

Missouri.⁵ On November 18, 2013, K again denied that any sexual abuse had occurred.⁶ K has no personal knowledge of the conduct at issue in this case, so her conflicting statements about whether she was abused do not detract from the weight given to F's testimony.

F reported that both Mr. N and Mrs. N had sex with K when the family was living in Missouri.⁷ F also reported that she might have been abused when she was younger, and that in 2012 Mr. N started making inappropriate comments about wanting to have sex with F. OCS made a Substantiated Finding that F had been sexually abused by Mr. N.

There was also a subsequent Child In Need of Aid (CINA) proceeding. By that time, F was an adult, and therefore not subject to the CINA action. She was called as a witness, and she did testify under oath. Her testimony was made a part of the record in this case. F testified that she had been placed in foster care with the Ns, and was subsequently adopted by them. She recalled that when she was 7 years old she was taking a shower and noticed that she was bleeding from her vagina. She did not recall what happened to cause the bleeding.

F did have a clear memory from when she was in 7th grade. She testified that Mr. N would sit next to her and try to put his hands on her thighs or chest. He would also try to hold her hand in the car, or put his hand on her upper thighs when sitting in the car. When he hugged her, he would grab her butt.

F testified that when she was 15 or 16, and the family was living in rural Alaska, Mr. N would give her massages. He would start at her feet, but move higher along her legs and try to place his hands beneath her shorts. He would rub her back and try to move his hands around to touch her breasts. F testified that she always moved away before he could touch her breasts.

⁵ Record at 10. The interview notes in the record are double hearsay. Neither the caseworker nor the interviewee testified in this proceeding. The notes are unsworn statements by the case worker describing what the interviewee reported. Hearsay is admissible if it is evidence "of the type on which a reasonable person might rely in the conduct of serious affairs." 2 AAC 64.290(a)(1). A reasonable person would rely on these notes as evidence that the person interviewed reported abuse similar to what is described in the notes. Without hearing directly from either participant in the interview, and without hearing a recording of the interview, a reasonable person would not assume that the notes were verbatim descriptions of what was said and also might not, without additional corroborating evidence, assume that the abuse reported had occurred. In this case, there is additional testimony from Emily about the abuse she was subjected to.

⁶ E-mail submitted by Mr. N on April 18, 2014.

⁷ Record at 13.

The next year, F was living in No Name with her mother while Mr. N taught school in a different rural community. He came home for a long weekend in September for Mrs. N's birthday. F was 17 at the time. According to F, during that visit Mr. N told her that he had wanted to have sex with her when she turned 16. He said that he loved giving her massages, and loved the full body massage she had given him. F did not recall giving Mr. N a full body massage.

Mr. N also told F that it was okay for them to have sex together because he had no sperm, so she would not get pregnant. Mr. N stated to F that he wanted to marry her.

The judge presiding over the CINA case found by a preponderance of the evidence that Mr. N's conduct constituted attempted sexual abuse of a minor (of F) and that his behavior was "grooming behavior."⁸ The judge also found that the three boys who were subject to this proceeding were in need of aid pursuant to AS 47.10.011(7), (8)(B)(ii), and (9).⁹ The court found by a preponderance of the evidence that the boys were at risk of being sexually abused, at risk of mental injury from exposure to certain types of criminal conduct, and had been neglected.¹⁰

Mr. N testified under oath and denied all of the allegations against him. He did not elaborate on his denial. While that may seem odd, if F's accusations are completely untrue and nothing similar to what she described actually occurred, then there would be nothing for Mr. N to say as elaboration. Mr. N did point out that, during her testimony, F had to refer to notes to refresh her memory as to the abuse, and that some of her statements were inconsistent with earlier interview statements.

III. Discussion

A. Substantiated Findings

Alaska Statute 47.17 requires various professionals to report suspected child abuse or neglect.¹¹ OCS is the agency charged with investigating those reports, and the Department of Health and Social Services keeps a central registry of all investigative reports.¹² Those reports are confidential, and may only be used by other governmental agencies with child-

⁸ Court's oral findings played on the record.

⁹ *Id.*

¹⁰ Oral findings by court and AS 47.10.011(7) – (9).

¹¹ AS 47.17.010 & .020.

¹² AS 47.17.040(a).

protection responsibilities, or in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.¹³

OCS has adopted a policy of making findings based on its investigations.¹⁴ Under this policy, abuse or neglect is substantiated if OCS finds there has been abuse or neglect as defined by AS 47.17.290(2) and that the child has been harmed as a result of that abuse or neglect.¹⁵

Alaska Statute 47.17.290 defines “child abuse or neglect” to mean 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[. ¹⁶]

The only substantiated finding at issue in this case was of sexual abuse by Mr. N against F.

Sexual abuse is not defined in AS 47.17.290, and OCS indicated at the hearing that it is not defined in its policy manual. At least one prior decision, however, has incorporated the definition from the CINA statute, which in turn incorporates the criminal definitions of sexual assault and sexual abuse of a minor contained in AS 11.41.410 – 460.¹⁷ OCS argued that the criminal law definitions should be used here, and its position makes sense as a matter of policy because those definitions contain clearly defined standards to measure whether the conduct in question constitutes sexual abuse.

B. Preliminary Evidentiary Issue

OCS offered as evidence F’s testimony from the CINA proceeding as well as the court’s ruling from that case. Alaska law limits use of the court’s records from a CINA case: “The court’s official records under this chapter may be inspected only with the court’s permission and only by persons having a legitimate interest in them.”¹⁸ While there is certainly a legitimate purpose in having those records reviewed in this proceeding, no court permission was obtained. In addition, there are also limits to the disclosure of the agency’s

¹³ AS 47.17.040(b).

¹⁴ This policy has not been adopted by regulation. *See State v. Nondalton Tribal Council*, 268 P.3d 293, 301 (Alaska 2012) (describing when policies of general application must be adopted by regulation); *Squires v. Alaska Board of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 33 (2009) (same).

¹⁵ *In re K. C. G.*, OAH No. 13-1066-SAN (Commissioner of Health and Social Services 2013), page 3; *In re U. H.*, OAH No. 12-0099-DHS (Commissioner of Health and Social Services 2014), page 6, fn 33.

¹⁶ AS 47.17.290(2).

¹⁷ *In re X. Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services 2011), page 11.

¹⁸ AS 47.10.090(e).

records related to a CINA proceeding.¹⁹ The evidence from the CINA case was allowed at the hearing, subject to further consideration as to whether it could be relied on.

There is no need to determine whether those two statutes preclude use of this information. Even if the evidence should not have been obtained and used, the use of that evidence did not prejudice Mr. N because, as discussed below, there was insufficient evidence to establish sexual abuse.

C. OCS Has Not Met Its Burden of Proof

F's report of abuse can be divided into three general categories. When she was seven, F had vaginal bleeding, but she could not recall why or whether Mr. N had done anything to cause that bleeding. She testified that she has repressed a lot of memories from her childhood. Raymond Edwards, a Protective Service Specialist employed by OCS testified that repressed memories from traumatic events were "not all that common," but it does occur.

Based on this evidence, it is certainly possible that F had been sexually abused when she was seven. It is also possible that if she had been abused, the abuse was by Mr. N. But there are other possible explanations, including abuse by a different perpetrator. Without more evidence of this incident, OCS has not proven that it is more likely true than not true that Mr. N sexually abused F when she was seven.

The second category involves the inappropriate touching of F's thighs, holding and hugging her inappropriately, and grabbing her butt. It also includes the massages during which Mr. N attempted to reach beneath F's shorts and also attempted to touch her breasts. Assuming this conduct occurred, it is extremely inappropriate. However, not all inappropriate conduct is sexual abuse as defined by the criminal statutes referred to above. For an act to constitute sexual assault or sexual abuse of a minor there must be either sexual penetration²⁰ or sexual contact.²¹ The conduct described by F falls short of either. She did not describe any completed sexual act or penetration, and she did not describe any actual touching of her genitals, anus, or breast. Similarly, she did not remember the full body

¹⁹ AS 47.10.093.

²⁰ In addition, sexual assault in the first degree includes attempted penetration with resulting serious physical injury. AS 11.41.410(a)(2). There was no serious physical injury alleged here.

²¹ Sexual contact and sexual penetration are defined in AS 11.81.900(b)(58) & (59).

massage, and therefore could not describe whether that massage included touching Mr. N's genitals or anus.

The third category encompasses Mr. N's statements to F about wanting to have sex with her. While those statements would be highly improper, they do not amount to sexual contact or sexual penetration.

OCS did not argue that there was actual sexual abuse by sexual penetration or sexual contact. Instead, it asserted a claim of attempted sexual abuse. OCS argued that attempted sexual abuse is the same as sexual abuse and that an attempt would justify a Substantiated Finding of sexual abuse under its policy.

In criminal law, attempt is defined as having the intent to commit a crime along with "conduct which constitutes a substantial step toward the commission of that crime."²² OCS suggested that not including attempted sexual abuse for substantiation purposes would have the effect of "blaming the victim" for having avoided being abused. This decision should not be interpreted as blaming F for anything. Based on her testimony, she acted appropriately under very difficult situations. She has nothing to be ashamed of. However, while both can be traumatic, there is a difference between abuse and attempted abuse.

OCS's policy makes a similar distinction with regard to harm. OCS will not issue a Substantiated Finding of abuse or neglect unless there was harm from that abuse or neglect. This does not "blame the victim" when he or she is able to avoid any harm after being neglected or maltreated. It is simply OCS's policy decision not to consider those situations as substantiated. OCS also made a decision to adopt the AS 47.17.290 definition of abuse and neglect. That definition includes "sexual abuse," but does not include attempted sexual abuse. Similarly, OCS has adopted AS 11.41.410 – 460 as its definition of sexual abuse. It did not include AS 11.31.100 as part of its definition.

Attempted sexual abuse is highly offensive conduct. It may at times cause as much harm as completed sexual abuse, but it is not the same as sexual abuse. OCS could have created a different policy with a broader definition of sexual abuse, just as it could have decided to substantiate findings even if the victim did not suffer harm. OCS didn't create a different policy. Instead, it created the policy set out in its manual, which is the policy that

²² AS 11.31.100(a).

has been adopted by the department in previous cases.²³ This case is decided based on the adopted policy.

This does not mean that OCS cannot protect children from attempted abuse. Under AS 47.10, the court can find that a child is in need of aid not only when harm has occurred, but also when there is a substantial risk of harm.²⁴ That is what appears to have happened here; the court found the three boys to be in need of aid because of a substantial risk that they would be sexually abused or subjected to mental injury.²⁵ OCS was able to protect the children even though there was no finding that any one of the boys had been sexually abused or harmed.

Even if all of F's assertions are accepted as true, OCS has not met its burden of proving that sexual abuse occurred. Accordingly, it is not necessary to determine whether the conduct she described actually occurred, or whether she suffered harm as a result of that conduct.

IV. Conclusion

The Office of Children's Services presented evidence of improper conduct by Mr. N, but it did not meet its burden of proving that his conduct constituted sexual abuse. The Substantiated Finding is not upheld.

Dated this 2nd day of June, 2014.

Signed

Jeffrey A. Friedman
Administrative Law Judge

²³ *E.g. In re U H*, OAH No. 12-0099-DHS (Commissioner of Health and Social Services 2014), pages 5 – 6.

²⁴ AS 47.10.011(6) – (8), (10) & (11).

²⁵ Court's oral findings on the record.

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 7th day of July, 2014.

By: Signed
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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