

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

In the Matter of:)
)
 S X) OAH No. 15-1223-SAN
) Agency No.
_____)

DECISION

I. Introduction

S X's daughter O was born in 2015. Ms. X is a troubled young woman, with issues of mental illness. The Office of Children's Services (OCS) determined that S X neglected O and placed Ms. X's name on the central registry created by AS 47.17.040. Ms. X appealed.

Before the date on which the hearing in this case was scheduled, a hearing was held in a Superior Court Child in Need of Aid (CINA) proceeding concerning the same events at issue in this administrative proceeding. The Superior Court found that O is a child in need of aid, based in part on a finding that Ms. X had neglected O. Under the doctrine of collateral estoppel, the establishment of neglect in the CINA case substantiates, as a matter of law, OCS' allegation of neglect in this proceeding. Accordingly, OCS' Motion for Summary Adjudication is granted. OCS' determination, that the evidence substantiates the allegation that Ms. X neglected O under AS 47.17.290(10), is affirmed.

II. Facts

The material facts relevant to this proceeding are not in dispute. Ms. X is 20 years old.¹ Her mother drank alcohol during her pregnancy, and as a child Ms. X was slow to meet developmental milestones. During her childhood, Ms. X was exposed to domestic violence, neglect, and abuse. She was taken into state custody in 2003 or 2004, and her parents' parental rights were terminated in 2007. She subsequently lived either with her maternal grandparents, or in foster care.

During Ms. X's adolescence, she began exhibiting serious behavioral problems including oppositional reactions, angry outbursts, and suicide threats and attempts.² She has had four acute psychiatric hospitalizations and one residential treatment stay. She has past and present

¹ All factual findings in this paragraph are based on OCS' agency record on appeal (agency record) at page 5. Future citations to the agency record are abbreviated as "R. at ____."

² All factual findings in this paragraph are based on R. at 5 unless otherwise stated.

behavioral health diagnoses including fetal alcohol spectrum disorder, generalized anxiety disorder, oppositional-defiant disorder, paranoid schizophrenia, pervasive developmental disorder, post-traumatic stress disorder, and reactive attachment disorder. She sometimes has auditory and visual hallucinations.³ A neuropsychological evaluation conducted on April 25, 2013 found (among other things) that Ms. X's memory is impaired⁴ and that her actions are often unpredictable.⁵ At the time of the evaluation, Ms. X was taking four different prescription medications for her behavioral health, and the evaluation recommended that she continue taking them indefinitely.⁶

After high school, Ms. X subsisted primarily through public assistance.⁷ At some point she began a relationship with, and began living with, T N.⁸ Mr. N is approximately the same age as Ms. X and also receives public assistance.

Mr. N, like Ms. X, has had a traumatic life.⁹ He was placed in state custody at the age of five due to his mother's substance abuse, and is believed to have fetal alcohol syndrome. During his childhood, Mr. N physically and sexually abused a younger brother on at least one occasion, and was placed in treatment for anger issues on several occasions.

Ms. X and Mr. N conceived O in the fall of 2014. During the time Ms. X was in the hospital for the birth of her daughter, she exhibited paranoid behavior and lashed out at the hospital staff on several occasions.¹⁰ She indicated that she did not trust certain members of the hospital staff, or certain lab test results, and stated her opinion that certain hospital staff members were not old enough to care for her.¹¹

O was born on 00/00/2015.¹² After O's birth, the hospital staff became concerned because Ms. X and Mr. N did not appear able to care for O.¹³ They had to be reminded to feed O and change her diapers, and they repeatedly asked hospital staff how to perform various care

³ R at 6.

⁴ R. at 9.

⁵ R. at 11.

⁶ R. at 6, 13.

⁷ R. at 54.

⁸ R. at 55.

⁹ R. at 55.

¹⁰ R. at 22, 56, 57.

¹¹ R. at 57.

¹² R. at 21.

¹³ All factual findings in this paragraph are based on R. 53 and R. 56 unless otherwise stated.

functions, even after being shown how to do so several times. Also, the hospital staff noticed that Ms. X did not appear to be taking her prescribed behavioral health medications.¹⁴

OCS received a Protective Services Report regarding the above on June 20, 2015.¹⁵ OCS' subsequent investigation determined that Ms. X and Mr. N have a history of acting out violently when they become frustrated.¹⁶ OCS found that there were allegations of domestic violence between Ms. X and Mr. N, and that they had been evicted from several apartments due to this, and due to intentionally damaging the apartments during arguments.¹⁷

Based on the foregoing, OCS concluded that Ms. X and Mr. N were not able to meet O's needs, and that she would be at high risk of maltreatment if she were left in their custody.¹⁸ Accordingly, OCS took emergency custody of O on June 22, 2015, and placed her in foster care.¹⁹ OCS met with Ms. X and Mr. N and interviewed them the following day.²⁰

III. Relevant Case Procedural History

On June 23, 2015, OCS filed an *Emergency Petition for Adjudication of Child in Need of Aid and for Temporary Custody* with the Superior Court.²¹ On July 14, 2015, OCS issued notices to Ms. X and Mr. N advising that OCS had entered substantiated findings of neglect against them, and placed their names on a child protection registry, based on their treatment of O.²² On August 3, 2015, Ms. X appealed OCS' finding of substantiated neglect. However, after that point, she did not participate in these proceedings. The Office of Administrative Hearings (OAH) mailed copies of all orders and notices issued in this case to Ms. X to the exact address she provided in her hearing request. However, all OAH's mailings to Ms. X were returned by the United States Postal Service (USPS) as "not deliverable as addressed; unable to forward." Telephone calls were placed to Ms. X using the phone number she provided in her hearing request, but OAH was never able to reach Ms. X. At the request of OAH, counsel for OCS contacted the attorney representing Ms. X in her CINA case to make sure Ms. X was aware of

¹⁴ R. at 53.

¹⁵ R. at 53. OCS' Initial Assessment Summary states that the Protective Services Report was received on "June 20, 2014," but this is clearly a clerical or typographical error.

¹⁶ R. at 54.

¹⁷ R. at 54.

¹⁸ R. at 54.

¹⁹ R. at 36, 45.

²⁰ R. at 53.

²¹ A copy of the petition was submitted as Exhibit 1 to OCS' motion for summary adjudication dated November 5, 2015.

²² R. at 27 - 30 (notice to Mr. N); R. at 31 - 34 (notice to Ms. X).

proceedings in this action, but neither that attorney nor Ms. X ever appeared to contest these proceedings. Ms. X participated by phone in, and was represented by counsel in, the CINA proceedings.

A notice of case planning conference (CPC) was issued on September 18, 2015 scheduling a CPC for October 2, 2015. Ms. X did not attend the October 2, 2015 CPC and she could not be reached by phone. Assistant Attorney General Diane L. Foster, Esq. participated by phone and represented OCS. On October 5, 2015, a scheduling order was issued setting the hearing on November 6, 2015. On October 27, 2015, OCS filed a status report with OAH advising that, following a hearing held on October 5, 2015, the Fairbanks Superior Court had made adjudicatory findings against Ms. X in the CINA (case No. 4FA-00000 CN). On November 3, 2015, an order was issued in this case vacating the hearing previously scheduled for November 6, 2015. On November 6, 2015, OCS filed a motion for summary adjudication. Attached to OCS' motion as Exhibit 2 was an order (*Order of Adjudication of a Child in Need of Aid and Custody Through October 5, 2016*), issued by the Fairbanks Superior Court on October 22, 2015 ("the CINA order").

Ms. X's opposition to OCS' motion for summary adjudication was due by November 23, 2015.²³ No response to OCS's motion was filed by Ms. X.

IV. Discussion

A. *The Relevant Statutes and Regulations*

The Alaska legislature has enacted several statutory schemes designed to protect children from mistreatment and neglect.²⁴ These laws give OCS a range of possible responses and remedies, depending on the level and immediacy of harm faced by the children. If the level of abuse or neglect is cause for concern, but does not immediately threaten the health and safety of the child, OCS can investigate, make a finding that the report of abuse or neglect has been substantiated,²⁵ and place the child's parent or caretaker on what amounts to a "watch list."²⁶ Alternatively, if the level of abuse or neglect is more serious, and the child is in need of

²³ 2 AAC 64.250(a) (response period is 15 days unless shortened or lengthened by the administrative law judge (ALJ)); 2 AAC 64.900(b) (adding three days to the response period where (as here) service is by mail).

²⁴ See AS 47.10.005 - AS 47.10.990 (Child in Need of Aid (CINA) statutes); AS 47.17.010 - AS 47.17.290 (child protection).

²⁵ This is typically referred to as a "substantiated finding of abuse or neglect."

²⁶ See generally AS 47.17.010 - AS 47.17.290; 7 AAC 54.010 - 7 AAC 54.900.

immediate assistance, OCS can initiate Child in Need of Aid (CINA) proceedings in Superior Court.²⁷ OCS may also pursue each of these remedies simultaneously, as it has done in this case.

Child abuse and neglect are defined by statute. Neglect, the type of mistreatment at issue in this case, is defined for purposes of CINA proceedings as when "the parent, guardian, or custodian fails to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development, though financially able to do so or offered financial or other reasonable means to do so."²⁸ Neglect is defined, for purposes of these administrative proceedings, as "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child."²⁹ Under AS 47.17.290(2), a finding of neglect also requires that the circumstances "indicate that the child's health or welfare is harmed or threatened thereby."

Substantiated abuse and neglect is reported on a list, established by AS 47.17.040, known as the "central registry." The central registry contains all investigative reports (but not reports of harm) filed by the Department of Health and Social Services (DHSS).³⁰ These reports are confidential, but can be used by governmental agencies with child-protection functions, inside and outside the state, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.³¹ Cases involving the central registry established by AS 47.17.040 are not subject to the Administrative Procedure Act³² (AS 44.62.330 - AS 44.62.630); the central registry is the list involved in this case.

OCS may issue a substantiated finding of abuse or neglect based upon probable cause.³³ A substantiated finding by OCS will be affirmed following an administrative hearing/appeal only if OCS proves, by a preponderance of the evidence, that the neglect alleged actually occurred and that the child was harmed thereby.³⁴

²⁷ See generally AS 47.10.005 - AS 47.10.142.

²⁸ AS 47.10.014.

²⁹ AS 47.17.290(10).

³⁰ AS 47.17.040(a).

³¹ AS 47.17.040(b).

³² 7 AAC 54.255.

³³ *In re XY*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011).

³⁴ See generally, *In Re K.S.*, OAH No. 07-0600-DHS (December 3, 2007) (available online at www.state.ak.us/officeofadminhearings).

B. *The Summary Adjudication Standard*

OCS' motion for summary adjudication is governed by 2 AAC 64.250. Under that regulation, a party may request summary adjudication on one or more issues in an administrative proceeding if a genuine dispute does not exist on an issue of material fact. Where a motion for summary adjudication is supported by an affidavit or other documents, the defending party may not rely on mere denial, but rather must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required.³⁵ In this case, OCS' motion for summary adjudication is supported by copies of the petition filed in, and the order issued in, the CINA case, and Ms. X has not opposed OCS' motion for summary adjudication.

C. *The Superior Court's Findings in the CINA Action Compel a Finding of Substantiated Neglect in This Case*

The *Order of Adjudication of a Child in Need of Aid*, issued by the Fairbanks Superior Court on October 21, 2015, in the CINA action, contains a number of findings of fact and conclusions of law.³⁶ First, the order found, by a preponderance of the evidence, that O is a child in need of aid under four different subsections of AS 47.10.011, including subsection nine (neglect).³⁷ Second, the order found, by clear and convincing evidence, that Ms. X's and Mr. N's continued exercise of custody of O is likely to result in serious emotional or physical damage to her.³⁸ Finally, the order concluded that O is a child in need of aid under AS 47.10.011, subsections (6), (8), (9) (concerning neglect), and (11).³⁹

In *State of Alaska v. United Cook Inlet Drift Association*, 895 P. 2d 947, 950-951 (Alaska 1995) the Alaska Supreme Court stated that there are three requirements for the application of collateral estoppel:

- (1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
- (2) The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action;

³⁵ 2 AAC 64,250(b).

³⁶ All references in this paragraph are to the Superior Court's order, submitted with OCS' motion for summary adjudication as Ex. 2.

³⁷ Ex. 2, p. 1, para. 2.

³⁸ Ex. 2, p. 2, para. 7.

³⁹ Ex. 2, p. 3, para. 8.

(3) The issue in the first action must have been resolved by a final judgment on the merits.

This doctrine binds the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation.⁴⁰ The doctrine “aim[s] to prevent parties from again and again attempting to reopen a matter that has been resolved.”⁴¹ The principle of collateral estoppel applies in administrative proceedings as well as in court proceedings.⁴²

The criteria for application of the doctrine of collateral estoppel are satisfied here. First, OCS is asserting collateral estoppel against Ms. X, who is a party in the CINA case. Second, the issue to be precluded from relitigation here by operation of the doctrine (neglect) is one of the same issues decided in the CINA case. Finally, the issue of neglect in the first action (the CINA case) has been resolved by a final judgment on the merits.⁴³

Accordingly, the Superior Court's findings and conclusions in the CINA case have preclusive effect in these administrative proceedings. The first preclusive finding from the CINA case is that O is a child in need of aid, due to neglect, under AS 47.10.011(9).⁴⁴ The definition of neglect used in the CINA case, based on AS 47.10.014, is, for purposes of this case, the same as the definition of neglect applicable to this case under AS 47.17.290(10). Accordingly, the Superior Court's findings and conclusions in the CINA case preclusively establish neglect in this case as a matter of law.

The only other item that OCS must establish to prevail in this case, under AS 47.17.290(2), is that O's health or welfare has been harmed or threatened by the neglect which occurred. The Superior Court's order in the CINA case found, by clear and convincing evidence,

⁴⁰ *Wilson v. Municipality of Anchorage*, 977 P.2d 713, 726 (Alaska 1999); *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006); *Alaska Public Interest Research Group v. State of Alaska*, 167 P.3d 27, 44 (Alaska 2007).

⁴¹ *Id.*, see also *State, Child Support Enforcement OCS v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

⁴² See *United States v. Utah Construction and Mining Company*, 384 US 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); see also *2 American Jurisprudence Second*, Administrative Law at Section 493; Davis, *Administrative Law*, Chapter 18 (Third Edition 1972); *Restatement (Second) Of Judgments* § 83(1) (1982) (“a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court”); Koch, 1 *Administrative Law and Practice* Section 6.63 (1985); *Sublett v. State of Alaska Commercial Fisheries Entry Commission*, 773 P.2d 952, 954 (Alaska 1989) (“principles of res judicata and collateral estoppel preclude collateral attack of a final agency decision made in an adjudicatory hearing”), citing *Jeffries v. Glacier State Telephone Company*, 604 P.2d 4, 8-9 (Alaska 1979); *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 44 (Alaska 2007), citing *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 779–80 (Alaska 2002) and *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989).

⁴³ Technically, the order issued in the CINA case is not a “final judgment” *per se*. However, it is the final and dispositive document adjudicating whether neglect was proven for purposes of the CINA case.

⁴⁴ Ex. 2, p. 1, para. 2.

that Ms. X's and Mr. N's continued exercise of custody of O is likely to result in serious emotional or physical damage to her.⁴⁵ This is equivalent to a finding that O's health or welfare has been threatened by the neglect which occurred. Accordingly, the Superior Court's finding and conclusions in the CINA case establish the elements of AS 47.17.290(2) in this case.

In summary, based on the Superior Court's findings and conclusions in the CINA case, applicable here under the doctrine of collateral estoppel, there are no disputed factual issues necessitating an evidentiary hearing in this case. The Superior Court's findings of neglect and threat of harm in the CINA case establish neglect and threat of harm in this case.

V. Conclusion and Order

OCS' Motion for Summary Adjudication is granted. OCS' determination of July 7, 2015, which found that the evidence substantiates the allegation that Ms. X neglected O under AS 47.17.290(10), is affirmed.

DATED this 30th day of November, 2015.

Signed

Jay Durych

Administrative Law Judge

Adoption

The undersigned 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 6th day of January, 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.]

⁴⁵ Ex. 2, p. 2, para. 7.