

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

In the Matter of:)	
)	
D O)	OAH No. 15-1531-SAN
<hr/>)	Agency No.
In the Matter of:)	
)	
T X)	OAH No. 15-1554-SAN
<hr/>)	Agency No.

JOINT DECISION GRANTING SUMMARY ADJUDICATION¹

I. Introduction

D O is the mother of two minor children P and T. T X is the father of the minor child T. They all resided together. The Office of Children's Services (OCS) determined that Ms. O and Mr. X neglected P and T and placed their names on the central registry created by AS 47.17.040. Ms. O and Mr. X separately appealed their placement on the registry.

Before the date on which the joint hearing in these two cases 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 P and T were both children in need of aid, based on a finding that Ms. O and Mr. X had neglected them. Based upon the finding made in the CINA case, OCS filed a motion for summary adjudication.² 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 that Ms. O and Mr. X neglected P and T under AS 47.17.290(10), is affirmed.

II. Facts

D O is the mother of two minor children, who were living with her. OCS received a report on September 9, 2015, that Ms. O and T X, with whom she resides and who is the parent of one of the minor children, were smoking marijuana and crystal methamphetamine daily and dealing drugs from their home. OCS investigated that report. It filed a CINA case, based upon the report, and its

¹ OCS filed separate cases against Ms. O and Mr. X. These cases have not been formally consolidated. However, because both cases involve identical facts, persons, and there are no confidentiality issues vis-à-vis Ms. O and Mr. X, a joint decision is being issued in these two related cases.

² Although OCS's motion is entitled as a "Motion to Dismiss," because it relies on matters outside the parties' pleadings, it is treated as a motion for summary adjudication. See *Adkins v. Nabors Alaska Drilling, Inc.*, 609 P.2d 14 (Alaska 1980).

investigation, with the Superior Court on September 16, 2015.³ OCS removed the two minor children from Ms. O's and Mr. X's home on September 17, 2015.⁴ On September 29, 2015, OCS sent Ms. O and Mr. X notice that it had made a substantiated finding that each had neglected, as defined in 47.10.011(10), both of the minor children due to their substance abuse. That finding was based upon the identical report and investigation which prompted the filing of the CINA case. Ms. O and Mr. X were both placed on the State of Alaska's Child Protection Registry.⁵

Ms. O and Mr. X's CINA case went to an adjudication hearing on May 10, 2016. Both Ms. O and Mr. X participated telephonically and were represented by attorneys during that hearing. The Superior Court Judge found, by a preponderance of the evidence, that Ms. X and Mr. O, had each caused the minor children to be children in need of aid under AS 47.10.011(10).⁶

III. Relevant Case Procedural History

On September 29, 2015, OCS issued notices to Ms. O and Mr. X advising them that OCS had entered substantiated findings of neglect against them, and placed their names on a child protection registry, due to their treatment of P and T.⁷ Ms. O and Mr. X appealed OCS' finding of substantiated neglect. On January 8, 2016, Ms. O and Mr. X participated in a case planning conference which resulted in the case being referred to alternative dispute resolution. The case was returned to the active hearing track on June 1, 2016. Ms. O and Mr. X did not participate in these proceedings after the case was returned to the active hearing track. The Office of Administrative Hearings (OAH) either mailed or emailed copies of all orders and notices issued in this case to Ms. O and Mr. X to the exact address (both street and email) which they had provided. These notices and orders were apparently received, inasmuch as they were not returned by the Post Office, nor were emails bounced back. Telephone calls were placed to Ms. O and Mr. X using the phone numbers that had previously been used to contact them, but the phone was not a working number.

A notice of case planning conference (CPC) was issued on June 2, 2016 scheduling a CPC for June 15, 2016. Ms. O and Mr. X did not attend the June 15, 2016 CPC and they could not be reached by phone. The CPC was renoticed for June 21, 2016. Ms. O and Mr. X did not attend the June 15, 2016 CPC and they could not be reached by phone. On June 21, 2016, a scheduling order was issued setting the hearing on August 12, 2016. On June 28, 2016, OCS filed a motion for

³ Ex. 2 (Superior Court Case No. 3AN-15-00000 CN).

⁴ Ex. 5, p. 2.

⁵ Agency Record, pp. 3 – 9.

⁶ Ex. 5.

⁷ Agency Record, pp. 3 – 9.

summary adjudication. Attached to OCS' motion as Exhibit 5 was an order (*Order of Adjudication of Children in Need of Aid*), issued by the Anchorage Superior Court on May 10, 2016 ("the CINA order").

Ms. O's and Mr. X's oppositions to OCS' motion for summary adjudication were due by July 18, 2016.⁸ No response to OCS's motion was filed by either.

IV. Discussion

A. *The Relevant Statutes and Regulations*

The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.⁹ 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, maltreatment, 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, maltreatment, or neglect has been substantiated,¹⁰ and place the child's parent or caretaker on what amounts to a "watch list."¹¹ Alternatively, if the level of abuse, maltreatment, or neglect is more serious, and the child is in need of immediate assistance, OCS can initiate Child in Need of Aid (CINA) proceedings in Superior Court.¹² OCS may also pursue each of these remedies simultaneously, as it has done in this case.

Child abuse, neglect, and maltreatment 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."¹³ Maltreatment is a general term, which is defined, for purposes of these administrative proceedings, as "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 47.0.011."¹⁴ Under AS 47.17.290(3), a finding of neglect includes maltreatment and also requires that the circumstances

⁸ 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).

⁹ 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).

¹⁰ This is typically referred to as a "substantiated finding of abuse or neglect."

¹¹ See generally AS 47.17.010 - AS 47.17.290; 7 AAC 54.010 - 7 AAC 54.900.

¹² See generally AS 47.10.005 - AS 47.10.142.

¹³ AS 47.10.014.

¹⁴ AS 47.17.290(9).

"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).¹⁵ 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.¹⁶ Cases involving the central registry established by AS 47.17.040 are not subject to the Administrative Procedure Act¹⁷ (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.¹⁸ A substantiated finding by OCS will be affirmed following an administrative hearing only if OCS proves, by a preponderance of the evidence, that the neglect alleged actually occurred and that the child was harmed thereby.¹⁹

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.²⁰ 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 neither Ms. O or Mr. X have 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 Children in Need of Aid*, issued by the Anchorage Superior Court on May 10, 2016, in the CINA action, contains a number of findings of fact and conclusions

¹⁵ AS 47.17.040(a).

¹⁶ AS 47.17.040(b).

¹⁷ 7 AAC 54.255.

¹⁸ *In re XY*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011).

¹⁹ *See generally, In Re K.S.*, OAH No. 07-0600-DHS (December 3, 2007) (available online at www.state.ak.us/officeofadminhearings).

²⁰ 2 AAC 64.250(b).

of law.²¹ First, the order found, by a preponderance of the evidence, that P and T were children in need of aid under AS 47.10.011(10) (substantial risk of harm to the children caused by parent, custodian, or guardian's impairment "by the addictive or habitual use of an intoxicant").²² Second, the order found that the children had been removed from the home and that Ms. O's and Mr. X's continued exercise of custody of the children was contrary to the children's welfare, and that returning them to the home would also be contrary to their welfare.²³ Finally, the order concluded that Ms. O and Mr. X had caused the children to be in need of aid under AS 47.10.011(10).²⁴

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;
- (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.²⁵ The doctrine "aim[s] to prevent parties from again and again attempting to reopen a matter that has been resolved."²⁶ The principle of collateral estoppel applies in administrative proceedings as well as in court proceedings.²⁷

²¹ All references in this paragraph are to the Superior Court's order, submitted with OCS' motion for summary adjudication as Ex. 5.

²² Ex. 5, p. 2, para. 2.

²³ Ex.5, p. 2, para. 5, 6; Ex. 5, p. 6, para. 10.

²⁴ Ex. 5, p. 6, para.1.

²⁵ *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).

²⁶ *Id.*, see also *State, Child Support Enforcement OCS v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

²⁷ 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).

The criteria for application of the doctrine of collateral estoppel are satisfied here. First, OCS is asserting collateral estoppel against Ms. O and Mr. X, who are parties in the CINA case. Second, the issue to be precluded from relitigation here by operation of the doctrine (neglect by addictive or habitual use of an intoxicant) is the same issue 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.²⁸

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 P and T are children in need of aid, due to addictive or habitual intoxicant use by the parent, custodian, or guardian, under AS 47.10.011(10).²⁹ The definition of neglect used in the CINA case, based on AS 47.10.014, encompasses the definition of maltreatment applicable to this case under AS 47.17.290(9). 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(3), is that the children's health or welfare has been harmed or threatened by the neglect which occurred. The Superior Court's order in the CINA case found that Ms. O's and Mr. X's continued exercise of custody of the children was not in their welfare.³⁰ This is equivalent to a finding that their 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(3) 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 in the CINA case establish neglect in this case.

V. Conclusion and Order

OCS' Motion for Summary Adjudication is granted. OCS' determination of September 29, 2015, which found that the evidence substantiates the allegation that Ms. O and Mr. X neglected P and T under AS 47.17.290(9), is affirmed.

DATED this 29th day of July, 2016.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

²⁸ 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.

²⁹ Ex. 5, p. 2, para. 2.

³⁰ Ex. 5, p. 2, para. 6.

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 25th day of August, 2016.

By: Signed
Signature
Douglas Jones
Name
Medicaid Program Integrity Manager
Title

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