

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

In the Matter of the)
)
 E E) OAH No. 15-1078-SAN
_____)

DECISION

I. Introduction

This case is the appeal of E E, who contested two findings that he had committed child neglect by the Office of Children Services (OCS). On December 1, 2014, OCS had received a report accusing E E of exposing his children, F and O, to illegal drugs and using drugs when they were in his custody. OCS investigated, and ultimately substantiated the two findings of neglect against Mr. E. On July 23, 2015, Mr. E appealed the substantiated neglect findings.

Telephonic hearings were held on October 21, 2015 and November 16, 2015. Mr. E represented himself, and testified on his own behalf. Assistant Attorney General Diane L. Foster represented OCS. OCS employee N C, the children’s maternal grandmother, F M, and the children’s maternal aunt, U Q, testified on OCS’s behalf.

The evidence at hearing established that Mr. E probably did use and sell illegal drugs during periods when he was exercising visitation and had the children in his custody, and that the children had trace amounts of illegal drugs in their hair follicles. Although the Division’s evidence to establish a causal connection between Mr. E’s drug use and the drugs in the children’s hair follicles was not conclusive, the evidence did show that it is more likely than not the children were exposed to dangerous drugs as a result of contact with Mr. E and/or the presence of these drugs or their residue in his home, and that Mr. E’s use of addictive and illegal drugs resulted in substantial risk of harm to the children when they were in his custody. Therefore, OCS met its burden of proving that the substantiated neglect findings should be upheld.

II. Facts

E E is the biological father of the children, F and O. During the period when the children were exposed to the drugs that were found in their hair follicles, the children were living with their mother, maternal grandmother, and grandfather, not with Mr. E. During this period Mr. E had contact with the children only for visits when their mother was not present in her parents’

home, and on one occasion when he exercised an overnight visitation with the children in his and his girlfriend's home on November 30, 2014.¹

This single night was the only time he was with the children during the relevant time-frame when he was not also in home of the children's mother and grandparents. At the hearing, OCS employee N C testified that the children's hair follicles had tested positive for opiates, marijuana and methamphetamines. N C explained that these test results showed that the lowest form of exposure that could have caused these test results would have been the children having skin-to-skin contact with someone who had these drugs in their system.²

The boy F was born on 00/00/2013, his sister O was born on 00/00/2014, so he was only one and she was less than one year old on November 30, 2014, when the overnight visitation with Mr. E and his girlfriend, T K, took place. The report notes that the children's mother was attempting to secure primary custody of the children. The report notes that there was a court custody agreement that was finalized on November 18, 2014, and that the mother had not brought her concerns about Mr. E's drug use or dealing to the court's attention during the custody proceedings. The report also includes notes from an interview with the children, F and O's four-year-old half-brother. These notes indicate that Mr. E was using drugs in the children's presence.³

The report also notes that the children's mother alleged that about two months before November 30, 2014 she had seen heroin in Mr. E's vehicle, and had reason to believe that Mr. E was abusing Xanax, which he did not have a prescription for, and possibly heroin. Mr. E was charged in August of 2014 with several serious drug-related crimes, including felony misconduct with a controlled substance, weapons, and theft charges. A Department of Corrections employee reported that when he was arrested, he had so much Xanax in his system that there were immediate concerns for his health. At the hearing, Mr. E was serving time for a drug conviction that he admitted was for a crime involving heroin.⁴

While the record shows that it is more likely than not that Mr. E has a history of both abusing and selling illegal drugs, as well as engaging in other criminal activities that would create a serious risk of harm to any children in his custody while he is actively engaged in these

¹ Recording of Hearings & Agency Record 0000004 & 0000010.

² Recording of Hearing.

³ Recording of Hearings & Agency Record 0000001-0000003.

⁴ Recording of Hearings & Agency Record 0000001-0000003.

activities or abusing these drugs, the evidence that Mr. E was engaged in these activities during the single incident of overnight visitation shown in the record or that he is solely responsible for their testing positive to drug exposure is less strong. Mr. E's testimony was that he was allowed overnight visitation only on the night of November 30, 2014, and this was more or less confirmed by OCS witnesses, the children's aunt, and grandmother.⁵

Mr. E testified that the children were living with their grandparents and that drugs were frequently used in that household. This testimony was contradicted by the aunt and the grandmother, and the fact that the children's mother, who also lived in that household tested negative, but it remains a possibility because the children's mother was not in the household during the day and the evidence indicates that she may not have been living with the children during all of the relevant times that the children were, and the grandparents, who appear to have been the primary caregivers for the children during this period, were not tested.⁶

Mr. E's testimony about the grandparents' drug use in the home was credible and is supported to a degree by the children's positive test results. The range of drugs in those positive results and the relatively short amount of time that the children spent in Mr. E's home compared with the fact that they were living with their grandparents indicates that at least some of the exposure may have occurred in the home they were actually living in. Mr. E's general credibility is undermined by his criminal history, and his motivation to avoid the affirmation of the substantiate finding in this appeal. However, despite caution and defensiveness in his testimony, he did not seem to be fabricating his testimony in regards to the drug use in the grandparents' household. He seemed to have some concern for the risk this may have put his children in and made the admission that he had given the grandparents money that he believed they would use for drugs with a certain amount of remorse, and awareness that the admission did not cast him in a very favorable light.

However, the preponderance of the evidence shows that Mr. E has been substantially impaired by the addictive use of heroin and Xanax, and that his habitual use of these drugs has resulted in a substantial risk of harm to the children while they were in his custody.

⁵ Recording of Hearings.

⁶ Recording of Hearings.

III. Discussion

OCS maintains a central registry of all investigation reports.⁷ Those reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.⁸ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. Here, OCS substantiated two counts of neglect, one for each child.

“Neglect means the failure by a person responsible for the child’s welfare to provide necessary food, care, clothing, shelter, or medical attention for a child.”⁹

The only portion of the definition appropriate to the facts of this case is a neglect finding on the basis of failure to provide care. When a substantiated finding is appealed, OCS has the burden of proving by a preponderance of the evidence that the finding should be upheld. OCS met its burden.

The two substantiated findings on appeal are allegations of neglect as described by Alaska Statute 47.10.11(10) which provides:

Subject to AS 47.10.019, the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following:

(10) the parent, guardian, or custodian's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child; if a court has previously found that a child is a child in need of aid under this paragraph, the resumption of use of an intoxicant by a parent, guardian, or custodian within one year after rehabilitation is prima facie evidence that the ability to parent is substantially impaired and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child as described in this paragraph

OCS’ witness testified that the results of the test showed only that the children had skin-to-skin contact with someone who had some these drugs in their system. OSC did not present evidence showing that the person or persons who may have passed these trace amounts of drugs to the children through skin-to-skin contact needed to be at a level where the transferor would be impaired. OSC did not present evidence indicating whether or not the residual levels of these drugs in the adult’s system at the time of contact with the children would have been enough for

⁷ AS 47.17.040.

⁸ AS 47.17.040(b).

⁹ AS 47.17.190(11).

the children to have tested positive to the test. OSC did not present evidence that other sources of exposure that could result in positive test results could be ruled out, such as playing or crawling in a room where they drugs had been smoked at some time in the past. There was no evidence presented regarding negative physical effects of the exposure that the test revealed. The positive drug tests would not by themselves support a finding of neglect of the children because the testimony was that those results only showed that the children were touched by someone with those drugs in their system.¹⁰

The Alaska Supreme Court has upheld neglect findings based on repeated instances of head lice, poor parenting, lack of housing, and lack of clean clothing, and food.¹¹ On the other hand, the Court has also rejected a finding of neglect based on allowing a two-year-old to jump in a slippery bath tub and be placed in a glass bowl on a stove to take photos.¹² The Court stated the allegations were not, “indicative of any general tendency toward insensitivity...to child safety issues.”¹³

Evidence that the children may have had skin-to-skin contact with an illegal drug user, supported by tests showing trace amounts of drugs in their hair follicles, might be indicative, but would not necessarily show that the child’s parent was insensitive to child safety issues. However, a parent’s chronic abuse of heroin and Xanax during a period when a parent was exercising custody and visitation would.¹⁴

This is a case where the substantiation is based on parental behavior indicative of a general tendency toward insensitivity to child safety issues, because Mr. E’s use of addictive illegal drugs put the children at a substantial risk of harm while they were in his care. The evidence shows that Mr. E does not appreciate the risk to children in the custody of adults engaged in the chronic abuse of illegal drugs and being engaged in the criminal activities associated with the use such drugs. Mr. E admitted that he gave the grandparents money that he thought they would use for drugs while the children were in their custody.

The children’s mother’s concern that Mr. E was using heroin is supported by his subsequent conviction for a crime involving that drug. Mr. E was the noncustodial parent and had overnight visitation with the children only one night during the period when the exposure to

¹⁰ AS 47.17.190(11) & AS 47.10.11(10).

¹¹ *Ralph H. v. State, Dept. of Health & Soc. Serv., OCS*, 246 P.3d 916, 918 (Alaska 2011).

¹² *J.F.E. v. J.A.S.*, 930 P.2d 409 (Alaska 1996).

¹³ *J.F.E. v. J.A.S.*, 930 P.2d 409, 412 (Alaska 1996).

¹⁴ AS 47.17.190(11) & AS 47.10.11(10).

drugs that led to the positive test results took place, but this does not mean that the children could not have received this exposure from him or his home. Furthermore, the notes from interviews with the children's mother and her four-year-old son, and Mr. E having dangerous levels of Xanax in his system when he was arrested, and his criminal history since the children's births, show that it is more likely than not that Mr. E has been under the influence of illegal substances and has been engaged in dangerous criminal activity when he exercising overnight visitation and visitation at the children's home. It is not acceptable for a an infant or toddler's caregiver to be impaired, or a parent engaged in other activities that puts the children at a substantial risk of harm when he is with them.

IV. Conclusion

OCS established by a preponderance of the evidence that the circumstances of his visitation and overnight visitation in November of 2014 amount to neglect by Mr. E. The substantiated findings of neglect are therefore upheld.

DATED this 29th day of February, 2016.

Signed

Mark T. Handley

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 12th day of April, 2016.

By: *Signed*

Name: Jared C. Kosin, J.D., M.B.A.

Title: Executive Director

Agency: Office of Rate Review, DHSS

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