

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

In the Matter of:)
)
X.Y.) OCS ROH No. XXXXXXXX
) OAH No. 10-0312-DHS
_____)

CORRECTED DECISION¹

I. Introduction

This is an appeal from a substantiated finding of child abuse by X.Y., issued by the Office of Children’s Services (OCS). OCS’s finding was that there was credible evidence that Mr. Y had, on a single occasion, inappropriately touched the vaginal area of [M.C.], the four-year-old daughter of A.B., Mr. Y’s girlfriend.²

Mr. Y filed an appeal and the assigned administrative law judge conducted a hearing in No Name on March 22, 2011. Assistant Attorney General Elizabeth Bakalar represented OCS and Mr. Y was represented by his attorney, Brent Cole. Testimony was heard from Mr. Y and Ms. B, and from M.G., supervisor of OCS’s No Name office.

The preponderance of the evidence and the testimony at the hearing is that Mr. Y did not sexually abuse M.C. The substantiated finding is therefore withdrawn.

II. Facts

A.B. was born (in 1962) and raised in No Name. Ms. B obtained her G.E.D. in 1981 and in 1982 she moved to Anchorage.³ While living there she married and had two daughters, born in 1983 and 1990. For a time while living in Anchorage she used cocaine, a drug her then-husband used heavily, but beginning in the early 90’s, after taking a job with the No Name, she stopped using cocaine or marijuana.⁴ She completed [redacted] studies at No Name College and worked as a [redacted] in connection with the No Name litigation.⁵

¹ The proposed decision in this matter, dated August 23, 2011, was issued on August 24. The changes made in this corrected decision, issued *sua sponte*, consist of typographical and other manifest errors as identified in the Notice of Corrected Decision. See 2 AAC 64.350.

² See R. 760.

³ R. 19.

⁴ R. 19.

⁵ R. 19.

In 1993 Ms. B returned to No Name, where she was employed at the No Name Center.⁶ In 1996, she married a co-worker at the No Name Center. During the marriage, OCS received several reports, none of which was substantiated, alleging neglect of Ms. B's two daughters.⁷ The marriage ended in 2001.⁸ Ms. B left her job at the [redacted] center and worked as a bartender in No Name for several years. In October of 2003 Ms. B met E.F, a No Name [redacted] who was in No Name while [redacted].⁹ The couple formed a relationship, and in April, 2004, pregnant with his child, Ms. B moved to No Name and began cohabiting with him, along with her younger daughter, then aged 14.¹⁰ Ms. B was concerned about the level of her alcohol use, and after she became pregnant, she stopped drinking.¹¹ In January, 2005, Mr. F and Ms. B's daughter, M.C., was born.

The relationship between Mr. F and Ms. B was chaotic and volatile. Ms. B's teenaged daughter had a history of drug and alcohol use, at times did not return home, and was under the supervision of juvenile authorities.¹² Mr. F had a significant history of serious drug use¹³ and continued to use marijuana.¹⁴ Mr. F is hypomanic and paranoid; he has difficulty in maintaining focus and engaging in reciprocal conversation.¹⁵ Ms. B has average to above average cognitive and problem-solving skills, and adequate interpersonal skills,¹⁶ but has some difficulty in regulating her emotions.¹⁷

Ms. B on one occasion in early 2005 sought refuge at a women's shelter.¹⁸ The couple continued to live together until July, 2006, when, after being threatened by Mr. F, Ms. B took M.C. out of the home, obtained a protective order, and again took refuge in a women's shelter

⁶ R. 19; AB Testimony (1:12).

⁷ R. 372, 380.

⁸ R. 20.

⁹ AB Testimony (1:14).

¹⁰ See R. 47, 95.

¹¹ AB Testimony (1:35). Mr. F confirmed that she stopped drinking when pregnant, although he also stated she smoked marijuana and used hydrocodone. R. 77.

¹² R. 20, 449, 95, 139, 140-143, 163, 177-82.

¹³ Mr. F's history includes binging on heroin, methamphetamines and cocaine. R. 11, 17, 47, 57. During her first marriage, in Anchorage, Ms. B used cocaine. R. 19

¹⁴ See R. 47 (in 2010 interview, stated he stopped using cocaine "6 or 7 years ago" and used marijuana "until a few years ago"); R. 439.

¹⁵ R. 53, 57-58.

¹⁶ R. 24.

¹⁷ R. 26.

¹⁸ R. 20, 428.

for several weeks.¹⁹ In response, Mr. F, with the aid of an attorney, filed an action in the superior court for custody of M.C.²⁰ The couple was separated until March of 2007. During the separation, Ms. B began dating X.Y., a fellow employee at No Name Company.²¹ Mr. Y had previously been married twice. He had two sons with his first wife. His second wife, who passed away ten years after their marriage, had two daughters, aged 3 and 7 at the time Mr. Y married her, and he helped raised them.²² Mr. Y and his wife had at one time rented a duplex from Mr. F, and Mr. F believed that Mr. Y owed him several thousand dollars in unpaid rent.²³

In March, 2007, after taking parenting courses, Ms. B resumed cohabitation with Mr. F.²⁴ Their relationship remained dysfunctional.²⁵ Mr. F's finances deteriorated.²⁶ In early 2008, the couple again separated, and Mr. F began living on his boat while Ms. B remained in his home.²⁷ The custody case Mr. F had filed in 2006 was highly contentious. In April, 2008, the court entered an order requiring Mr. F to provide one hour advance notice of any visit to the courthouse except for scheduled matters, because of his admitted threats to other parties and because his "demeanor and behavior demonstrate a level of anxiety and mental distress which is disturbing to other people."²⁸

Ms. B worked for No Name as a [redacted], a job which entailed regular and random urinalysis testing.²⁹ Mr. F had worked for a number of years as a [redacted] for No Name,³⁰ but in 2008 was not hired, and he blamed Ms. B for it.³¹ In mid-June, Mr. F and Ms. B engaged in a disruptive argument in the lobby of the No Name Police Department.³² Towards the end of June, 2008, Ms. B moved out of Mr. F's home and, with her two daughters, then aged 3 and 18,

¹⁹ R. 17, 20-21, 98-112, 144, 585, 752. Ms. B asserted that Mr. F pointed a gun at her, but that allegation was not confirmed and no assault charge was filed. In 2000, Mr. F had been accused of similar conduct with a prior girlfriend. *See* R. 459-463.

²⁰ R. 21.

²¹ R. 21.

²² XY Testimony (1:52).

²³ R. 187, 540

²⁴ R. 21.

²⁵ R. 43, 147-149, 193-199.

²⁶ R. 438, 443.

²⁷ R. 21, 77, 561; AB Testimony (1:16).

²⁸ R. 17.

²⁹ R. 813.

³⁰ R. 540.

³¹ R. 432

³² R. 151.

moved in with Mr. Y.³³ In the absence of a formal custody order or written custody agreement, custody of M.C. alternated between Mr. F and Ms. B, depending on their work schedules.³⁴ Mr. F and Ms. B had frequent disputes over visitation, and each accused the other of improper parenting.³⁵ On July __, 2008, Mr. F filed a petition for an *ex parte* protective order on behalf of M.C. (No. XX-00-0000 CI), asserting that Mr. Y was stalking M.C.; the court denied the petition.³⁶ On July 19, 2008, Mr. F called police and reported that Ms. B and Mr. Y had left drug paraphernalia at his house; a trooper responded but no action was taken.³⁷ On September 24, 2008, Mr. F contacted OCS and asserted that Ms. B and Mr. Y were drug and alcohol abusers and that M.C. was being exposed to their substance abuse.³⁸ OCS initiated an investigation. On October 5, 2008, Ms. Y, who had for some time been keeping a regular journal describing Mr. F's behaviors, recorded this item:

I received a message from V [a co-worker]...that E had been calling and leaving msgs. all day. I returned V's call and she replayed all his mess. They were full of lies and threatening. She [V] is saving the tape for me... M and V are both afraid. He indicated in his msgs. X is being left alone w/ [M C]. My mom called that one right he is setting up a child molestation scenario.^[39]

A couple of days later, as part of OCS's investigation, OCS social worker 1 made a home visit to Ms. B's residence (Mr. Y's home).⁴⁰ She found no evidence of drug or alcohol or of any form of mistreatment; OCS found the allegation unsubstantiated and closed its investigation on October 23.⁴¹

³³ R. 21.

³⁴ See R. 203-252.

³⁵ See, e.g., AB Testimony (1:18, 1:27)

³⁶ R. 214 (notice not provided to Mr. Y), 406.

³⁷ R. 165.

³⁸ R. 745.

³⁹ R. 218. Ms. B subsequently asserted that she had expressed concerns about Mr. F falsely alleging molestation to OCS 1 at OCS in a home visit in October, 2008, as well as to J C, W B, members of her family, and to Mr. Y. R. 253. Mr. Y testified to the same effect. OCS did not call any of the other individuals as witnesses, and thus Ms. B's and Mr. Y's testimony is un rebutted.

⁴⁰ Ms. B testified that on this occasion she informed OCS 1 of her concern that Mr. F would fabricate an abuse allegation, and that OCS 1 had indicated her concern would be noted. AB Testimony (1:18, 1:22, 1:24); R. 267 (reporting that OCS 1 acknowledged that her comments to that effect "were on record), 356. OCS 1's case notes do not reflect any such comment. R. 813-814. OCS 1 was not called as a witness.

⁴¹ R. 747.

In November, M.C. made several comments to her mother to the effect that Mr. Y was a drunk, and that Mr. F had told her so.⁴² A custody hearing was scheduled for February. In January, Mr. F began attempting to persuade Ms. B to re-establish a relationship with him in letters he sent to her, which she attributed to his desire to have custody of M.C.⁴³ M.C. again told her mother that Mr. Y was a drunk, and that Mr. F had said so.⁴⁴ Mr. F expressed to M.C. that the reason he and Ms. B were not together was that Ms. B had run off with Mr. Y.⁴⁵ Mr. F repeatedly made harassing calls to Ms. B at home and at work, and made unfounded complaints about her parenting to the police department, her employer and others.⁴⁶ Despite Mr. F's disparagement of Mr. Y in the presence of M.C., M.C. never displayed any fear or concern about Mr. Y.⁴⁷

A custody hearing was conducted on February 20, 2009. At the custody hearing, Mr. F (who was of the opinion that any man was capable of molesting a child if given the opportunity) asserted that Mr. Y should never be left alone with M.C., without giving any reason.⁴⁸ The court ordered shared custody.⁴⁹ One day in mid-March, 2009, while at Mr. F's house, M.C. saw Mr. F coming out of the shower and took a picture of him with her digital camera.⁵⁰ Over the weekend of March 14-15, while M.C. was in her mother's custody, Mr. F told Ms. B that M.C. had seen him coming out of the shower and suggested she talk to M.C. about it.⁵¹ On Monday, March 16, M.C. told her mother that she took pictures of her father naked.⁵² When Ms. B relayed that to Mr. F, he became upset.⁵³ The next night, Tuesday, March 17, M.C. stayed with Mr. F.⁵⁴

⁴² R. 226, 228.

⁴³ R. 229-230, 232, 246, 291, 299-315. *See also* R. 237 (M.C. exposed to Mr. F's professed love for Ms. B and desire to resume living together).

⁴⁴ R. 235.

⁴⁵ R. 189.

⁴⁶ *See, e.g.*, R. 242, 243, 249, 255.

⁴⁷ AB Testimony (1:23).

⁴⁸ R. 303. Ms. B told the investigating officer that Mr. F had told her that "all men are capable of molesting children if given the opportunity." R. 187. *See also* AB Testimony (1:23).

⁴⁹ R. 692.

⁵⁰ R. 186 (Mr. F reports picture was of his elbow and back), 542.

⁵¹ R. 252.

⁵² R. 252. Ms. B reported to police that M.C. had commented on the pictures earlier. R. 187.

⁵³ R. 187, 252.

⁵⁴ R. 252.

At about 7:00 a.m. on Wednesday, March 18, Mr. F called Ms. B and reported that M.C. had told him that Mr. Y had molested her and that there had been a fight at Mr. Y's house that resulted in blood getting all over the carpet.⁵⁵ Mr. F told her that she would lose custody of M.C. if she didn't "get rid of this guy."⁵⁶ Ms. B, as scheduled, left No Name that morning to attend a two day training program in B.⁵⁷ After arriving in B, she called OCS and reported Mr. F's allegation, which she did not believe, as an instance of harassment by him.⁵⁸

Over the course of the next two days, Mr. F repeatedly discussed the allegation with M.C. "to make sure she was consistent before he reported."⁵⁹ At about 4:30 p.m. on Thursday, March 19, Mr. F called the No Name Police Department and reported that he had asked his daughter, as a general parental inquiry, "if anybody touched her or anything inappropriate."⁶⁰ He reported she told him "X wet his finger and stuck it inside of her and she doesn't like it."⁶¹ He stated he asked her where and she pointed to her vaginal area.⁶² He stated he asked her if it hurt and that once she said yes and another time she said no.⁶³ He stated she told him "it happened one time, a long time ago."⁶⁴ He stated he asked her if she had told her mother about it and one time she said yes and another time she said no.⁶⁵

At about 5:45 that evening, Det. Z contacted Mr. F. Mr. F told her that he had been parked in his vehicle at No Name with his daughter, checking out the weather, when she told him that X had touched her, and that he had asked her about the touch and determined it was on her

⁵⁵ R. 187, 253. Ms. B reported Mr. F as saying that M.C. had told him Mr. Y and Ms. B had fought. She stated there had been not fight, and that in fact a police officer had stopped by the house that night to get a current address for her older daughter (the police records submitted into evidence do not mention any contact at the Y residence on that date). She stated the rug was shampooed because of "L". R. 254. At the February 4 hearing, Mr. F testified that M.C. had described Mr. Y punching "J" and getting blood on the carpet. R. 541. He testified that she told him she had something to say, and then said that Mr. Y had put his finger in her. *Id.*

⁵⁶ AB Testimony (1:25).

⁵⁷ R. 256.

⁵⁸ R. 256, 756.

⁵⁹ R. 59, 184.

⁶⁰ R. 183. At the February 4 hearing, Mr. F testified that M.C. told him she had something to say, and then said that Mr. Y had put his finger in her. R. 541.

⁶¹ R. 183.

⁶² R. 183.

⁶³ R. 183.

⁶⁴ R. 183-184.

⁶⁵ R. 184.

genitals and that he had “possibly put his finger inside her.”⁶⁶ He stated that M.C. told him it happened “yesterday” but that to M.C., “yesterday” meant anytime in the past.⁶⁷

The next day, March 20, M.C. was interviewed at the No Name police station by Q.R., a dispatcher at the department who had been employed as a child protection investigator for a county sheriff’s office in Florida and had some training and experience in interviewing children regarding sexual abuse.⁶⁸ Ms. R asked M.C. if she knew the difference between good touches and bad touches, and M.C. said she did. Ms. R asked if anyone had given her a bad touch by touching her in a way she didn’t like and M.C. said yes, pointing to her vaginal area. She stated X touched her there and it hurt when he did. She said her mother came into the room when X was touching her and stopped him.⁶⁹ Ms. R asked her if X had put something on his hands before he touched her and she said X had spit on his finger and licked it with his tongue before he touched her.⁷⁰ Ms. R exited the interview room and talked to Det. Z, and they decided to continue the interview with an anatomical doll.⁷¹ Ms. R returned to the interview with the doll, and M.C. again pointed to her own vaginal area and said X touched her there, and pointed to the doll’s stomach area.⁷² M.C. said that after X touched her he “looked at her” and demonstrated by putting her face between the doll’s legs.⁷³

That same day, the court issued an order in the pending divorce case, providing for Mr. F to have custody of M.C. through March 25, and that she was to have no contact with Mr. Y.⁷⁴ In M.C.’s presence, Mr. F repeated the purported accusations, in graphic terms, to Ms. B in two conversations on March 20 and 22.⁷⁵ On March 23, Mr. F called M.C.’s child care provider and

⁶⁶ R. 185.

⁶⁷ R. 185.

⁶⁸ R. 189.

⁶⁹ R. 189.

⁷⁰ R. 189. Det. Z and Mr. F observed the interview from another room on a closed circuit television, but because Mr. F was talkative it was difficult for Det. Z to observe. *See* R. 186.

⁷¹ R. 186. The OCS report relaying M.C.’s description states that Ms. R said that Mr. Y “laid her out on the bed, held her legs straight up in the air, wet his finger and inserted it in her vagina.” R. 780. Ms. R’s written statement does not state that M.C. said that Mr. Y had laid her out on the bed or that he held her legs straight up in the air. R. 189. Rather, Ms. R described M.C. as having stated that after touching her, Mr. Y looked at her, and demonstrated by pulling the doll’s legs apart and putting her face between them.

⁷² R. 190.

⁷³ R. 190.

⁷⁴ R. 713.

⁷⁵ R. 259, 261.

prompted M.C. to tell her what Mr. Y had done.⁷⁶ In a meeting with OCS on March 23, Ms. B agreed to establish a living arrangement that would eliminate contact between Mr. Y and M.C.,⁷⁷ either by moving in with friends, or having Mr. Y move in with his sister.⁷⁸

On March 31, 2009, M.C. was interviewed at Alaska CARES (Child Abuse Response and Evaluation Services), an Anchorage organization that evaluates allegations of child sexual abuse on behalf of OCS.⁷⁹ I.J., an OCS employee, conducted the interview.⁸⁰ M.C. stated that X touched her with his finger, pointing to her genital area, and then he wet his finger and put it inside her.⁸¹ She stated she had been sleeping and X woke her up, and that her mom was at home at the time and came into the room and stopped him.⁸² She stated it happened one time and that it hurt.⁸³ She stated nobody told her what to say.⁸⁴ Alaska CARES notified OCS that it considered M.C.'s interview a credible report.⁸⁵

On April 2, Ms. B spent the night with M.C. at the No Name women's shelter, which was the first time she was alone with M.C. since the abuse allegation.⁸⁶ That night, as Ms. B was reading M.C. a book, "The Right Touch," that Alaska CARES had given to her, M.C. interrupted her and said that X had not touched her.⁸⁷

Mr. F and Ms. B signed a written safety plan on April 3, 2009, calling for Ms. B to stay at the women's shelter during times when she had custody of M.C. and for M.C. to have no contact with Mr. Y.⁸⁸ By April __, 2009, each of the adults had filed for protective orders: Nos. XX-00-000-CI (Mr. Y v. Mr. F), XX-00-000 CI (Ms. B v. Mr. F), and 3XX-00-000-CI (Mr. F *ex rel.* M.C. v. Mr. Y).⁸⁹ On April __, 2009, the superior court (Judge 1) conducted a hearing in the

⁷⁶ R. 263.

⁷⁷ R. 759.

⁷⁸ R. 558, 583, 602, 793-795 (typewritten safety plan, not signed at the time), 813.

⁷⁹ UG Testimony (9:55).

⁸⁰ R. 332.

⁸¹ Ex. 2; R. 333.

⁸² Ex. 2; R. 333, 336.

⁸³ Ex. 2. R. 333, 336. On this occasion, M.C. stated she was wearing pajamas bottoms (pink, with reindeer) at the time. She told Ms. R that she had been wearing panties but took them off.

⁸⁴ Ex. 2.

⁸⁵ R. 812, 813.

⁸⁶ R. 399; AB Testimony (1:43).

⁸⁷ R. 333, 399, 563; AB Testimony (1:43).

⁸⁸ R. 423, 790-792 (handwritten safety plan, signed April 4 and May 22).

⁸⁹ R. 406, 684-685.

custody case (No. XX-00-0000 CI) and the three pending protective order cases.⁹⁰ All three protective orders were granted.⁹¹ The court issued an interim custody order awarding custody to Ms. B, with Mr. F having the right to visitation on weekends, from noon Saturday through noon Monday.⁹²

In early May, M.C. told a worker at the shelter that Mr. Y had not touched her inappropriately.⁹³ On July 13, 2009, OCS notified Ms. B that it had substantiated the abuse allegation.⁹⁴ However, due to agency oversight and contrary to agency policy, a notice of the finding was not sent to Mr. Y.⁹⁵ In August, with the consent of OCS, Ms. B moved out of the shelter and into Mr. Y's home.⁹⁶ In the fall of 2009, OCS 1 retired, and the M.C. case was reassigned to K.L.V.⁹⁷ On October 30, 2009, Mr. Y was provided a polygraph examination, and the examiner concluded that examination results indicated he had truthfully denied the abuse allegation.⁹⁸

⁹⁰ R. 684-685.

⁹¹ R. 407.

⁹² R. 707.

⁹³ R. 585-586, 589 (in Ms. B's absence, worker asked about touching; M.C. pointed to her arm and said X touched her there, but denied he touched her elsewhere).

At the February 4, 2010, CINA hearing, Mr. F testified that "[M.C.] was going around to everyone saying that X did not touch her", but the time this was happening is unclear. R. 541. He may have been referring to a subsequent withdrawal of the allegation in 2010.

At the hearing in this case, Ms. B testified that M.C. recanted the allegation to OCS 1 in July, 2009. R.P. Testimony (1:38). However, OCS 1's case notes from that timeframe do not report any such event. OCS 1's July 13, 2009, case note states that in a home visit with M.C. at Mr. F's residence on that date, she stated that Mr. F had not touched her "private parts." R. 807.

⁹⁴ R. 425. The record includes an undated copy of a substantiated finding that references a May 29, 2009, case planning conference. R. 760-763. OCS subsequently reported to the Ombudsman that the investigation was completed and the allegation was substantiated on August 27. Ex. G, p. 1 (Ombudsman's Letter to X.Y., June 2, 2010).

⁹⁵ Ex. G, p. 1; UG Testimony (10:17). Ms. G testified that based on the Alaska CARES assessment, OCS considered the allegation substantiated at that time, and that a notice of substantiation should have been sent to Mr. Y within 45 days of the allegation. However, within that period of time OCS made no formal determination that the allegation was substantiated and instead focused on ensuring that Ms. B was adequately protecting her daughter. U.G. Testimony (10:16-18; 11:09).

⁹⁶ R. 556, 594-595. OCS has characterized the agreement (which was not reduced to written form) as being that "A could leave No Name and move back into X.Y.'s house, without X living there, as long as there would be no contact of any kind between [M.C.] and X." R. 617. Ms. B understood the agreement to be that Mr. Y did not need to vacate the premises, even when M.C. was in her custody, but that he was not permitted to be in the house when M.C. was there.

⁹⁷ R. 574.

⁹⁸ Ex. C, p. 4.

On November 18, 2009, OCS received a report that Mr. Y had been in his home (where Ms. B was living, with OCS's consent) while M.C. was there.⁹⁹ OCS performed a welfare check and found that although Mr. Y was there, M.C. was at her care provider's. Ms. B expressed frustration that OCS was investigating, because she did not believe that Mr. Y had abused M.C., and she expressed an unwillingness to cooperate in the future with OCS.¹⁰⁰ At that time M.C. had not reported having any contact with Mr. Y, and OCS had no evidence that Ms. B had at any time since the initial report allowed Mr. Y to have any contact with her daughter, or that she had in any way violated the February, 2009, temporary custody order issued in the divorce case.¹⁰¹ However, under the domestic violence restraining order obtained by Mr. F on April __, 2009, Mr. Y was not to be within 500 feet of M.C.'s residence.¹⁰² (That same date, the court issued an order in the divorce case designating that Ms. B's residence, during any time she had custody of M.C., would be the No Name women's shelter, unless otherwise designated by the court.¹⁰³)

On December 10, 2009, OCS took custody of M.C. from Ms. B and placed M.C. with Mr. F.¹⁰⁴ OCS filed an emergency petition for adjudication of M.C. as a child in need of aid (CINA) and for temporary custody on December 14, 2009,¹⁰⁵ "[d]ue to the current safety threats, the mother's inability to cooperate with OCS in following the safety plan and case plan, and that [sic] fact that despite [M.C.'s] disclosure of sexually [sic] abuse by X.Y., the mother's boyfriend, the mother does not believe her daughter and continues to pursue a relationship with X."¹⁰⁶

Court hearings regarding the CINA petition were conducted on December 23, 2009, and on January 7, 15 and 26, and on February 4 and 10, 2010, before Judge 2.¹⁰⁷ At the February 4 hearing, the court found probable cause that M.C. is a child in need of aid.¹⁰⁸ At a hearing on February 10, Ms. B stated she would terminate her relationship with Mr. Y and obtain her own residence. On March 6, 2010, M.C. told Mr. F that Mr. Y had not touched her, and she repeated

⁹⁹ See, e.g., R. 595 (November 18 report that Mr. Y was in the home; welfare check showed he was there while M.C. was at care provider's).

¹⁰⁰ R. 369.

¹⁰¹ R. 599, 602.

¹⁰² R. 701 (E F ex rel. M.C. v. X Y, No. XX-00-000 CI).

¹⁰³ R. 707 (E F v. A B, No. XX-00-000 CI).

¹⁰⁴ R. 615-616.

¹⁰⁵ See R. 3, 546 (decision made on December 10), 558.

¹⁰⁶ R. 618.

¹⁰⁷ R. 528-627.

¹⁰⁸ R. 534.

her statement on March 9, 2010, to her counselor.¹⁰⁹ The counselor reported that M.C. had said her mother told her to say this, and both Mr. F and the counselor believed that her statement had been prompted by Ms. B.¹¹⁰

On May 12, 2010, Mr. Y filed a complaint with the ombudsman, asking for assistance in clearing his name.¹¹¹ The ombudsman contacted OCS on May 19, at which time OCS acknowledged its failure to provide a closing letter when OCS substantiated the abuse allegation.¹¹² Mr. Y filed this appeal on May 28, 2010.

III. Analysis

A. Applicable Law

AS 47.17.290(2) provides that “‘child abuse or neglect’ means the...sexual abuse...of a child...under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby.” The term “sexual abuse” is not defined in AS 47.17, but it is defined in AS 47.10.990(31) to mean the conduct described in AS 11.41.410-.460. Among the conduct described in those provisions is sexual contact by an adult with a minor under age 13.¹¹³ Sexual contact includes knowingly touching, directly or through clothing, the minor’s genitals, other than contact that may reasonably be construed as normal caretaker contact.¹¹⁴ For purposes of this proceeding, these definitions will be applied.

OCS may issue a substantiated finding based upon probable cause. A finding will be affirmed on appeal only if OCS proves by a preponderance of the evidence that the alleged abuse actually occurred and that the child was thereby harmed.¹¹⁵

B. Sexual Contact

The fundamental issue in this case is whether Mr. Y inappropriately touched M.C.’s genitals. The only evidence that he did consists of M.C.’s statements to that effect to her father on March 18, 2009, and in forensic interviews on March 20 and 31. Since then, M.C. has

¹⁰⁹ R. 10, 725-727. U G testified at some point M.C. had told a counselor it did not happen, but was not sure of the date. U.G. Testimony (11:34).

¹¹⁰ *Id.*

¹¹¹ Ex. G, p. 1.

¹¹² Ex. G, p. 1.

¹¹³ AS 41.440(a)(1).

¹¹⁴ AS 11.81.900(a)(58)(A)(i), (B)(i).

¹¹⁵ *See generally, In Re K.S.*, OAH No. 07-0600-DHS (December 3, 2007) (available online at www.state.ak.us/officeofadminhearings).

consistently denied that Mr. Y touched her. Mr. Y testified at the hearing, was cross-examined, and denied the act he was alleged to have committed. Ms. B also testified and was cross-examined. Ms. B denied that she had witnessed any such incident, contrary to M.C.'s statement that her mother had come into the room while Mr. Y was molesting her. All of the parties deemed it in the best interests of M.C. to not be subjected to examination regarding the incident, and there is no corroborating physical evidence of the alleged event (nor would any be expected, in light of the nature of the alleged conduct).¹¹⁶ Thus, the essential issue to be determined is whether, in light of the record as a whole, M.C.'s statements at the time of the alleged incident are more persuasive than her own subsequent denials and Mr. Y's and Ms. B's testimony at the hearing.

1. M.C. Statements and Context

The record includes evidence of statements by M.C. describing sexual contact by Mr. Y, made on three occasions at a time when M.C. was two months past her fourth birthday. These statements are: (1) her initial report to Mr. F on March 18, 2009, which was not witnessed by any other person; (2) an interview by a dispatcher at the No Name Police Department on March 20; (3) an interview by I.J., an OCS employee, on March 31. The evidence of these statements is entirely hearsay. That is, neither M.C. nor any of the persons to whom she made the statements was a witness at the hearing. The available evidence of the initial report to Mr. F, moreover, consists primarily of second hand hearsay, that is, reports by persons to whom Mr. F relayed what M.C. had purportedly told him. The interview of M.C. at the No Name Police Department was recorded, but was not offered into evidence. The available evidence of that interview consists of the interviewer's written report. The only report by M.C. that is available for direct review is the interview by Ms. J. A video recording of that interview was admitted into evidence.

(1) Initial Report by M.C. to Mr. F

Mr. F did not testify at the hearing. The best evidence of what M.C. said to him consists of: (a) written, contemporaneous reports of what Mr. F said to (i) Ms. B and (ii) the intake officer at the No Name Police Department; and (b) Ms. B's testimony at the hearing. Less reliable

¹¹⁶ See U G Testimony (11:38).

(because more remote in time and hearsay) is (c) Mr. F's February 4, 2010, testimony in the CINA case.¹¹⁷

Mr. F's initial report to Ms. B on March 18, according to her written note made that same morning, was simply that M.C. had told him that Mr. Y had "molested" her, with no detail;¹¹⁸ she subsequently told police that Mr. F had alleged that Mr. Y had "touched" M.C.¹¹⁹ Mr. F's initial report to the No Name Police Department,¹²⁰ two days later, after discussing the matter with M.C., included the following key details:

- (a) No mention by M.C. of the time of day or location where the event occurred¹²¹
- (b) Mr. Y wet his finger
- (c) Mr. Y ("X") touched her vaginal area, put his finger in her, and it hurt
- (d) No mention of Ms. B observing the event
- (e) Mr. F had asked M.C. about good touch and bad touch

No incidental details were provided in any of Mr. F's reports. In his February 4, 2010, testimony, Mr. F said that M.C. told him she had something to say, and appears not to have mentioned asking M.C. about "good touch bad touch."¹²²

(2) No Name Police Dispatcher Interview

M.C. was interviewed by a dispatcher at the No Name Police Department on March 20, two days after her initial report to Mr. F. Ms. R's notes state that M.C.'s description of the incident included these key details:

- (a) The incident occurred at night in her bedroom ["while it was still light out"]
- (b) Mr. Y spit on his finger and licked it with his tongue
- (c) Mr. Y ("X") touched her vaginal area, put his finger in her, and it hurt
- (d) Ms. B came into the room and stopped Mr. Y
- (e) M.C. told Mr. F and he did not tell her what to say

¹¹⁷ R. 541.

¹¹⁸ R. 253.

¹¹⁹ R. 187.

¹²⁰ Mr. F's initial report was to Officer 1, on duty at the police station. Mr. F provided additional information in a subsequent call back from Detective Z.

¹²¹ Mr. F told Officer 1 that he assumed the incident had occurred at Ms. B's residence (no name Street). He told Detective Z that it occurred at that location, without stating that M.C. had told him so.

¹²² R. 541.

Before M.C. mentioned that Mr. Y spit on his hand, Ms. R asked if Mr. Y had put anything on his hands before he touched her. M.C. added one key detail, that Mr. Y had “looked at her” after he touched her, demonstrating with the doll. One incidental detail M.C. provided was that her panties were off at the time because she had taken them off.¹²³

By the time of the interview, Mr. F had repeatedly talked with M.C. about her initial disclosure to him.¹²⁴ In light of these conversations, the reliability of the police interview as a spontaneous, untainted, self-directed description is less than would otherwise have been the case. Moreover, because a recording of the interview was not offered into evidence, it is impossible for the fact-finder to independently and directly assess her statements. However, the individual who conducted the interview had some experience and training in conducting interviews of this nature, and a consultant retained by M.C.’s guardian ad litem reviewed the recording of the interview; there is no reason to believe that the interview was conducted in a manner contrary to accepted protocols (other than that the use of anatomical dolls “is not recommended”¹²⁵).

(3) Alaska CARES Interview

M C was interviewed by I J, an OCS employee, at Alaska CARES on March 31. M.C.’s description of the key details of the incident was in substance the same as the description noted in the police interview. It included:

- (a) The incident occurred at night in her bedroom [without reference to light outside]
- (b) Mr. Y spit on his finger [without reference to licking it]
- (c) Mr. Y (“X”) touched her vaginal area, put his finger in her, and it hurt
- (d) Ms. B came into the room and stopped Mr. Y
- (e) M.C. told Mr. F and he did not tell her what to say

M.C. described hiding from Mr. Y, but it is unclear if this was at the time of the incident; she also described hiding from her mother. The description of an incidental detail, her clothing, varied from the police interview: M.C. stated she was wearing pajamas (not panties), and they were up (not that she had taken them off).

¹²³ R. 190.

¹²⁴ R. 88, 89; *see* R. 184 (“Mr. F told me he waited a day to report it to make sure [M.C.’s] story didn’t change.”).

¹²⁵ Exhibit 3, p. 3.

By the time of the Alaska CARES interview, two weeks had passed since M.C.'s first mention of the alleged incident (which had occurred an unknown period of time prior to that). By March 31, in addition to multiple conversations with Mr. F, M.C. had been interviewed at the police department, had on at least two occasions heard her father describe the alleged incident to Ms. B, and had, with her father's encouragement, described what had happened to a third party. In light of these repeated prior retellings and rehearings of the alleged incident, the reliability of the Alaska CARES interview as a spontaneous, untainted, self-directed description is less than would otherwise have been the case.

Disregarding these prior rehearings and retellings, upon viewing the recorded interview the questioning does not appear leading or suggestive, and M.C.'s responses appear spontaneous. Her description was plausible, coherent, consistent during the interview, and contained appropriate detail. The narrative is, in its key details, consistent with prior reported statements, although it includes some differences. For these reasons, viewed in isolation, the interview is, as both Alaska CARES and a consultant retained by M.C.'s guardian ad litem concluded, a credible report of molestation, notwithstanding the young age of the reporter.¹²⁶

However, to consider the recorded interview, or the police interview, without regard for the multiple occasions that Mr. F discussed the incident with M.C. before those interviews is to ignore the possibility that those interviews were tainted by those contacts. So far as the record indicates, neither the police interviewer nor the Alaska CARES interviewer was made aware of Mr. F's prior interactions with M.C., and there is no mention of them in the guardian ad litem's consultant's report assessing those interviews.¹²⁷ OCS's consulting clinical psychologist in the CINA case stated, "[c]onsidering his personality and hyperfocus, it is quite likely [Mr. F] either consciously or unconsciously influenced her during these conversations."¹²⁸ She added:

The allegations of sexual abuse against Mr. Y have been considered credible by others, but there is little doubt Mr. F impacted [M.C.'s] statements considering the

¹²⁶ Expert opinion supports the common-sense view that a child's narrative that is coherent, spontaneous and appropriately detailed bears characteristics of credibility. *See* Post Hearing Brief, Ex. 3, p. 3.

¹²⁷ The guardian ad litem was provided copies of the No Name Police Department records, which include some evidence of Mr. F's discussions with M.C. but are not specific about it. The consultant's report does not reference any such discussions. *See* Ex. 3.

¹²⁸ R. 59.

2 days he spent discussing the allegations with her before she was interviewed by someone else.^[129]

These observations by OCS's retained expert, and the fact that M.C. heard her father describe the incident to Ms. B and was encouraged by him to repeat it to others before one or both of those interviews occurred, lessen the persuasive power of the interviews and of the opinion of Alaska CARES and the guardian ad litem's consultant as to their credibility.

2. *Surrounding Circumstances*

Chief among the surrounding circumstances are the circumstances affecting the credibility of Mr. F, Ms. B, and Mr. Y. Mr. F's credibility is important because he was the individual who first heard M.C.'s report, and his credibility regarding the manner in which that report was elicited, and its content, reflect on the credibility of M.C.'s subsequent interviews. Mr. F's credibility and reliability as a reporter is low, for several independent reasons. First, as a general matter, Mr. F has a limited ability to engage coherently and responsively on topics of significance. Second, and more specifically, Mr. F's credibility with respect to allegations concerning M.C.'s safety while in Ms. B's custody is low: he has repeatedly made unfounded reports of harm to M.C., and he had previously requested a protective order against Mr. Y on behalf of M.C. that was rejected by the court. Third, Mr. F had a pre-existing bias against Mr. Y, for two reasons: first, he had been involved in a financial dispute with Mr. Y; second, he believed that Mr. Y had alienated Ms. B's affections from him. Fourth, Mr. F had a strong motivation to fabricate: he was engaged in an ongoing custody dispute. Fifth, Mr. F had a history of presenting Mr. Y in a negative light to M.C.

As for Mr. Y's credibility, it is true, of course, that he had a significant motivation to lie about what happened: if he had admitted doing what he was alleged to have done, he would have been admitting to a felony. But other than that, there is nothing in the record to suggest that Mr. Y was not telling the truth. Twice married, he helped raise two sons and, from the time they were aged 3 and 7 respectively, two step-daughters.¹³⁰ For the past 40 years, Mr. Y has lived in No Name, an [redacted] community in which an individual's character and behavior are difficult

¹²⁹ R. 59.

¹³⁰ XY Testimony (1:52)

to disguise or conceal, and there is no evidence or suggestion that at any time Mr. Y ever engaged in any kind of inappropriate behavior toward any of the children he raised, or in any type of sexual misbehavior prior to this alleged incident. His testimony at the hearing, under direct and cross-examination, was credible both in its content and in his demeanor. Mr. Y was willing to take a polygraph test and did so, and the results of that test support his denial of inappropriate conduct.

Ms. B's testimony was direct, responsive, assured and composed. Ms. B was in the best position to observe Mr. Y and her daughter. Nobody has suggested that she would have condoned or permitted improper contact by Mr. Y.¹³¹ Ms. B believes what her daughter has told her from the first: that Mr. Y did not molest her. She, like OCS's retained CINA expert, believes that M.C.'s interviews were affected by Mr. F's prior discussions with M.C. Ms. B testified that Mr. Y was never left alone with M.C., precisely because she feared that Mr. F would fabricate an allegation of child abuse. That testimony was buttressed by her pre-existing journal entry, was confirmed by Mr. Y and was un rebutted.¹³² That Mr. Y would have engaged in the conduct alleged notwithstanding prior notice of a possible false accusation, and with knowledge of Ms. B's vigilance, seems unlikely.

Finally, apart from the relative credibility of these three key witnesses, there are additional circumstances that support Mr. Y's denials. First, M.C. has consistently and repeatedly recanted her initial statements beginning two days after her interview at Alaska CARES, including to staff at the No Name women's shelter. While it appears that Ms. B has influenced M.C.'s most recent denials of impropriety, both the initial denial to Ms. B and a subsequent report to staff at the No Name women's shelter appear to have been spontaneous. Second, the immediate circumstances in which the allegation arose suggest an additional motive for fabrication or manipulation by Mr. F. Mr. F acknowledged that shortly before the disclosure,

¹³¹ The court, considering whether Ms. B had witnessed the alleged incident, as M.C. reported, concluded that she most certainly did not, suggesting that if she had Mr. Y would either be in jail or in the hospital. R. 557.

¹³² R. 218 (October 5, 2008, entry: ("[Mr. F] is indicating in his msgs. [to V, a co-worker] X is being left alone w/ [M.C.]. My mom called that one right he is setting up a child molestation scenario."); R. 253 (March 18, 2009, entry, immediately after call from Mr. F reporting molestation: "[M.C.] has never been left alone with X because I have been expecting E to pull this for months."). *See also* R. 187 ("B said because of these statements [that 'all men are capable of molesting children if given the opportunity'] made by F she has always been careful never to leave M.C. alone with any man.").

M.C. had observed him exit his shower and had taken a picture of him while naked. Ms. B confronted him about the incident and the next day he accused Mr. Y of molesting M.C. That sequence of events lends credence to the possibility that Mr. F influenced or manipulated M.C. to make the initial disclosure, in order to pre-empt an accusation by Ms. B that he had himself acted inappropriately.

IV. Conclusion

M.C.'s reports that she had been inappropriately touched by Mr. Y lack any corroborating evidence. At the time of the reports, M.C. was two months past her fourth birthday, an age at which, in common experience, children are suggestible. M.C.'s recorded statements do not indicate trauma, shame, fear¹³³ resulted from the incident described, and she does not exhibit symptoms of sexual abuse.¹³⁴ M.C. has consistently recanted her prior report over a period of eighteen months, beginning two days after her examination at Alaska CARES.

Whether M.C.'s initial report to Mr. F was spontaneous or prompted is unclear. Her subsequent interviews followed repeated instances in which Mr. F discussed the allegation with her, described the alleged incident in M.C.'s presence, and encouraged her to repeat her initial report to third parties. Mr. F's reliability and credibility as a reporter is low, and his motive to fabricate or otherwise elicit a false allegation was high.

There is no evidence of any untoward conduct by Mr. Y towards his minor stepchildren, and his demeanor in testifying and denying the alleged occurrence was direct, forceful, and otherwise entirely credible.

Ms. B denied any knowledge of or opportunity for inappropriate conduct by Mr. Y and there is no evidence (other than M.C.'s statements, which the court found implausible) that Ms. B would have condoned, permitted, or ignored inappropriate behavior by Mr. Y had it been

¹³³ On April 15, 2010, M.C. stated to OCS's examining psychologist that she was afraid of Mr. Y, but "I just said that to get mom and dad to get back together again." R. 82. The psychologist's opinion is that a cause-and-effect relationship of this nature would not have been made by a child of M.C.'s age; such abstract reasoning would typically not occur until age 9 or 10. R. 89. The psychologist noted that M.C. "continues to feel uncomfortable around Mr. Y." R. 89. The basis for that notation is unclear. The evidence is that at the time of the interview M.C. had not been in Mr. Y's presence for over a year (since the initial allegation).

¹³⁴ OCS's examining psychologist stated: "[T]here did appear some concern around sexual matters, although it is not clear that this is the result of sexual molestation or anything Mr. Y did." Rather, she observed, "there are many things occurring in [M.C.'s] life that raise concern," mentioning in particular older boys she plays with at Mr. F's residence and sleeping arrangements there. R. 81, 89-90.

known or suspected by her. Ms. B's intimate familiarity with Mr. F, M.C., and Mr. Y gave her a unique vantage point to assess the credibility of M.C.'s allegations, and she does not believe Mr. Y engaged in the conduct described by M.C.

In weighing the evidence in this case, on one side of the balance are disclosures by a four-year-old that are credible when viewed in isolation, but whose weight is lessened by her multiple discussions with Mr. F prior to any forensic interview. On the other side of the balance are the child's close-in-time unprompted denials to Ms. B and a No Name women's shelter employee and her consistent denials thereafter (the latter likely influenced by Ms. B), Mr. F's relative lack of credibility as compared with Ms. B and Mr. Y, the absence of any corroborating evidence of any form for the allegations and of rebuttal testimony regarding the denials, the absence of any surrounding circumstances suggestive of sexual misconduct by Mr. Y, and the presence of circumstances suggestive of fabrication or manipulation by Mr. F. The preponderance of the evidence as a whole is that Mr. Y did not sexually abuse M.C., did not engage in sexual contact with her, and did not inappropriately touch her. The substantiated finding is therefore withdrawn.¹³⁵

DATED September 21, 2011.

By: Signed
Andrew M. Hemenway
Administrative Law Judge

¹³⁵ Because no sexual abuse occurred, it is not necessary to determine whether, under the circumstances of this case, M.C. incurred an identifiable physical, mental or emotional injury.

Adoption

The undersigned adopts this corrected 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 26th day of September, 2011.

By: Signed
Signature
William Streur
Name
Commissioner
Title

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