

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

In the Matter of:)

M N)
_____)

OAH No. 15-1326-SAN)

DECISION¹

I. Introduction

The Office of Children’s Services (OCS) placed M N on the Child Protection Registry based on substantiated findings that she had abused and neglected her four-year-old son F in 2014 and 2015. Ms. N requested a hearing to challenge those findings and her placement on the Child Protection Registry. The hearing was held at the Office of Administrative Hearings (OAH) on March 11, 2016.

OCS’s substantiations consisted of two findings: one finding of abuse in the form of causing “substantial risk of mental injury” to the child, based on Ms. N having engaged in a pattern of domestic violence with her boyfriend in the presence of the child, and one finding of neglect for engaging in substance abuse while caring for the minor child.

OCS met its burden of establishing, by a preponderance of the evidence, that Ms. N committed the acts on which the substantiated findings of risk of mental injury and neglect were based. Therefore, Ms. N’s placement on the Child Protection Registry due to the two substantiated findings is affirmed.

II. Facts

Ms. N represented herself at the hearing, with the assistance of her father S N. Assistant Attorney General Rachel Van Patten represented OCS. OCS presented testimony from U L, the father of Ms. N’s son; OCS Protective Services Specialist Paige Early; and OCS Protective Services Specialist (“PSS”) Catherine Gray. Ms. N did not present any testimony on her own behalf, but she did present a written closing statement.

Ms. N is the mother of F, who was two years old as of July 2014, when the first incident in question in this matter took place. On July 28, 2014, Ms. N was arrested for domestic

¹ This revised decision has been issued pursuant to 2 AAC 64.350(a), to correct manifest typographical errors on pages 5 and 6.

violence assault against her boyfriend, D X.² According to the report prepared by the arresting officer, F was present in the home when the assault took place.³ Ms. N was observed by the officer to be highly intoxicated at the time; she smelled of alcohol and admitted to officers on the scene that she had been drinking.⁴ Ms. N was charged with “assault – domestic violence,” and with “family violence” under Anchorage Municipal Code 8.10.050(B) (defined as committing “the crime of assault ... with knowledge or reckless disregard of the presence of a child or children”).⁵

In April 2015, another incident of domestic violence and intoxication took place involving Ms. N and Mr. X. In this instance, Mr. X was arrested and charged with domestic violence assault against Ms. N.⁶

In July 2015, F’s father U L contacted OCS and spoke with PSS Early. Mr. L reported to Ms. Early that he was very concerned about his son being exposed to substance abuse and domestic violence in the home, and he related what he had been hearing about those issues from friends and family members.⁷ Mr. L also mentioned that he had previously contacted OCS, in the summer of 2014, and had spoken with another OCS worker, Mike Brede, about similar concerns regarding F.⁸ PSS Early contacted Mr. Brede and discussed his prior contact with Mr. L and the concerns regarding F being exposed to substance abuse and domestic violence.⁹ PSS Early then contacted Ms. N, who came in with F for an interview at her office. During this interview, Ms. N admitted that two incidents of domestic violence had taken place between her and Mr. X, while her son F was in her custody.¹⁰ At the end of that meeting, OCS took temporary custody of F, who was eventually placed with his father Mr. L.¹¹

Through the course of investigating the allegations against Ms. N, Ms. Early also spoke with Ms. N’s mother, K D, and Mr. L’s sister, E L. They both corroborated the allegations that

² Agency Record (“AR”) 26-31.

³ AR 28.

⁴ *Id.*

⁵ AR 26. According to court records submitted in the agency record in this matter, Ms. N was also subsequently charged with violating a condition of release, i.e., that she violated the condition that she not possess or consume alcohol. (AR 41-42.) It appears from online court records that prior to trial, Ms. N pleaded guilty to that charge, and the assault and family violence charges against her were dismissed.

⁶ AR 15-25.

⁷ Mr. L testimony; PSS Early testimony.

⁸ Mr. L testimony.

⁹ PSS Early testimony.

¹⁰ PSS Early testimony.

¹¹ *Id.* Eventually Mr. L was able to obtain a custody modification order from the court system, granting him custody of F, apparently at least until Ms. N completes certain treatment programs. (L testimony.)

Ms. N and Mr. X had exposed F to several incidents of substance abuse (primarily heavy drinking of alcohol) and domestic violence.¹²

A meeting was held at Ms. Early's office on July 23, 2015, attended by Ms. N, Mr. L and Ms. D. Both Mr. L and Ms. D expressed their concerns regarding F being exposed to a pattern of substance abuse and domestic violence incidents by Ms. N and Mr. X.¹³ Ms. N responded by stating that she "agreed with what everyone said," essentially admitting the accuracy of the allegations; she further stated that she agreed to undergo treatment.¹⁴ During this meeting, Ms. D stated that F sometimes cried at bedtime while speaking about the violence between his mother and Mr. X.¹⁵

On July 24, 2015, the day after the meeting, PSS Early visited Mr. L and F at Mr. L's home, and she had the opportunity to interview F. Although he was only four years old, F was able to articulate that "Mommy hits D and D hurts Mommy," and also that "Mommy yells at D and D throws [F's] toys and also throws things at ... Mommy."¹⁶

OCS sent Ms. N a letter dated August 26, 2015, making substantiated findings of neglect against her based on (a) her "ability to parent" being "impaired by the ... habitual use of an intoxicant," resulting in "a substantial risk of harm to the child"; and (b) the parent having a mental illness or serious emotional disturbance.¹⁷ Ms. Early testified that the latter finding was incorrect, due to a typographical error. OCS subsequently sent an amended letter, dated November 10, 2015, which corrected the error and changed the second finding to a substantiated finding of abuse in the form of causing "substantial risk of mental injury" to the child, based on Ms. N having engaged in a pattern of domestic violence with her boyfriend in the presence of the child.¹⁸

Ms. N submitted her request for this hearing in September 2015, in response to the first letter. Prior to and during the hearing, however, she stated no objections regarding any potentially defective notice based on OCS's subsequent revision to the second substantiated finding, and the hearing went forward on the basis of the second OCS letter.

¹² *Id.*; AR 11-12.

¹³ PSS Early testimony; AR 12.

¹⁴ AR 12.

¹⁵ *Id.*, PSS Early testimony.

¹⁶ AR 13.

¹⁷ AR 8.

¹⁸ AR 44-45.

During the hearing, Ms. N asked questions of OCS’s witnesses but did not testify herself or present testimony from any other witnesses. After the hearing the record was kept open to allow OCS to submit a post-hearing brief and Ms. N to submit a response. OCS’s post-hearing brief summarized the legal bases for the substantiated findings at issue in the case and the facts presented by OCS in support of the findings. Ms. N submitted a two-page typed response in which she focused on her perception that the substantiated findings are “unfair” and on her efforts to regain custody of her son. She did not, however, deny the facts cited by OCS in support of the substantiated findings.

III. Discussion

OCS maintains a central registry of all investigation reports.¹⁹ 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.²⁰ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. A substantiated finding is one where the available facts gathered from the initial assessment indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child’s health or welfare is harmed or threatened thereby.²¹

Alaska Statute 47.17.290(3) states that “child 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 the child’s health or welfare is harmed or threatened thereby.”²² The statutory definition of maltreatment guides us to Alaska’s “child in need of aid” provisions: “Maltreatment means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011.”²³ A “child in need of aid,” under AS 47.10.011, means a child who has been “subjected to ... conduct by or conditions created by the parent [that] have ... (B) placed the child at substantial risk of mental injury as a result of ... (ii) exposure to conduct by a household member against another household member that is a crime under AS 11.41.100-11.41.220,

¹⁹ AS 47.17.040.

²⁰ AS 47.17.040(b).

²¹ OCS Child Protection Manual, CH. 2.2.10.1 (Rev. 5/16/15), *available at*: <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>

²² AS 47.17.290(2).

²³ AS 47.17.290(9).

11.41.230(a)(1) or (2), or 11.41.410-11.41.432”²⁴ The referenced statutes in AS 11.41 are all crimes of violence ranging from murder and manslaughter to assault and domestic violence.

OCS’s burden is to prove, by a preponderance of the evidence, that Ms. N committed the acts of abuse and neglect involving her children that are the basis for OCS’s two substantiated findings in this case.

A. Substantiated Finding for Risk of Mental Injury

OCS made a substantiated finding against Ms. N that she had caused “substantial risk of mental injury” to her son F by engaging in a pattern of domestic violence in the household, in the presence of F. Under the applicable statutes, the definition of “mental injury” requires that such a finding be “supported by the opinion of a qualified expert witness.”²⁵ The statutory definition of “substantial risk of mental injury,” however, does not mandate that expert witness testimony be provided in order to support the substantiated finding.²⁶

AS 47.10.011(8)(B)(ii) describes “substantial risk of mental injury” as resulting from “exposure to conduct by a household member against another household member” that falls within a list of crimes, including domestic violence. Thus OCS must prove that Ms. N engaged in conduct, or created conditions, that exposed her son F to domestic violence in the home. It was not disputed at the hearing that Ms. N and Mr. X engaged in two incidents of domestic violence, in F’s presence, that resulted in criminal charges against Ms. N in July 2014, and against Mr. X in April 2015. Although OCS did not present any direct evidence from a witness who could testify that they saw these incidents occur in F’s presence, OCS did present the police report and charging document from the July 2014 incident, which stated that F had been present during the incident. OCS also presented PSS Early’s testimony regarding Ms. N’s admissions during her first interview in July 2015, and her admissions at the close of the July 23, 2015 meeting. Cumulatively this evidence was credible and persuasive, and it was sufficient to support OCS’s substantiation of the finding of “substantial risk of mental injury” due to F being exposed to domestic violence in the home. OCS met its burden of proving by a preponderance of the evidence that F was exposed to domestic violence as a result of Ms. N’s conduct and conditions created by Ms. N. Therefore, her actions caused a substantial risk of mental injury to F, and OCS’s finding of risk of mental injury is affirmed.

²⁴ AS 47.10.011(8)(B)(ii).

²⁵ AS 47.17.290(10) (incorporated by reference at AS 47.10.990(21)).

²⁶ AS 47.10.011(8)(B)(ii).

B. Need for an Expert Witness

An additional legal issue that is raised in this case is whether a substantiated finding of causing substantial risk of mental injury can be affirmed without the expert witness testimony that would be statutorily required in order to prove actual mental injury. Under AS 47.10.011(8), maltreatment can be established when a person creates a risk of mental injury in a child by exposing a child to domestic violence. OCS's position is that the requirement of an expert witness applies only to a person charged with causing mental injury, not to a person charged with causing a risk of mental injury by exposing a child to domestic violence.

Decisions of the Alaska Supreme Court strongly emphasize “the devastating impact that witnessing domestic violence can have on children.”²⁷ Given this recognition of the potential impact that domestic violence can have on children, the law allows us to conclude that a person who commits an assault against a family member in the presence of a child, puts the child at risk of mental injury. Depending on the facts of the case, in some cases, a proceeding under AS 47.10.011(8) may well require expert witness testimony. Here, however, where OCS has proved that Ms. N was the perpetrator of a significant event of domestic violence in the presence of her then two-year-old son, OCS is not required to put on expert witness testimony to substantiate the finding.

C. Substantiated Finding for Neglect

OCS also made a substantiated finding of neglect based on Ms. N's “ability to parent [being] substantially impaired by the ... habitual use of an intoxicant,” resulting in “a substantial risk of harm to the child.”²⁸ It was not disputed at the hearing that Ms. N at times became extremely intoxicated on alcohol while F was in her care and custody, and that her use of alcohol was frequent and habitual. OCS did not present any direct evidence from witnesses who stated that they observed Ms. N intoxicated to this extent. However, Ms. Early's testimony about the evidence that she gathered from witnesses, and the police report from July 2014 detailing Ms. N's intoxication and out of control behavior, were sufficient to support the factual elements of this substantiated finding. As to whether her ability to parent was “substantially impaired” by her use of alcohol, it is self-evident that a person who becomes intoxicated to this extent while

²⁷ *In re J.A.*, 962 P.2d 173, 178 (Alaska 1998), citing *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 140 (Alaska 1997); see also *Martin N. v. State*, 79 P.3d 50, 55 (Alaska 2003 (“witnessing domestic violence is mentally harmful to children”).

²⁸ AR 45.

having a toddler in her custody is impaired in her ability to parent. Ms. N certainly did not argue to the contrary during the hearing, or during the July 23, 2015 meeting at OCS's office.

OCS met its burden of proving, by a preponderance of the evidence, that Ms. N's ability to parent was substantially impaired by her habitual use of alcohol. Therefore, OCS's substantiated finding of neglect is affirmed.

IV. Conclusion

OCS's substantiated findings against Ms. N for neglect and for causing substantial risk of mental injury to F are affirmed.

DATED this 4th day of May, 2016.

Signed _____
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 1st day of June, 2016.

By: *Signed* _____
Name: Deborah L. Erickson
Title: Project Coordinator
Agency: Office of the Commissioner, DHSS

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