

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

In the Matter of the )  
 )  
 F T )  
\_\_\_\_\_ )

OAH No. 13-0050-SAN

**DECISION**

**I. Introduction**

F T learned in 2012 that in 2006 the Office of Children’s Services (OCS) had substantiated one finding of physical abuse and one finding of neglect related to the care of her daughter, B. According to OCS, B burned herself on the kitchen stove (neglect) and Ms. T then punished her by hitting her with a belt (physical abuse).

Ms. T requested a hearing to contest OCS’s substantiated findings. For the reasons discussed below, the substantiated finding of neglect is reversed, but the finding of physical abuse is upheld.

**II. Facts**

In September of 2006, OCS worker K H investigated a report of harm involving B B.<sup>1</sup> B was five years old at that time.<sup>2</sup> Ms. T is B’s mother.<sup>3</sup> The report of harm indicated that B had a burn on her arm and a bruise on her leg.

The parties dispute how the two injuries occurred. Ms. T lived separately from B’s father, with whom she was in a custody dispute. According to Ms. T, B was with Ms. T over the weekend, and returned to her father’s home at about 1:30 p.m. on Sunday. Ms. T testified that B did not have a bruise or a burn when she left that Sunday.

On the Monday after B returned to her father’s house, her step-mother, N J, gave B a bath and did not observe any injuries. She bathed her again on Tuesday and discovered the injuries.<sup>4</sup> On September 6, 2006, B was examined by Dr. Louis Mayer. His chart note says:

---

<sup>1</sup> Testimony of Ms. H.

<sup>2</sup> Agency Record 089; Testimony of Ms. T.

<sup>3</sup> Testimony of Ms. T. At the time, Ms. T’s name was F B.

<sup>4</sup> Agency Record 068. This information comes from Ms. H’s notes. Her notes are something a reasonable person might rely on in making important decisions. 2 AAC 64.290(a)(1) (admissible evidence). It is more likely true than not true that the notes accurately reflect what Ms. H was told. However, the statements made to Ms. H are hearsay. Given the existence of the custody dispute, it is not assumed that what Ms. J stated was true.

Patient is brought in by her stepmother to evaluate and record trauma to the child. She has a burn on her left forearm. It measures  $\frac{3}{4}$  x  $\frac{1}{2}$  inch on the mid-antromedial left forearm. The second evidence of trauma is an area of ecchymosis that is on the left thigh. It is on the mid-posteromedial left thigh. This measures 1 inch in length and 4 inch in width.

When I asked the child how these happened, she started crying and burying her head in her stepmother's lap and chest. It took a while to calm the child down. The best I can understand is that the child said she tried to climb on the stove and burned herself, and because of that, F hit her with a belt. Apparently F is the mother who has partial custody. The stepmother tells me this is the third time that the child has come home from her mother's house with burns.<sup>[5]</sup>

Given B's age at the time, some caution must be used in deciding how much weight to give that statement. There was no testimony as to B's ability to distinguish between truth and fiction at the time of these statements, and no testimony as to whether she understood the importance of telling the truth.

B also reported to Ms. H that she was burned when she opened the stove, and that her mother punished her for that by slapping her with a belt.<sup>6</sup> Ms. H testified that B became very assertive during her interview and insisted that Ms. H not talk to her mother.

B was not called as a witness, and neither was her father or stepmother. Ms. H testified based on what was contained in her report, but she had no personal knowledge as to the events in question. Given the passage of time and the limited amount of evidence available, it is difficult to determine exactly what occurred in September of 2006. That the burn and bruise were not noticed during the Monday night bath could mean that they weren't there when she returned from her mother's house on Sunday, or could mean that they were minor injuries that were easily overlooked. That B did not want Ms. H to speak to her mother could mean that B was afraid her mother would find out she had told what happened that weekend, or it could mean B was afraid her mother would learn she had blamed her mother for something that happened elsewhere.

In proving what occurred, OCS is only required to prove that the facts it asserts are slightly more likely to be true than not true. B appears to have been consistent in what she reported concerning the burn and the bruise.<sup>7</sup> OCS has proven that it is more likely that B was burned by the stove at her mother's house, and was then hit with a belt by Ms. T as punishment for touching the stove.

---

<sup>5</sup> Agency Record 089.

<sup>6</sup> Testimony of Ms. H.

<sup>7</sup> See Agency Record 0004.

### III. Discussion

#### A. OCS Need Not Show Harm or Threat of Harm to B's Health or Welfare Under the Commissioner's New Standard

OCS agrees it has the burden of proof in this matter, and that to support its substantiated findings it must show by a preponderance of the evidence that Ms. T neglected or physically abused B in September of 2006. OCS's position is that abuse or neglect for purposes of these findings is defined in AS 47.17.290(2). Prior decisions have adopted that definition,<sup>8</sup> and it will be used here as well.<sup>9</sup>

“[C]hild abuse or neglect” means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby[.<sup>10</sup>]

The present Commissioner of Health and Social Services, as well as prior commissioners, have previously interpreted this statute to mean that a physical injury would only constitute child abuse if the harm was caused by a person under circumstances indicating a harm or threat to the child's health or welfare.<sup>11</sup> However, two recent decisions have changed the interpretation. In the first case, a proposed decision suggested that a substantiated finding of physical abuse was not justified even where there was a physical injury because OCS had not proven the injury occurred under circumstances indicating the child's health or welfare was harmed or threatened.<sup>12</sup> The Commissioner, through his authorized delegee, rejected that portion of the proposed decision, stating:

I reject the proposed decision overturning the substantiation of physical abuse due to evidence and appropriately interpreting the disjunctive use of “or” in the statute.<sup>[13]</sup>

Any ambiguity in this decision was clarified in the second case. There, the Commissioner, through his delegee, stated

The interpretation of AS 47.17.290(2) is rejected because a substantiation of physical abuse does not require a finding that the child's health or welfare be threatened.<sup>[14]</sup>

---

<sup>8</sup> See *In re H.N.*, OAH No. 12-0715-SAN (Commissioner of Health and Social Services 2013), page 3.

<sup>9</sup> OCS also referred to a manual during the hearing, but there was no OCS manual offered as an exhibit.

<sup>10</sup> AS 47.17.290(2).

<sup>11</sup> E.g. *In re A.B.*, OAH No. 10-0157-DHS (Commissioner of Health and Social Services 2010), page 7 n. 64; *In re X & YZ*, OAH No. 09-0598-DHS (Commissioner of Health and Social Services 2010), page 4; *In re John Doe*, OAH No. 06-0112-DHS (Commissioner of Health and Social Services 2007), page 12.

<sup>12</sup> *In re H.N.*, OAH No. 12-0715-SAN (Commissioner of Health and Social Services, 2013), pages 4 – 5.

<sup>13</sup> *In re H.N.*, OAH No. 12-0715-SAN, page 7.

Although neither decision contains a “reasoned analysis”<sup>15</sup> for reversing the prior decisions, the intent of these two decisions is clear. Under this new rule, the phrase “by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby,” only applies to claims of maltreatment of a child under the age of 18. The last part of this statutory clause does not apply to injury, neglect, sexual abuse, or sexual exploitation.<sup>16</sup> As the Department now interprets this statute, OCS may make a substantiated finding of physical abuse any time a child is injured. Such a finding must be upheld regardless of the circumstances that led to that injury. All that needs to be proven is that the child was injured in some way.

***B. OCS Has Proven Physical Abuse***

Ms. T hit B with a belt. That punishment left a 1 inch by 4 inch bruise on B’s left thigh.<sup>17</sup> The bruise demonstrates there was physical injury. B was in Ms. T’s care when that injury occurred. Under the rulings discussed above, proof of a physical injury occurring while in her care is sufficient to support a finding of child abuse against Ms. T.<sup>18</sup>

***C. OCS Has Not Proven Neglect***

The neglect alleged in this case was that B burned herself on the stove when her mother was out of the room. The burn was described as a first degree burn on her left forearm, measuring ¾ x ½ inch.<sup>19</sup> There is no evidence as to how long Ms. T was out of the room, whether B was in the kitchen when Ms. T left, or whether there were others around who may have also been supervising B. There is no evidence that Ms. T left B alone at all, as there could have been other adults or older children around. If B was left alone, there is no evidence that she was left alone for more than a brief period of time. Leaving a five year old child unsupervised in one room while the parent is in another room for a brief period of time is not always neglect.

---

<sup>14</sup> *In re C.X.*, OAH No. 12-0761-SAN (Commissioner of Health and Social Services, 2013), page 3.

<sup>15</sup> *See May v. State*, 168 P.2d 873, 883 (Alaska 2007) (“Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”)

<sup>16</sup> Mental injury is separately defined in AS 47.17.290(2) and (9).

<sup>17</sup> Agency Record 089.

<sup>18</sup> Under the Commissioner’s prior interpretation, the proposed decision would have held that a substantiated finding could only be upheld when the injury was caused by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby. The proposed decision would then have found that the division failed to meet its burden of proving B’s health or welfare was harmed or threatened by the corporal discipline imposed by her mother.

<sup>19</sup> Agency Record 089.

Based on the evidence available more than six years after the events in question, the division has not met its burden of proof.<sup>20</sup>

#### **IV. Conclusion**

It is more likely true than not true that B did receive a burn while under Ms. T's supervision, and Ms. T did hit her with a belt as punishment. OCS did not meet its burden of proving that the burn occurred as a result of neglect. OCS did, however, prove physical abuse. Accordingly, one substantiated finding of abuse is upheld.

DATED this 9<sup>th</sup> day of May, 2013.

*Signed* \_\_\_\_\_  
Jeffrey A. Friedman  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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

DATED this 13<sup>th</sup> day of June, 2013.

By: *Signed* \_\_\_\_\_  
Name: Ree Sailors  
Title: Deputy Commissioner, DHSS

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

---

<sup>20</sup> As discussed in section III A, however, OCS could have made a substantiated finding of physical abuse based on this burn, since the burn occurred while B was in Ms. T's care.