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

In the Matter of:	)	
	)	
A.B.	)	
	)	OCS Case No. 928935
	)	OAH No. 10-0157-DHS

DECISION

I. Introduction

On July 22, 2009, the Office of Children's Services (OCS) received a report of harm identifying A.B. as the perpetrator and three of her minor children, ages 10 (C), 12 (D), and 16 (E), as the victims.[1] In late February, 2010, OCS issued a closing letter finding that neglect was not substantiated,[2] but substantiating a finding of child abuse in the form of mental injury to C and D.[3]

Ms. B filed an appeal on March 1, 2010,[4] and the matter was referred to the Office of Administrative Hearings. The assigned administrative law judge conducted a telephonic hearing on August 9, 2010. Assistant Attorney General Elizabeth Bakalar represented the Office of Children's Services. Ms. B represented herself. Testimony was provided by Ms. B, OCS employee F.G., and H.J., an Alaska Court System child custody investigator.

OCS's position is that Ms. B's acts and omissions over time, cumulatively, inflicted a mental injury on D and on C. The primary manner in which Ms. B contributed to a mental injury to her children, according to Ms. G's and Mr. J's testimony at the hearing, was by failing to shield them from the conduct of her boyfriend, K.L., in the form of denigrating language and domestic violence. In addition, OCS posits a litany of alleged actions or omissions to act by Ms. B that OCS asserts cumulatively inflicted mental injury,[5] including[6] attempted suicide or

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1 R. 90-92.

2 R. 15. The letter is dated September 4, 2009, but according to F.G. it was actually prepared and issued in late February or early March, 2010. AB 1:59 (testimony by a witness is cited by reference to the witness's [pseudonym letters] [F.G. for ___; A.B. for ___, and H.J. for __], followed by the hour and minute of the digital recording on which the testimony may be found).

3 R. 15.

4 The request for appeal is dated March 1, 2010, and was stamped in at OCS on March 26, 2010.

5 Post-Hearing Brief at 10-15.

6 OCS also characterizes Ms. B as an unfit parent, as generally lacking in self-awareness, and as emotionally "cold." *See*, Post-Hearing Brief at 11 (citing investigator's characterization of Ms. B as not a "fit" parent); 12 ("Ms. B 'deflects all blame onto others and is unwilling to see how she is contributing to the current stress.'"); 14 ("the environment in [Ms. B's] home is 'cold'."). Such observations are conclusory opinions, not allegations of harmful conduct. In addition, OCS asserts that Ms. B neglected the children. Post Hearing Brief at 11. However, OCS did not substantiate neglect.

suicidal gestures,[7] providing alcohol,[8] frequent intoxication,[9] drunken and vulgar arguments with Mr. L,[10] hurtful remarks,[11] and including the children in ongoing court proceedings.[12]

OCS proved that D, but not C, incurred a mental injury that was evidenced by a substantial impairment in her ability to function. This injury was manifested after D had been placed in Ms. B's custody by court order, based on the court's express findings that D's father was:

> unable to satisfactorily provide for the emotional, mental and social needs of the children due to his disparaging of Ms. [B], [and] his failure to provide a reasonably structured environment for the children [and that he had made] a conscious effort to undermine the relationship between Ms. [B] and the children… [13]

Prior to the time the court issued the custody order, D lived primarily with her father, who failed to provide appropriate supervision and discipline.[14] OCS did not prove that D's mental injury, evidenced by a substantial impairment in her ability to function after she was placed in Ms. B's custody by court order, was caused by Ms. B. The substantiated finding is therefore withdrawn.

II. Facts

A and M.B. were married in 1993 and have three biological daughters, E (1993), D (1996) and C (1998).[15] Ms. B had two older children, N (1989) and O (1991), who were adopted by Mr. B and grew up in the household.[16] The couple separated in November, 2006 and filed for divorce.[17]

Initially, with no formal custody order in place the children stayed with one or the other parent according to their own desires and their parents' consent.[18] Beginning in 2007, Ms. B was involved in a relationship with K.L., who was out of town for lengthy periods.[19] Ms. B was

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7 Post-Hearing Brief at 10, 11, 12.
8 Post-Hearing Brief at 10, 11.
9 Post-Hearing Brief at 11.
10 Post-Hearing Brief at 11, 12.
11 Post-Hearing Brief at 11, 12.
12 Post-Hearing Brief at 11.
13 Ex. 2, p. 23.
14 The court expressly noted Mr. B's "lack of monitoring of the children. Ex. 2, p. 23. *See also, infra,* note 40.
15 Ex. 2, pp. 1, 21.
16 Ex. 2, p. 22.
17 Ex. 2, p. 21; A.B. 2:34.
18 A.B. 2:34, 2:51.
19 A.B. 2:53.

house sitting and had no fixed residence, while Mr. B lived in rented premises.[20] Through early in 2008, E, D and C lived primarily with Mr. B and had relatively little contact with Mr. L.[21]

Sometime in 2008, Ms. B moved into Mr. L's house, and the children were able to spend more time with their mother. When the children stayed with Ms. B, on those occasions when Mr. L was also there the couple often argued; Mr. L used vulgar language in front of the children and the couple was at times intoxicated.[22] Ms. B at times made hurtful remarks to the children and did not always insulate them from the divorce proceedings.[23] These remarks and her inability to insulate the children from the divorce case were detrimental to the children.[24] Mr. B was close to E, and he used his close relationship with her to attempt to undermine his children's relationship with Ms. B.[25] His disparagement and derision of Ms. B also damaged the children.[26]

By the end of July, 2008, after her father began dating, D decided she wanted to live with her mother for a time.[27] She and C began living primarily with Ms. B, at Mr. L's home. Following a custody hearing on September 29-30, 2008,[28] D and C were placed in Ms. B's custody,[29] based on the court's finding that Mr. B was unable to provide for the emotional, mental and social well being of the children.[30] E, because of her age and Mr. B's successful efforts to poison her relationship with her mother, was placed in Mr. B's custody.[31] However, the three children were to spend weekends together, alternating between Mr. B's and Ms. B's residence.[32] Initially, because the court's order prohibited contact with Mr. L[33] and Ms. B was

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20 Ex. 1, p. 206; A.B. 2:51.

21 *See* Ex. 1, p. 68. (In a child questionnaire dated March 25, 2008, Mr. B wrote: "D lives with me. She visits her mom when she has time. It has been once overnight (last week) first time in over two months."). Ex. 1, p. 68 is actually the second page of the questionnaire whose first page is at Ex. 1, p. 70.

22 Ex. 2, p. 24.

23 *See* Ex. 2, p. 24.

24 Ex. 2, p. 24.

25 Ex. 2, p. 23.

26 Ex. 2, p. 23.

27 Ex. 1, p. 69 (The children's therapist, Q R, reported after a July 29, 2008, session: "D feels abandoned by dad (he is dating). So she wants to spend some time w/ mom."). The child custody investigator reported that he had been informed of this by Mr. B and by Ms. R. R. 68.

28 Ex. 2, p. 21.

29 The court issued a written custody order on April 20, 2009. Ex. 2, pp. 21-36. However, the record suggests that the court had made a verbal order for custody at the time of the hearing.

30 Ex. 2, p. 23.

31 R. 68; Ex. 2, p. 28. Ms. B testified that E was in her father's custody beginning in October, 2008.

32 *See* R. 71; Ex. 2, pp. 28-29.

33 Ex. 2, pp. 25, 32.

living in his house, D and C lived with their father when Mr. L was at home, notwithstanding that Ms. B had custody.[34]

By fall, D no longer wanted live with her mother,[35] who was more of a disciplinarian than her father,[36] and she balked at the court-ordered custody arrangement. With her older siblings N and E's complicity, D repeatedly tried to leave her mother's custody and return to her father's home.[37] On one occasion, in May, 2009, D ran away for several days, and was picked up by police as a runaway.[38] D would drink and smoke marijuana during her visits to her father's house, along with E.[39] D wanted to return to living with her father in large part because when there she was able to do as she pleased.[40] On July 27, 2009, at Ms. B's request, the court modified the custody order and allowed Mr. L to be in the home while D and C were there.[41] D continued to resist her mother's control and to try to return to her father's house.[42]

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[34] A.B. 2:35.

[35] R. 82 (referencing investigation of October 1, 2008 ROH).

[36] *See, e.g.,* Ex. 1, pp. 115, 150, 204; R. 86.

[37] *See* R. 45-46 (June 23, 2009 incident, E's notebook), R. 49-51 (N's notebook). R. 83 (June 24, 2009, ROH, reporter alleges "C and D both want to live with their dad and have been actively trying to run away from their mom's home."). The June 24 report of harm undoubtedly refers to the incident described in the notebooks; OCS investigated and deemed the report unsubstantiated.

A representative incident had occurred earlier, in September, 2008. D was spending the weekend visiting her mother, and Ms. B allowed D to go to a bonfire. Rather than returning to her mother's house, D went to her father's house without checking in with either parent, with the result that she was left unsupervised. *See*, Ex. 1, p. 71. Mr. J reported that at times Mr. B, too, had conspired with E to bring the girls out of Ms. B's home without her knowledge or permission. R. 68.

[38] Ex. 1, pp. 39 (history of running away with sister), 138 (Ms. B states she ran away with her older sister (presumably E) for several days in May, 2009), 150 ("D has been involved with the police due to her running from home.").

[39] Ms. B reported this, without indicating the source of her allegation. Ex. 1, p. 37. However, D herself admitted it. Ex. 1, pp. 43, 57, 115, 147.

[40] Ex. 1, p. 115 (P.T., a social worker, interviewed D in October and reported: "D informed me that she doesn't like living with A because she is too strict, whereas her father lets her do what she wants…D told me how fun it was to be a runaway and how much she enjoys smoking weed with her peers near her fathers. D told me that her father doesn't care whether she goes to school or comes home at night."). *See also* Ex. 1, p. 150 (Alaska Children's Services Intake Assessment, noting records "indicate her father provides minimal supervision."); R. 86 ("...M reports that he does not have to discipline [the children].").

When D was admitted to No Name in 2009, she reported her alcohol use had begun two years earlier (2007). Ex. 1, pp. 30, 61. Elsewhere, D reported her first use as occurring in 2009. Ex. 1, p. 37. Her most extended admissions concerning drug and alcohol use were to Alaska Children's Services, in 2010. At that time she reported her first use of alcohol was with friends at her house "when there was no parental supervision." She stated she first tried pot when she ran away. Initially she used both frequently, but later reduced her usage. *See* Ex. 1, pp. 171-172. In 2010, E reported her first use of alcohol at age 14 (2007) ("while home alone"), increased usage at 15 (2008), and first use of marijuana at 16 (2009). Ex. 1, pp. 184, 185.

[41] H.J. 0:27; www.courtrecords.alaska.gov, accessed September 1, 2010. The administrative law judge takes official notice of the court docket in the pending divorce case, as reported in the court system's electronic filing system. Either party may object to the taking of official notice in a proposal for action.

[42] One incident, in July, 2009, was reported to Mr. J by the girls and was described by Mr. J, based on the girls' statements to him, to the court at the April, 2010, status hearing. Ex. 2, p. 12. Ms. B described the same

After the court had amended its custody order to allow Mr. L contact with the B children, Mr. L, in order to accommodate Ms. B's role as the primary custodial parent, gave up his job and obtained work in No Name. Upon the advice of her therapist, in order to gain separation from Mr. B,[43] the couple planned to move into a home in No Name effective August 1, 2009. Closing on the new home was delayed, and pending the availability of the new home, for a couple of weeks the couple lived in a recreational vehicle parked in the area.[44] C and D stayed with them there, sometimes sleeping in a jet boat parked adjacent to the camper.

For the 2009-2010 school year, D did not want to attend public school. She got her mother to agree to allow her to home school, with the understanding that D would then be amenable to living with her mother.[45] Things did not go well. Eventually, because D was not engaged in her studies, her mother told her she would need to re-enroll in the public schools.[46] On October 29, 2009, the two argued: D accused her mother of breaking an agreement to allow her to home school, and when she tried to call her father to intercede, her mother took the cell phone.[47] D reacted by running into the garage to the gun cabinet to get a gun. She was intercepted by her mother, who brought her to the No Name hospital, where D described having held a gun to her head on two occasions that week, as well as in the previous few months taking excessive pills and cutting herself.[48] On October 30, 2009, upon referral from the hospital,[49] D was admitted to No Name, where she was diagnosed as experiencing a major depressive episode, with moderate to high risk of suicide or self harm.[50] D was "determined to get her way with respect to living in her father's home and took every opportunity possible to denigrate her mother and idealize her father."[51] After spending a month at No Name, a treatment plan was

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incident in her testimony. A.B. 2:47. Another incident was reported to OCS on July 30. R. 79, 89. OCS received a report that Ms. B "had thrown the girls out last night and N had to go pick them up. They had walked 2 miles on No Name R[oad]]." Ms. B testified that the girls had run away, rather than being thrown out. Her testimony was more credible than the unnamed reporter's allegation.

43 R. 10; Ex. 1, p. 111 ("Mom states that she moved to No Name on advice of her former therapist to gain distance from her ex and to allow her children to develop a more positive relationship with her without such direct influence from their father, who is allegedly quite openly hostile about mom with the children.").

44 A.B. 2:51; R. 10.

45 Ex. 1, p. 61.

46 R. 1, pp. 55, 59.

47 *See, e.g.*, Ex. 1, pp. 61, 62, 82, 111.

48 Ex. 1, pp. 24, 113.

49 Ex. 1, p. 23.

50 Ex. 1, p. 13.

51 Ex. 1, p. 31.

devised, and on December 2, 2009, D was placed in residential treatment at Alaska Children's Services in No Name.[52]

By the spring of 2010, E had been suspended from school multiple times, most recently for possession of illegal drugs and smoking,[53] and had run away from her father's home; she was living with a friend in No Name and was not attending school.[54] D remained in residential treatment at Alaska Children's Services in No Name, and remained depressed but showed some signs of progress.[55] C remained with her mother; she was receiving counseling once a week, and was attending school and doing well academically.[56] Throughout this time, Mr. B continued to have serious parenting deficiencies.[57] His continuing inability to give priority to the best interests of the children and his continuing desire mete out retribution to his former wife continued to cause ongoing injury to the children.[58]

On March 30, 2010, the court appointed a guardian ad litem.[59] The court allowed only supervised visitation by Mr. B.[60] At a status hearing on April 21, Ms. B asked that Mr. B be given custody of D and C, because she was unable to control them and both were expressing a preference to be in his custody. By then, C was expressing thoughts of self harm, which the custody investigator believed was "directly related" to Mr. L's disparaging remarks and intemperate behavior.[61] Accordingly, the investigator recommended that the girls be placed with Mr. B unless Ms. B established a separate residence from Mr. L.[62] Ms. B, at her wits' end, knowing that the children were adamantly opposed to living with her, asked the court to send the girls to live with Mr. B.[63] The court, believing that Mr. B was not a fit parent, was reluctant to issue such an order. The court did, however, remove the requirement for supervised visitation with Mr. B. In addition, the court issued an order for OCS to conduct a child investigation and make a report.

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52 Ex. 2, p. 11; Ex. 1, p. 15.

53 Ex. 1, pp.183-184 (E reports suspension for possession of vodka), 189 (school reports suspension for possession of vicodin).

54 Ex. 2, p. 9.

55 Ex. 2, p. 9; Ex. 1, pp. 164-165.

56 Ex. 2, p. 9. (April 21, 2010: "C is still with us, getting A's and B's…").

57 Ex. 2, p. 6.

58 Ex. 2, p. 6.

59 Ex. 2, p. 4.

60 Ex. 2, p. 8.

61 Ex. 2, p. 12.

62 Ex. 2, p. 13.

63 Ex. 2, p. 16.

III. Analysis

A. Applicable Law

AS 47.17.290(2) provides that "'child abuse or neglect' means the…mental injury…of a child…under circumstances that indicate that the child's health or welfare is harmed or threatened thereby." It further provides that in AS 47.17.290(2), "'mental injury' means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function."

A substantiated finding of mental injury may be affirmed on appeal when the facts as found by a preponderance of the evidence at the hearing establish that the perpetrator, by act or omission, inflicted an injury to the emotional well-being of a child, evidenced by an observable and substantial impairment in the child's ability to function.[64]

B. Mental Injury Evidenced by Observable and Substantial Impairment

1. D

It is beyond doubt that D has suffered a mental injury evidenced by an observable and substantial impairment of her ability to function. At the end of October, 2009, following an incident in which D attempted to obtain a gun with the apparent intent of shooting herself or her mother, she was placed into an adolescent mental health care facility, where she was found to have severe depression.

The date of the onset of the impairment is not evident. Certainly, D had incurred a mental injury, evidenced by an observable and substantial impairment of her ability to function, prior to that particular incident. Over the course of several months prior to that incident, she had made several suicidal gestures, was cutting herself, and was described by her own mother as unable to function because she stayed up for lengthy periods, was withdrawn, did not go out and otherwise clearly displayed an impaired ability to function. These behaviors apparently began more or less at the end of the summer, when school began. Thus, at the least, D had incurred a mental injury, evidenced by an observable and substantial impairment of her ability to function, no later than the start of the 2009-2010 school year.

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[64] *See generally*, In Re. . ., OAH No. 07-0600-DHS (Department of Health and Social Services 2007). For cases involving allegations of child abuse or neglect in the form of physical injury or maltreatment, it is necessary to prove that the injury or maltreatment was harmful to the child's health or welfare. In the case of child abuse in the form of mental injury, the definition of mental injury is such that harm to the child's health or welfare is established simply by showing mental injury within the definition, which requires a showing of a "substantial and observable impairment to the child's ability to function." A "substantial and observable impairment to the child's ability to function" is "harm" within the meaning of AS 47.17.290(2).

Less clear is whether a mental injury, evidenced by an observable and substantial impairment of her ability to function, had been incurred earlier. For purposes of analysis, several time periods will be considered. First is the period from the time Ms. B began her relationship with Mr. L in 2007 through the end of the summer in 2008. Second is the period from the start of the 2008-2009 school year through the date of the court's written custody order, April 20, 2009. Third is the period from the date of the written custody order through the start of the 2009-2010 school year.

During the first period, beginning when Ms. B began seeing Mr. L and continuing through the summer of 2008, D primarily lived with her father. Ms. B saw her on occasional weekend visits, and for much of that time Mr. L was out of town. He had relatively little contact with D during this period, mostly in 2008.

In the spring of 2008, D participated with her father and siblings in family counseling with Q.R. Ms. R reported D as "coping," or "angry", and that "D does not like mom's boyfriend."[65] At the end of the summer she reported that D felt "abandoned by dad (he is dating). So she wants to spend more time w/ mom."[66] Ms. R did not report any observable and substantial impairment in D's ability to function.

The end of the first period coincides with the child custody report filed by Mr. J, dated September 17, 2008. In that report, Mr. J asserted that certain conduct by Ms. B "constitute[s]…mental injury."[67] However, Mr. J is the court's child custody investigator, not an OCS employee. His use of the term "mental injury" in that report was not tied to the statutory definition in AS 47.17.290(2). The only observation Mr. J made about D's ability to function was that she was "withdrawing from her parents."[68] He added that she, and the rest of the children, was "suffering" and that she was at "significant risk of developing emotional and behavioral disorders,"[69] as well as at risk of other substance abuse, engaging in self destructive behavior, entering into dysfunctional relationships, and having academic problems. That D was at risk does not mean that she had already incurred an observable and substantial impairment in her ability to function. In the summer of 2008, OCS received two reports of harm to the children

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65 Ex. 1, p. 205.
66 Ex. 1, p. 207.
67 R. 67.
68 R. 68.
69 R. 69.

and determined that neither warranted investigation.[70] If by that time D had incurred a mental injury evidenced by an observable and substantial impairment in her ability to function, it entirely escaped the notice of OCS. OCS has not established that by end of the summer of 2008, D had incurred a mental injury evidenced by an observable and substantial impairment of her ability to function.

During the next period of time, from the start of the 2008-2009 school year through April 20, 2009, the date of the written custody order, the custody dispute had become more problematic. D had moved in with her mother and was primarily living with her in Mr. L's home.[71] However, it is unclear whether Mr. L was present in the home while D was with her mother during this period; he was apparently still absent while working for extended periods of time, and it appears that the court had, at the time of the custody hearing in September, 2008, issued an oral custody order that barred contact with him. In any event, by early in 2009, D was undergoing counseling. By this time she was perhaps more withdrawn than she had been previously; both her mother and D commented on it.[72] D reported that she "has become more depressed and withdrawn."[73] However, she denied suicidal ideation or self-harm, and reported getting good grades.[74] Her counselor stated that as a result of her parents' divorce she had "strong feelings of grief and sadness as well as social withdrawal that now appear to be impacting her sense of self worth," and diagnosed adjustment disorder.[75] By the end of this period of time, D had quite clearly suffered an injury to her emotional well-being, but it had not yet manifested itself in an observable and substantial impairment to her ability to function.[76] In October, 2008, OCS had investigated a third report of harm, and again deemed it unsubstantiated.[77] OCS did not prove by a preponderance of the evidence that D had incurred a mental injury, evidenced by an observable and substantial impairment of her ability to function, prior to the court's written custody order on April 20, 2009.

During the third period, from the date of the written custody order through the start of the 2009-2010 school year, D had begun drinking alcohol and smoking marijuana while at her

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70 The reports, dated July 25, 2008 (Ms. B), and August 1, 2008 (Ms. B and Mr. B), were screened out.
71 *See* Ex. 1, p. 194.
72 Ex. 1, p. 194.
73 Ex. 1, p. 194.
74 Ex. 1, p. 195.
75 Ex. 1, p. 196.
76 Ex. 1, p. 196.
77 The report, dated October 1, 2008 (Ms. B), was screened in for investigation but was not substantiated for either neglect or mental injury. R. 82.

father's house. She was a runaway on more than one occasion and became increasingly ungovernable, largely due to the fact that she had been placed in her mother's custody against her will. The final incident leading to her placement in a treatment facility was not the first time she had evidenced a substantial impairment in her ability to function. The preponderance of the evidence is that D incurred a mental injury, evidenced by an observable and significant impairment of her ability to function, soon after the court issued the written custody order on April 20, 2009.

2. C

According to the child custody investigator, at the start of the 2008-2009 school year, C was reportedly "acting out angrily" at school.[78] However, C's school expressed "no concerns" for her.[79] Moreover, there is no indication that C's academic performance had suffered, and the nature of her behavior at the school has not been specified. In the spring of 2010, C was continuing to perform well at school. By the end of April, 2010, however, she expressed thoughts of self harm to Mr. J. While the expression of such thoughts indicates that some emotional harm had been incurred, it is not evidence of an observable and substantial impairment in C's ability to function. Mr. J testified that he was unaware of anything an outside observer would have noticed that would indicate an impairment in her functioning.[80] Ms. G testified that D had been harmed, and that C was "going down that road", but did not identify any observable and substantial impairment in C's ability to function.[81] Certainly, C had incurred an injury to her emotional well being by the time the report of harm that led to the substantiated finding in this case. But the existence of an injury to a child's emotional well being does not mean that the child has incurred a mental injury as defined in AS 47.17.290(2): only if the injury so serious that it is evidenced by an observable and substantial impairment in their ability to function has the child incurred a "mental injury" as defined in AS 47.17.290(2). Children, while vulnerable, are also resilient. OCS did not prove that C has incurred a mental injury evidenced by an observable and substantial impairment in her ability to function.

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78 R. 69.
79 R. 82 (September 9, 2008, contact with schools).
80 H.J. 1:13.
81 F.G. 1:40.

C. Harmful Conduct

The primary issue in this case is whether Ms. B, by her own act or omission, inflicted D's mental injury, as evidenced by the observable and substantial impairment in her ability to function after April 20, 2009. OCS argues that Ms. B may be found to have inflicted a mental injury that was allegedly the direct result of Mr. L's conduct, because she willingly cohabited with him. OCS also asserts that Ms. B's acts and omissions over time, cumulatively, directly inflicted the mental injury on D evidenced by the impairment to her ability to function.

1. Conduct By Mr. L

(a) Denigrating language

The superior court made no finding that Mr. L had disparaged any of the children. However, there is evidence that in June, 2009, following a confrontation over visitation, in the presence of D and C, Mr. L called E a "a fucking cunt, a bitch, a whore, a slut."[82] Moreover, there is evidence that Mr. L disparaged Mr. B in the presence of D and C.[83] In addition, there is evidence that he called C a "'useless daughter, brat and bitch,'"[84] and a "sucky daughter, a stupid daughter and stuff"[85] and D may have heard those or other similar comments. The preponderance of the evidence is that Mr. L on multiple occasions used denigrating and vulgar language to describe family members in the presence of D.

(b) Domestic Violence

No finding of domestic violence perpetrated by Mr. L was made by the court and none has been made in this case. OCS suggests that such a finding should be made, asserting that "this case is rife with evidence of domestic violence between A.B. and K.L., witnessed by the children."[86] But although it is true that the record is rife with allegations by OCS of domestic violence between Ms. B and Mr. L, it is not true that the record is rife with evidence to support those allegations.[87] To the contrary, there is very little evidence in the record in this case to support those allegations.

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[82] The incident, as reported to Mr. J by the girls, was described to the court at the April, 2010, status hearing. Ex. 2, p. 12. Ms. B described the same incident in her testimony. A.B. 2:47.

[83] Ex. 2, p. 12 (statements to Mr. J).

[84] R. 79 (C's statement to OCS investigator in private interview, July 31, 2009).

[85] R. 36 (pseudo-deposition).

[86] Post-Hearing Brief at 17. *See also, id*. at 18, 19 ("ample" evidence). These assertions are unaccompanied by citation to specific evidence in the record.

[87] One example typifies this. The investigation summary leading to a substantiated finding includes the assertion that E's diary "outlin[ed] alleged domestic violence between Ms. B and Mr. L." R. 78. OCS continues to

The initial report of harm includes an allegation that the reporter had "witnessed yelling, screaming and fighting in the home."[88] In context this appears to be nothing more than a report of loud arguments.[89] Ms. B has denied that there was any domestic violence, and there is no evidence of any report of domestic violence to the police. Nonetheless, there is some evidence of domestic violence between the two. OCS received a report in October, 2008, that E had disclosed to the reporter that Ms. B and Ms. L had a "violent relationship" and that she had "seen [Mr. L] hurt [Ms. B]."[90] In addition, C on one occasion in 2008 reportedly told an OCS investigator that at some point in the past she had observed Mr. L hit her mother, but that she had not seen anything of that nature for some time,[91] and in 2009 she said that Mr. L had hit her mother "a long time ago, but I'm not sure if he still does."[92] The court noted that one of the children had reported seeing Mr. L shove Ms. B.[93]

Assuming that at some point in 2007 or early 2008, Mr. L pushed, shoved or hit Ms. B, for purposes of this case what matters is not whether domestic violence occurred, but rather whether D was exposed to it. Mr. J, who had interviewed both E and C, stated only that "[o]ne of the children reported seeing Mr. L push her mother."[94] But D herself reportedly denied that she ever witnessed domestic violence between Mr. L and Ms. B.[95] The preponderance of the evidence is that D never witnessed an act of domestic violence by Mr. L against her mother.

2. Conduct By Ms. B

(a) Attempted suicide in 2006

Both N and E described in their notebooks with some specificity an incident in which Ms. B, while intoxicated, drove off in a vehicle and was found by her husband sitting in the vehicle

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make this assertion. Post-Hearing Brief at 3, citing R. 78. In fact, E's diary does not include any allegations of domestic violence between Ms. B and Mr. L. R. 41-46.

88 R. 91.

89 On a later occasion, D reported that the couple fought frequently, but that "the fights were yelling." R. 79.

90 R. 94. This report of harm, dated October, 2008, was made shortly after Mr. J's initial custody investigation. Mr. J testified that he had filed a report of harm after completing his report, which is dated September 17, 2008, and this particular report of harm was filed by a mandated reporter, not a family member. *See* R. 95.

91 R. 82 (OCS reports that in 2008, "C stated DV used to happen but indicated it isn't happening any more."). *See also* R. 95 ("child disclosed DV"). Both references followed the October, 2008 report of harm; both apparently rest on C's statement. The investigation report leading to the substantiated finding appears to restate the same comment. *See* R. 85 ("Tessa reports that he used to hit her mother but unaware if it is an ongoing issue.").

92 R. 29.

93 Ex. 2, p. 3. The court also noted that one child had reported observing bruises on Ms. B's neck one neck after the couple returned from a night out. Ms. B, at the hearing, asserted that the alleged "bruise" was a hickey.

94 R. 87.

95 R. 82. D stated she had observed domestic violence between her biological parents, "wherein her mother would hit her father but her father would not retaliate." Ex. 1, pp. 24, 194. D was also aware that Mr. L had been involved in domestic violence with his former wife, S U. Ex. 1, p. 205.

with a revolver and a suicide note.[96] Ms. B has not disputed that the incident occurred, and she has admitted to at least one suicide attempt. It is likely, although no specific finding has been made either by the court or in this case, that the incident described by N and E is the attempted suicide that Ms. B has admitted to, and that the incident unfolded as largely as described by N and E.

If the incident occurred as they described it, D was in her father's car when he drove up behind Ms. B's vehicle. Mr. B approached Ms. B's car and observed her with the gun and called for N to come help him and the two wrested the gun from her. Later, at home, Mr. and Ms. B were talking in their bedroom when she allegedly attempted to cut her wrists with a box knife but was prevented by Mr. B and N and (by her account but not by N's) E.

N's and E's accounts do not state or necessarily imply that D observed her mother sitting in the car with a revolver, that she heard her mother threaten to shoot herself, or that she subsequently observed or overheard the alleged immediately subsequent incident back in the family home where Ms. B allegedly attempted to cut herself with a box knife. D has stated that she was aware of a suicide attempt, but she has not indicated the source of her knowledge or the nature of the attempt,[97] and Ms. B testified that she only knew of it because Mr. B told her.[98] OCS did not establish by a preponderance of the evidence in the record in this case that D observed her mother in a car with a gun in her hand, or that D heard her threaten to shoot herself, or to cut herself with a box knife or other cutting instrument. OCS did not prove that D observed her mother attempt suicide.

(b) Suicidal threats or gestures in 2006-2007

The court found that "[i]n the 2006-2007 timeframe there were two or three incidents where the children observed…suicidal threats of Ms. [B]"[99] and "[t]he children have witnessed Ms. [B] threaten suicide when intoxicated," specifically mentioning an incident in which Ms. B warned a child "that she would throw herself in front of passing vehicles."[100]

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96 R. 41-43, 47.
97 R. 10.
98 A.B. 2:59.
99 Ex. 2, p. 24.
100 Ex. 2, p. 24.

OCS has not argued that the court's factual findings in the custody hearing must be taken as established for purposes of this case,[101] and the nature of the evidence leading to these findings is unknown. In this case the only individual with firsthand knowledge of the events at issue who testified was Ms. B, who did not describe the nature of any suicide attempts, threats, or gestures. She did, however, deny that D had witnessed any suicidal threats or gestures, stating that she knew of them because she was told by her father.[102] Mr. J's report notes that there is evidence that "the children" were exposed to "suicidal gestures," but does not state the nature of that evidence.[103]

The use of the term "the children" in the court's factual findings is not a specific finding that all of the children observed suicidal threats or gestures. Moreover, apart from the example of threatening to throw herself in front of passing vehicles, the court's findings do not state the nature of any suicidal threats or gestures. The record in this case as it bears on the suicide attempts or gestures primarily consists of E's and N's allegations in their notebooks.[104] Neither of them stated that D witnessed either the alleged suicide attempt in 2006, or any other suicidal threat or gesture, such as Ms. B's alleged threat to throw herself in front of oncoming traffic. OCS has not established by a preponderance of the evidence in this case that D witnessed a suicidal threat or gesture by her mother.

(c) Provision of alcohol

There has been no factual finding, either by the court or in this case, that Ms. B provided alcohol to D. There is limited evidence to that effect, primarily in the form of assertions by E in her notebook,[105] and by D's statement, when interviewed by OCS on July 31, 2009, that her mother had, one occasion, allowed her to drink.[106] E's assertions are implausible on their

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[101] The doctrine of collateral estoppel bars a party to a prior case from contesting an issue of fact determined in that case which (a) is identical to the issue in the later case and (b) was essential to the judgment in the prior case. *See e.g.,* State, Department of Health and Social Services, Office of Children's Services v. Doherty, 167 P.3d 64, 71 (Alaska 2007).

[102] A.B. 2:59.

[103] R. 67.

[104] N described an incident, apparently in 2006 or 2007, in which Ms. B allegedly shut herself in the garage with the car running. However, he did not indicate that either D or C witnessed or was aware of this alleged incident. R. 48. On one occasion, the court found, Ms. B told one of her children that she would throw herself in front of passing vehicles. Ex. 2, pp. 2-3. E also alleges that on one occasion Ms. B attempted to throw herself down the stairs, but was caught by Mr. B. R. 44. Either of these incidents may have been the subject of a 2008 report of harm, dated August 1, 2008, which was screened out by OCS. R. 82. There is no evidence that either D or C witnessed either incident.

[105] R. 45.

[106] R. 79.

face.[107] Neither her allegation, nor D's more realistic allegation, is credible. As the court found, Mr. B had used his influence over E to turn her against her mother, and in light of her suspect motives, her facially implausible allegations are not persuasive. D's claim is similarly not persuasive in light of its timing (it was made in July, 2009, when D was doing everything she could to get out of her mother's house) and in light of her subsequent admission to a counselor that she wanted to get out of her mother's house because at her father's house she could do as she please and that when there she was able to drink, and the absence of any statement to her counselor, after she was no longer in her mother's custody, that her mother had provided her with alcohol. The more persuasive evidence is to the effect that Ms. B was a disciplinarian. On balance, the preponderance of the evidence is that both E's and D's allegations were fabricated in an attempt to have their mother removed as the custodian.

(d) Intoxication

The court made no specific findings about the frequency with which Ms. B was intoxicated while in the presence of D. However, the court specifically found that she was intoxicated in the presence of "the children" on more than one occasion.[108] Moreover, the court specifically found, based in part on the court's own personal observation of Ms. B's testimony at the divorce trial, that in her testimony she had minimized her own use.

The preponderance of the evidence in this case is that Ms. B was often intoxicated in the presence of D from the time she moved in with Mr. L until, at the least, the date of the custody hearing in September, 2008. After the custody hearing, and more particularly after the court issued its written custody order on April 20, 2009, there is no finding by the court that Ms. B was intoxicated in the presence of either child. C has provided conflicting statements as to whether Ms. B continued to drink in her presence after the court custody order was issued.[109] Although

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[107] E alleged that at Ms. B's house, "us older kids were allowed to drink as long as we could drink it all and didn't waste any. We also didn't really have to attend school if we didn't want to. We were also allowed to be sexually active. We could do what wanted. A was spiking D's and C's drinks so that the girls would pass out so that they could have sex." R. 45. These allegations, which are on their face implausible at best, are directly contrary to the clear preponderance of the evidence, which is to the effect that Ms. B was a disciplinarian.

[108] Specifically, the court found that on two or three occasions in 2006-2007, "the children observed drunken behavior, that "[t]he children have seen drunken and vulgar arguments between [Ms. B] and Mr. L," and that "[t]he children have witnessed Ms. [B] threaten suicide when intoxicated." Ex. 2, p. 24. The court also found that "Ms. [B]'s alcohol use is a significant problem." *Id.*

[109] In November, 2009, C stated her mother no longer drank in her presence. R. 29, 34-35. However, Mr. J testified that C told him, in an April, 2010 interview, that Ms. B occasionally drank in her presence. H.J. 31:30. The record does not include any contemporaneous note of such a statement to him, however. At the April, 2020, court hearing, Mr. J testified that one of the (D or C) told him that Ms. B drank in her room, without indicating this occurred in the child's presence. Ex. 2, p. 11.

the court did find, in April, 2010, and Ms. B admitted, that on a couple of occasions after the court order was issued alcohol was inadvertently on the premises while the children were there,[110] the preponderance of the evidence is that after the court order had been issued, Ms. B did not drink to the point of intoxication while D was in the home.

(e) Drunken and vulgar arguments with Mr. L

The court found that Ms. B and Mr. L's use of alcohol and arguing adversely impacted the children.[111] The same finding has been made in this case, as there is ample evidence in the record in this case that during 2007 and 2008, Ms. B and Mr. L frequently argued while intoxicated, and that Mr. L used vulgar language. However, the record does not establish that either Ms. B or Mr. L drank to the point of intoxication while the children were in the home after the court custody order was issued. It seems likely that following entry of the court order, the frequency of these kinds of arguments was reduced, in tandem with a reduction or cessation of drinking while the children were in the home. Still, the preponderance of the evidence is that, regardless of the degree of their intoxication, Ms. B and Mr. L continued to engage in arguments, and that Mr. L used vulgar language, through the spring of 2010.[112]

(f) Hurtful remarks to the children

The court found that Ms. B at times made hurtful remarks to the children, and the same finding has been made in this case. However, there is no evidence that Ms. B used the type of language attributed to Mr. L. C is alleged to have reported that Ms. B and Mr. L "belittle her and call her names, especially [Mr. L]."[113] That allegation is contained in Ms. G's investigative report, but the report does not indicate when or to whom C made that allegation. Ms. G's report is largely a third hand report based on notes taken by an interviewer. The interviewer did not testify, and the interview notes are not in the record. While the court's finding that Ms. B at times made hurtful remarks has been adopted, the only such remark identified in the record is that on one occasion Ms. B told a child that her husband's statement that he could not exercise

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[110] Ms. B testified that on two occasions alcohol was present in the home when the children were there, but only inadvertently, once when a child found a six pack of beer in the refrigerator, and once when a child found a vodka bottle. Ex. 2, pp. 4, 17. The child custody investigator reported that C told him she found the six pack, and that both children told him they found a bottle of alcohol in their mother's bedroom. The investigator reported he was told by one of the children that Ms. B "mixes alcohol in her room and has alcohol in her room." Ex. 2, p.11.

[111] *See* R. 71 ("[E]ach of the children that spoke with me expressed a fear of living with their mother because of concerns about their mother and Mr. L's excessive drinking and arguing.").

[112] Ex. 2, p. 12 ("Both children told me that both K and Mom cuss all the time and get in arguments frequently and cuss."). *See also* H.J. 0:23.

[113] R. 86. C reported to OCS that Mr. L had called her "'a useless daughter, brat and bitch'". R. 79.

visitation one weekend was a lie, and that the actual reason was that her husband wanted to spend time with his girlfriend.[114] Mr. J, the child custody investigator, testified that Ms. B's hurtful remarks typically occurred in defending herself against her ex-husband's ongoing attempts to alienate the children.[115] The preponderance of the evidence is that although Ms. B on occasion made hurtful remarks to D, she did not use demeaning or denigrating language to describe a family member in D's presence.

(g) Including children in court proceedings

The court's finding was that Ms. B "included" the children in the domestic relations battle between Mr. B and herself.[116] The court did not specify how this occurred, but the finding was made in tandem with the finding that she made hurtful remarks. As the court and Mr. J recognized, any remarks of this nature that she made were likely in reaction to Mr. B's deliberate and largely successful attempts to alienate the children from their own mother.[117] The finding in this case, accordingly, is that Ms. B did not always insulate the children from the ongoing custody battle, which reflects the court's finding in light of the evidence in the record in this case.

Assessing this particular allegation is made somewhat problematic by the fact that at the same time the B divorce action was ongoing, Mr. L was engaged in a custody dispute with his ex-wife, S.U., the new wife of Mr. B's attorney, V.U. Mr. L had custody of the couple's two young children. OCS references an incident in which Ms. B is alleged to have harmed C by including her in that court action by compelling her to write a note to the court for use in that case by S.U.[118] That allegation is contained in a pseudo-deposition of C arranged by V.U. and Mr. B.[119] The court, upon learning that Mr. B had participated in the event, was outraged, as was Mr. J. Mr. J testified that the pseudo-deposition was coercive and intimidating. C's pseudo-deposition is of little persuasive value, and in any event OCS did not prove that C incurred a mental injury as defined in AS 47.10.290(2).

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114 R. 79.

115 H.J. 0:23.

116 Ex. 2, p. 24.

117 Ex. 2, p. 24 ("[T]he court does recognize that her remarks to the children may very well be the result of Mr. B's attempts to alienate the children from their mother."). Mr. J testified that her comments were mostly in defending herself against Mr. B's statements to the children. H.J. 0:23.

118 Post-Hearing Brief at 11. *See* R. 22-23.

119 R. 21-47.

D. Causal Connection

In addition to establishing a mental injury as defined in AS 47.17.290(2), OCS was obliged to make a causal connection between the mental injury and Ms. B's conduct. OCS did not establish that C incurred a mental injury as defined by law. Thus, the sole remaining issue is the existence of a causal connection between Ms. B's conduct and D's mental injury. OCS has identified two distinct sorts of conduct by Ms. B that it alleges are causally connected to D's injury. First, her failure to remove D from contact with Mr. L. Second, her own conduct over a lengthy period of time, as described above.

1. Mr. L's Conduct

OCS's position at the hearing was that the primary direct cause of D's injury was Mr. L's conduct in (1) engaging in acts of domestic violence against Ms. B in D's presence, and (2) using denigrating and degrading language concerning family members in her presence. OCS failed to prove that D observed any incident of domestic violence between Mr. L and Ms. B, if any such incident occurred. Thus, the causal connection must be based on Mr. L's use of denigrating and degrading language.[120] OCS asserts that Ms. B may be found to have inflicted a mental injury on D because she voluntarily cohabited with Mr. L, and his use of denigrating and degrading language caused D's mental injury.

Mr. L on a number of occasions used denigrating or demeaning language to describe family members in D's presence. These comments undoubtedly inflicted emotional harm on D. However, the causal connection between Ms. B's decision to cohabit with him and the mental injury evidenced by D's behavior after the written custody order was issued in April, 2009, is indirect and attenuated. Indeed, it appears that Mr. L was prohibited from contact with D from the date of the custody hearing in September, 2008, until late July, 2009, which is the time during which D's mental injury was first evidenced by a substantial impairment in her ability to function. In light of the record as a whole, OCS has not established by a preponderance of the evidence that Ms. B's decision to cohabit with Mr. L caused D to incur a mental injury as defined in AS 47.17.290(2).

[120] OCS argues that because a child may be deemed in need of aid as a result of exposure to domestic violence, a victim of domestic violence may be deemed to have inflicted a mental injury resulting from acts of domestic violence by a person with whom the victim voluntarily cohabits. Because OCS did not prove that D was exposed to domestic violence between her mother and Mr. L, it is not necessary to consider this argument.

2. Ms. B's Conduct

The record includes a number of assertions by OCS that there is a causal connection between Ms. B's behavior in general and her children's mental and emotional state, without identifying specific acts or omissions as the basis for the alleged causal relationship. For example OCS notes its own observation that "'the children are exhibiting anxiety and significant depression' as a result of Ms. B and Mr. L's conduct toward and around them,"[121] and it refers to Mr. J's conclusory statement that "both parents have caused these children mental injury."[122] Ms. G testified that she was told by one of D's counselors that she believed D's condition was causally related to Ms. B's conduct.[123] But without a foundation in established facts concerning the specific behavior that occurred, these kinds of generalized assertions have no probative value. Rather than being opinions based on established facts, they are opinions based on assumed, unstated, or unknown facts. Similarly lacking in persuasive power are statements such as Mr. J's characterization that certain "incidents by the mother constitute mental injury."[124] Conduct cannot meaningfully be characterized as mental injury.

The established facts concerning harmful conduct by Ms. B that was observed by or directly impacted D are these: Ms. B was frequently intoxicated in D's presence from the time she moved in with Mr. L through at least the custody hearing in September, 2008, but that after the custody order was issued she did not drink alcoholic beverages to the point of intoxication while D was in her home; Ms. B frequently engaged in arguments with Mr. L in D's presence in which vulgar language was used, from the time she moved in with him through at least the end of 2008, and on occasion after the custody order was issued through October 29, 2009; Ms. B on occasion made hurtful remarks to D; and Ms. B did not always insulate D from the ongoing custody battle. The fundamental question to be determined is whether this conduct caused the mental injury evidenced by an observable and substantial reduction in D's ability to function after the written custody order was issued in April 2009.

In considering the existence of a casual relationship between Ms. B's conduct and the injury to D, one important consideration is the timing of the injury. As outlined above, the preponderance of the evidence is that D incurred a mental injury evidenced by an observable and

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121 Post-Hearing Brief at 12, citing R. 81.
122 Post-Hearing Brief at 11, citing R. 69.
123 There is no such observation in the written record.
124 Post-Hearing Brief at 11, citing R. 67-68.

substantial impairment of her ability to function shortly after the court issued its written custody order in April, 2009. OCS suggests that this temporal relationship is evidence of a causal connection between Ms. B's conduct and the mental injury, the implication being that because the evidence of mental injury surfaced during the time Ms. B had custody, the injury likely was the result of her conduct. That is certainly one possibility. However, the factual findings establish that during this period of time, Ms. B did not drink to the point of intoxication while D was in her home, and the amount of arguing and improper language by both herself and Mr. L was substantially reduced. Indeed, at the time D first exhibited a substantial impairment in her ability to function, and apparently for some months previously, Mr. L, who was the chief target of both the court and OCS's concerns, had no contact at all with D because the court had ordered him not. In light of the entire record, the temporal relationship can also be viewed in a completely different light: that it was not Ms. B's bad behavior after the court awarded her custody that adversely impacted D, but rather Ms. B's efforts to impose reasonable disciplinary measures on an out of control adolescent. The latter explanation is particularly compelling in light of the specific conduct that led to D's placement in an adolescent treatment facility. The placement occurred after D had failed to make a reasonable effort to meet her obligations as a home school student, and her mother told her that she would need to enroll in the public school. D then tried to use a cell phone to call her father to intercede for her: this is the person who had consciously tried to undermine Ms. B and had been found an unfit parent by both the court and Mr. J. Confronted with her mother's efforts to impose reasonable limits and to enforce those limits by preventing her from seeking recourse Mr. B, D exploded and went for a gun.

Ms. B's bad behavior, as found above, no doubt had a deleterious impact on D. However, not every deleterious impact constitutes a mental injury as defined by law. For much of the time in 2007 and 2008, D primarily lived with her father and only occasionally stayed with her mother. While living with her father, D was exposed to his conscious effort to undermine Ms. B and she was not appropriately disciplined. When D stayed with Ms. B, Ms. B's conduct was often inappropriate, as described above, and on those occasions when Mr. L was present his conduct exacerbated the situation. However, after D went to live with her mother by court order, Ms. B's inappropriate behavior was substantially reduced or eliminated. Mr. L, by court order, had no contact with the children until late in July, 2009. During that time Ms. B attempted to impose reasonable and appropriate limits on D, who was constantly running away to try to get

back to her father's house so that she could behave as she pleased. That is when D incurred a mental injury evidenced by a substantial and observable impairment in her ability to function. OCS has not shown that Ms. B inflicted that injury.

IV. Conclusion

During the time that Mr. B and Ms. B were engaged in a contentious and acrimonious custody dispute, OCS received multiple reports alleging that Ms. B had harmed her children. OCS found most of those reports did not warrant investigation; when investigated, they were found to be unsubstantiated. When the report of harm that is the subject of this proceeding was received, on July 22, 2009, D and C were in the custody of their mother under a court order, based on the court's finding that their father was unable to satisfactorily provide for their emotional, mental and social needs and was consciously undermining Ms. B's relationship with them.[125] OCS initially determined that the July 22, 2009, report of harm was unsubstantiated.[126] Not until after D had been placed in a treatment facility in November, when its prior determinations might have been called into question, did OCS reopen the matter and decide that Ms. B had inflicted mental injury on her children.[127]

OCS has not shown that its prior determinations regarding Ms. B were incorrect, or that its initial determination regarding the July 22, 2009, report of harm was mistaken. Rather, consistent with the court's findings and custody order, the preponderance of the evidence in this case is that a person other than Ms. B inflicted D's mental injury evidenced by the substantial and observable impairment in her ability to function after the court placed D in Ms. B's custody. C has not suffered a mental injury that is evidenced by a substantial and observable impairment in her ability to function. The substantiated finding as to Ms. B is therefore withdrawn.

DATED October 12, 2010.

By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

[125] Ex. 2, p. 23.
[126] *See* R. 9-12.
[127] *See* R. 87.

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15th day of November, 2010

By: *Signed*
Signature
William J. Streur
Name
Commissioner
Title

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