

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

In the Matter of)
)
K J) OAH No. 16-0871-SAN
) Agency No.
_____)

DECISION

I. Introduction

F H stabbed K J. They were at home with their son E at the time. The incident was reported to the Office of Children’s Services (OCS). OCS investigated. OCS substantiated two findings of maltreatment against Mr. J based on the incident. OCS concluded that Mr. J had put E at a substantial risk of mental injury by exposing him to domestic violence, and at a substantial risk of harm because his addictive or habitual use of alcohol had impaired his ability to parent. OCS placed Mr. J on the child protection registry.

The record does not contain evidence sufficient to support OCS’s findings that Mr. J maltreated E. OCS’s substantiated findings against Mr. J are reversed.

II. Facts

Late one evening in October 2015, E J’s parents, F H and K J, were at home drinking and arguing. Ms. H stabbed Mr. J. E was at home at the time.¹ However, it is not clear that E saw or heard the stabbing.² Mr. J was hospitalized in Anchorage.³ Ms. H was charged with assault and taken to No Name A for court proceedings.⁴ E went to his aunt’s house. Three days later, OCS received a report about the stabbing, and began an investigation.⁵

The case was assigned to OCS Protective Services Specialist John Spitzberg. In November 2015, Mr. Spitzberg spoke on the phone with P Y, the Indian Child Welfare Act (ICWA) worker in No Name B. He had a phone conversation with E’s aunt, D H. He visited Ms. H at the correctional center in No Name C, and she told him that she could not

¹ Testimony of J.

² Mr. J testified that E was sleeping at the time of the stabbing, and that the place in the house where he was stabbed was not within E’s line of sight. No one else who was present in the home the night of the stabbing testified at the hearing. Ms. Herron, who did testify, had never been inside Mr. J’s home.

³ Record at 6.

⁴ Record at 6; Alaska Court Systems Public Access Website, “Courtview,” at 4XX-15-00000CR, *available at* <http://courtrecords.alaska.gov/>.

⁵ Record at 6.

remember anything that happened the evening of the stabbing. He went to No Name B and met with E. E, however, did not say anything when asked if he remembered Mommy and Daddy fighting, and the interview “revealed nothing” about the issues raised by the protective services report.⁶ During his visit to No Name B, Mr. Spitzberg met with D H (E’s aunt) and the school counselor at the No Name B school.⁷ About a week later, he encountered the aunt at the No Name C airport, and spoke further with her about the case.⁸ Mr. Spitzberg visited No Name B again in January 2016, and spoke with E, the school principal, and E’s aunt.⁹ Mr. Spitzberg’s notes do not indicate that he ever spoke with Mr. J.¹⁰

Mr. Spitzberg is no longer employed by OCS. When he left, Mr. Spitzberg’s cases were transferred to Protective Services Specialist Heather Herron. Ms. Herron visited No Name B in April 2016. She met with Mr. J and E at the ICWA office, and F H outside of a relative’s house. Ms. Herron substantiated the findings against Mr. J after her April visit to No Name B.¹¹ OCS notified Mr. J of placement on the child protection registry in June. Mr. J appealed.

A telephonic hearing was held on October 12, 2016. Mr. J represented himself. Assistant Attorney General Laura Bowen represented OCS. Heather Herron, a Protective Services Specialist with OCS, testified.

III. Discussion

OCS substantiated two findings of maltreatment against Mr. J. For purposes of the child protection registry, “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.”¹² The first finding of maltreatment was substantiated under AS 47.10.011(8)(B)(ii) for placing E at a substantial risk of mental injury by exposing him to a crime of domestic violence.¹³ The second finding, substantiated under AS 47.10.011(10), was that Mr. J’s ability to parent had been substantially impaired

⁶ Record at 12.

⁷ Record at 12 - 13.

⁸ Record at 13.

⁹ Record at 14.

¹⁰ Record at 12 - 14.

¹¹ Record at 8 - 9; Testimony of Herron.

¹² AS 47.17.290(9).

¹³ Record at 1; Bowen argument at hearing.

by the addictive or habitual use of alcohol, resulting in a substantial risk of harm to E.¹⁴ Each of these findings is evaluated below.

A. *Substantial risk of mental injury by exposure to domestic violence*

OCS substantiated the first finding against Mr. J based on AS 47.10.011 (8)(B)(ii) – substantial risk of mental injury as a result of exposure to conduct by a household member against another household member. The statute provides, in part:

[T]he 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:

...

(8) conduct by or conditions created by the parent . . . have

...

(B) placed the child at a 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.

OCS based this finding on Ms. H’s assault on Mr. J.¹⁵

If E was exposed to a crime of domestic violence, the exposure was due to Ms. H’s conduct, not conduct by or conditions created by Mr. J. Ms. H stabbed Mr. J. She pled guilty to assault in the second degree under AS 11.41.210(a)(1) for the stabbing.¹⁶ Ms. H engaged in criminal conduct. But this case is not an appeal of the substantiation against Ms. H; it is an appeal of the substantiation against Mr. J.

The record does not contain any evidence that Mr. J engaged in domestic violence. Furthermore, the record does not show repeated incidences of domestic violence, and the substantiation was under AS 47.10.011(8)(B)(ii), not AS 47.10.011(8)(B)(iii). None of the evidence suggests (nor did OCS argue) that Mr. J could or should have anticipated that Ms. H would stab him. Ms. H exposed E to conduct against another household member that is a crime under one of the listed statutes; Mr. J did not.

¹⁴ Record at 2.

¹⁵ Record at 1 - 2, 10; Argument at hearing.

¹⁶ See Alaska Court Systems Public Access Website, “Courtview,” at 4XX-15-00000CR, available at <http://courtrecords.alaska.gov/>.

OCS has not demonstrated that conduct by or conditions created by Mr. J placed E at a substantial risk of mental injury. Therefore, the substantiation of the allegation against Mr. J under AS 47.10.011(8)(B)(ii) is reversed.

B. Habitual or addictive use of alcohol

OCS also substantiated an allegation of neglect against Mr. J under AS 47.10.011(10), which applies if a parent'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."

However, OCS has not demonstrated that Mr. J's parenting ability was substantially impaired by the addictive or habitual use of an intoxicant. At the hearing, Mr. J testified that both he and Ms. H had been drinking the night he was stabbed. He also testified that before the stabbing, he used to drink two or three times a month. These admissions, standing alone, made nearly a year after the events in question and after Mr. J was notified of the substantiation of the allegation, are not sufficient to support a substantiation of neglect. A parent's occasional use of alcohol is not in itself sufficient to substantiate an allegation of neglect. The use must be addictive or habitual, and result in substantial impairment of the person's parenting ability.

There is nothing in the agency record to support the allegation that Mr. J's use of alcohol was addictive or habitual. In fact, there is nothing at all addressing Mr. J's use of alcohol, other than an April case note by Ms. Herron noting that "he knows that what happened was a result of the alcohol and that they will need to keep it out of their lives to prevent exposing E to anything else."¹⁷ This statement is ambiguous. It suggests that either Mr. J or Ms. H or both had a problem with alcohol.¹⁸ It might reflect a concern by Mr. J about Ms. H and her use of alcohol, rather than his own use of alcohol. It clearly shows Mr. J's awareness of the need to protect E. Ms. Herron also wrote in her initial assessment summary that the parents' behavior the evening of the stabbing "was part of a larger pattern of drinking."¹⁹ But the initial assessment summary does not specify whether Ms. H or Mr. J or both were drinking, and does not explain the basis of the conclusion that there was a

¹⁷ *Id.*

¹⁸ There was an allegation by Mr. J's mother documented in a February case note that Ms. H and her sister had been drinking while E was in their care. That statement was contradicted by a statement made in April by Ms. H to Ms. Herron that she had not been drinking since the stabbing incident. Record at 14.

¹⁹ Record at 9.

pattern of drinking. As part of her court case, Ms. H was ordered not to possess or consume alcohol for three years.²⁰ While this is evidence of cause for concern about Ms. H's use of alcohol, it does not show the addictive or habitual use of an intoxicant by Mr. J.

The record does not show previous reports to OCS expressing concern that Mr. J had been using alcohol. The record does not show any alcohol-related criminal convictions for Mr. J.²¹ The record shows that both parents were drinking on the night Mr. J was stabbed. It does not show that Mr. J was addicted to alcohol or a habitual user of alcohol. Ms. Herron admitted at the hearing that OCS did not have reports of other incidents when she said "[t]his is the type of case where it could have been the first incident of many or the first incident of record of many." The stabbing incident in this case was quite serious, and OCS was certainly correct to respond and investigate. However, speculation that there may have been previous unreported instances where Mr. J and Ms. H were both drinking is not sufficient to support a finding of habitual or addictive use of an intoxicant.

With regard to whether Mr. J's drinking on the evening of the stabbing put E at a substantial risk of harm, Ms. Herron argued that Mr. J's ability to protect E was impaired by the use of alcohol that evening, and that E could have been injured in the altercation. She argued that even though Mr. J was not the aggressor in the stabbing incident, he was "not acting in a protective manner because he was intoxicated." However, Ms. Herron was not present to evaluate Mr. J's conduct that evening, and no one who was, other than Mr. J, testified. Mr. J testified that after he was stabbed, he asked his friend to take E out of the house, avoiding further direct exposure to the events taking place.²² Mr. J's actions thus show some ability to parent and protect E, even though he had been drinking. Moreover, Mr. J's testimony about his friend suggests that there was a third adult, an alternate caregiver, present in the home. This further undermines the claim that E was at a substantial risk of harm. Nothing in the case notes suggests that Mr. J's use of alcohol on any other occasion impaired his parenting ability.

Ms. Herron argued that the fact that Mr. J drank on the night he was stabbed established that he was unable to protect E. However, this does not establish the required foundation to substantiate the allegation under AS 47.10.011(10). The evidence is the

²⁰ Courtview 4XX-15-00000CR, August 23, 2016.

²¹ Record at 7.

²² Testimony of J.

record is not sufficient to establish that Mr. J's parenting ability was substantially impaired by the addictive or habitual use of an intoxicant, or that his use of alcohol put E at a substantial risk of harm.

IV. Conclusion

The evidence in the agency record and the testimony at the hearing are not sufficient to support the agency's findings of maltreatment by Mr. J. The agency's decision to substantiate the allegations against Mr. J is reversed.

DATED: November 8, 2016.

Signed
Kathryn L. Kurtz
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 16th day of December, 2016.

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

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