed, H.E. is seen gesturing to Mr. T to get his attention in the Pioneer Home security footage. And she has sought physical contact from Mr. T in the form of kisses and hand-holding in the past.<sup>80</sup> Accordingly, Mr. T's light, brief massage of H.E.'s neck, shoulder and trapezoid—especially in light of his massage training—was not nefarious, perverse, or even inappropriate under these circumstances.<sup>81</sup> For these reasons, the visitation restrictions imposed do not strike a proper balance between Pioneer Home resident security and Ms. T's right to have her husband visit her at Pioneer Home. Accordingly, the restrictions are overturned.

However, according to the Administrator, H.E.'s family has expressed concern about Mr. T touching H.E. And the Pioneer Home Administrator does have the authority to instruct Mr. T not to touch other residents. Accordingly, Mr. T is instructed not to touch any other Pioneer Home residents without their express permission.<sup>82</sup> And he is instructed not to go near H.E. If H.E. approaches him, he must leave the area and call a staff member for assistance.

#### **IV. Conclusion**

The preponderance of the evidence does not support a conclusion that Mr. T poses a risk to Pioneer Home residents. And thus, the visitation restrictions imposed do not strike a proper balance between Pioneer Home resident security and Ms. T's right to have her husband visit her at Pioneer Home. Accordingly, the restrictions are overturned. However, Pioneer Home does have the authority to instruct Mr. T not to touch other residents. And Mr. T is instructed not to touch any other Pioneer Home residents without their express permission. Moreover, because H.E.'s family has reportedly expressed concern about Mr. T's physical contact with H.E., he is

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<sup>77</sup> Although none of the Pioneer Home witnesses expressly characterized the contact as sexual, the characterization was implied. The restrictions forbid him to touch female residents only, and Ms. Cinco's report was based on what she learned in a sexual abuse prevention training.

<sup>78</sup> J T Testimony; U Testimony; L Testimony.

<sup>79</sup> J T Testimony; U Testimony; L Testimony.

<sup>80</sup> J T Testimony; U Testimony; L Testimony.

<sup>81</sup> J T Testimony.

<sup>82</sup> This instruction is not intended to prohibit Mr. T from customary physical contact, such as hand-shakes.

instructed not to go near H.E. If H.E. approaches him, he must leave the area and call a staff member for assistance.

Dated: December 28, 2017

*Signed* \_\_\_\_\_  
Jessica Leeah  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]