

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

In the Matter of)	
)	
E B)	OAH No. 16-1362-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children’s Services substantiated one count of child abuse against E B, based on an allegation that he had sexually abused his wife’s seven-year-old daughter. Mr. B appealed, and a hearing was held. The evidence at the hearing included the videotaped recording of the child’s accusation, and Mr. B’s testimony. The evidence did not establish that the abuse had occurred. Therefore, the substantiation is overturned.

II. Facts

E B is a 45-year-old member of the army, currently assigned a work post as a truck driver. He is stationed at Army Base A, just outside of No Name City.¹

Following a difficult deployment in Afghanistan in 2010, Mr. B suffered from symptoms of post-traumatic stress. He returned to an earlier problem he had with alcohol addiction. In 2015, he entered a substance abuse treatment program. He remained sober for a time, but then relapsed. He was drinking in 2016, but never as heavily as he had been before treatment. He recalls that he was not drinking in May and June 2016, although he admitted that he did drink three beers in August.²

Mr. B has two sons from his first marriage, who are both in their late twenties now. They live in Arizona, as did his first wife, C B, during June 2016.³ Z U, Ms. B’s daughter from a relationship before she met Mr. B, also lives in Arizona. Ms. U was raised by Mr. B as if she was his daughter.⁴

Mr. B also has a three-year-old son, F, from his second marriage. F’s mother is G D. Ms. D has a daughter, Y N, from a previous marriage. Y turned eight in November 2016. Until July

¹ E B testimony.
² *Id.*
³ C B testimony. Ms. B now lives in No Name City.
⁴ U testimony.

2016, the time that Y disclosed an alleged incident of sexual abuse, Y lived with Ms. D and Mr. B.⁵ She was seven at the time of the incident.

Ms. D and Mr. B were married from May 2012 until October 2016.⁶ Ms. D was also in the army. They were transferred to Army Base A in 2014. Ms. D works as a sexual harassment/sexual assault specialist for the army. She was sometimes away from home to receive training in her field or for other reasons.⁷ When Ms. D was away from home, the children would stay with Mr. B.

During 2015, Mr. B and Ms. D were having significant marital problems. They decided that they would divorce. By June 2016, they were on a pathway toward an amicable dissolution of their marriage, with a joint custody agreement regarding F.⁸

From June 19-27, Ms. D had to travel to another state to attend a training. The children stayed home with Mr. B.⁹

Immediately after Ms. D returned, Mr. B and F left to go to Arizona. They were visiting family, including his parents and his sons from his earlier marriage.¹⁰

On the Fourth of July, Mr. B and F were at a barbecue with family members, including his sons, his stepdaughter, Ms. U, and his ex-wife, Ms. B. The group was having a good time, and one member of the party posted pictures of the barbecue on Facebook. At least one of the pictures showed Mr. B and Ms. B together.¹¹

Shortly after the pictures were posted, while the barbecue was still ongoing, Mr. B received a call from Ms. D. Ms. D was very upset about seeing Mr. B together with his ex-wife. Ms. D was animated during the conversation and indicated that their divorce would not be amicable.¹²

On July 26, 2016, Ms. D again called Mr. B. She told him that he was a pedophile, and that she would be obtaining full custody of F. Although Mr. B did not fully understand the allegation being made by Ms. D, he understood that she was alleging that he had molested Y.¹³

⁵ E B testimony.

⁶ E B testimony; Admin. Rec. at 54.

⁷ E B testimony.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; C B testimony.

¹² E B testimony; C B testimony.

¹³ E B testimony.

On July 27th, Ms. D made a report of harm to OCS.¹⁴ She reported that when she had told Y that Mr. B would be taking care of her again after he returned from Arizona in a few days, Y had reacted with apprehension. When pressed, Y disclosed that during Ms. D’s absence in June, Mr. B had sexually abused her. She said that he had touched her private parts with both his hand and his private parts, and he had kissed her neck.¹⁵

On July 28th, a social worker at a child advocacy center conducted a forensic interview of Y. In this interview, Y described the same three acts that she had disclosed to her mother.¹⁶ A videotaped copy of the interview is in the record.

Upon his return to No Name City on July 28th, Mr. B was met at the airport by military police officers and OCS. They served a restraining order on him and F was removed from his custody. On the same day, OCS and the military’s Criminal Investigation Department (CID) interviewed Mr. B. Mr. B denied that he had committed any act of sexual abuse.¹⁷

Following its investigation, OCS substantiated that Mr. B had committed one act of child abuse.¹⁸ Mr. B appealed.¹⁹ A hearing was held on March 7, 2017. Both parties were represented by counsel. The issues raised in the hearing are discussed below.

III. Discussion

When OCS receives a report of potential harm, it must investigate the report to determine whether it can substantiate whether the person identified in the report committed an act of child abuse or neglect.²⁰ If OCS finds that a parent, guardian, or custodian has sexually abused a child, OCS will substantiate in its records that the parent or guardian has committed child abuse.²¹

The evidence in this case includes two entirely different versions of events. According to the statement by Y, Mr. B subjected her to sexual abuse. According to Mr. B’s sworn testimony,

¹⁴ Admin. Rec. at 5.

¹⁵ Admin. Rec. at 11.

¹⁶ Unnumbered OCS Exhibit (DVD recording).

¹⁷ Admin. Rec. at 12-13.

¹⁸ Admin. Rec. at 1.

¹⁹ Admin. Rec. at 17.

²⁰ AS 47.17.290(3). The standard that must be met to make a finding of substantiated abuse or neglect is found in the definition of abuse or neglect:

“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 that the child’s health or welfare is harmed or threatened thereby.

²¹ Understanding the statutory scheme takes several steps. First, “child abuse or neglect” is defined under AS 47.17.290(3) to include “maltreatment of a child under the age of 18 by a person under circumstances that indicate that a child’s health or welfare is harmed or threatened thereby.” “Maltreatment,” in turn, is defined under AS 47.17.290(9) to include an act or omission described in AS 47.10.011. Under subparagraph (7) of that statute (AS 47.10.011(7)), committing or allowing sexual abuse is included within the definition of maltreatment of a child.

the abuse never occurred. The outcome in this case depends entirely on whether Y's statement is sufficient to meet OCS's burden of proving that more likely than not Mr. B committed the abuse. Below, this decision will first examine whether Y is a credible witness. It will then discuss whether Mr. B is a credible witness. Finally, the decision will discuss whether the evidence is sufficient to meet the burden of proof.

A. Is Y a credible witness?

Y's recorded statement raises several issues. It is hearsay evidence given by a young child who was not under oath. To determine a framework for analyzing the credibility of this evidence, including the ultimate question of when a statement by a child would outweigh the sworn testimony of an adult, we turn to cases that have discussed issues raised by testimony of children.

One substantiation case in which OCS relied on testimony by child is in *In re HN*.²² In *In re HN*, the Department upheld the substantiation of one count of sexual abuse against Mr. N, based on a 13-year-old child's testimony that Mr. N, her mother's fiancé, had touched her vaginal area two years earlier. Mr. N adamantly denied the accusation. OCS offered the contemporaneous interview of the child. The ALJ determined that the interview was not admissible, but did rely on notes from the interview, as well as testimony from the child at the hearing.²³ Although the decision in *HN* did not discuss in great detail why the child was found to be more credible than the adult, this case does show that a child's testimony, standing alone, can be sufficient to meet OCS's burden of proof.

In re XY, however, reached the opposite result.²⁴ In *In re XY*, after a detailed and careful analysis of the evidence, the Department determined that it could not rely on a four-year-old child's initial accusation that Mr. Y sexually abused her. In that case, there were several reasons why the child's statements were not reliable. The two most significant reasons, however, were that the child's father, Mr. F, had motive and opportunity to influence the child's memory, and the child had recanted her allegations shortly after making her initial accusations.

Although the facts of *In re XY* are not comparable to the facts in this case, it does provide guidance that is applicable here. First, *In re XY* observed that, "[e]xpert opinion supports the common-sense view that a child's narrative that is coherent, spontaneous and appropriately

²² OAH No. 12-0715-SAN at 5-6, revised on other grounds by final decisionmaker at 7 (Dep't of Health and Soc. Servs. 2013).

²³ *Id.* at 1-2, 5.

²⁴ OAH No. 10-0312-DHS (Dep't of Health and Soc. Servs. 2011).

detailed bears characteristics of credibility.”²⁵ Second, *In re XY* notes that “in common experience, [young] children are suggestible.”²⁶ Third, *In re XY* looked for corroborating evidence for the accusation from the child’s own statement or behavior, including “trauma, shame, fear” and “symptoms of sexual abuse.”²⁷ Each of these three observations is applicable to the analysis of the evidence in this case.

With regard to evaluating hearsay statements by children, the Alaska Supreme Court has also identified factors that must be taken into account when evaluating the reliability of hearsay statements by children. The factors cited by the court are as follows:

- (1) the spontaneity of the child’s statements; (2) the age of the child; (3) the use of “childish” terminology; (4) the consistency of the statements; (5) the mental state of the declarant; and (6) the lack of motive to fabricate.²⁸

The guidance from these cases will form the framework for the analysis of Y’s statement here.

1. Is Y’s statement spontaneous, detailed, and consistent, and does her age indicate a lack of guile?

The video recording of Y’s interview is coherent and consistent. Early in the interview, Y explained that

“My mom left to go to school. The next day after that my dad, I slept in his bed, and he was like touching me, he was like touching my private and putting his private on mine, and kissing me and [indiscernible] me just like on the neck.”²⁹

During the interview, she consistently identified the same three acts. She denied that Mr. B had committed any other acts, such as ejaculation, or kissing or fondling other parts of her body.³⁰

²⁵ *Id.* at 15 n.126.

²⁶ *Id.* at 18. *XY* specifically noted that four-years-old is an age at which children are suggestible.

²⁷ *Id.* The unpublished Alaska Supreme Court case *Jared S. v. State, Dep’t of Health & Soc. Servs., Office of Children’s Servs.*, No. S-11836, 2006 WL 1957903 (Alaska July 12, 2006) provides similar guidance. That decision cites with approval the superior court analysis that a child’s testimony of sexual abuse was reliable. The superior court had noted that the child’s testimony was consistent and that the mother, who was not in a custody battle, had no motive to coach the child. *Id.* at 4. The court also noted the presence of nightmares as a corroborating detail to conclude by clear and convincing evidence that inappropriate sexual contact occurred. *Id.*

²⁸ *In re T.P.*, 838 P.2d 1236, 1241 (Alaska 1992); see also *In re A.S.W.*, 834 P.2d 801, 804 (Alaska 1992).

²⁹ Unnumbered OCS Exhibit (DVD recording).

³⁰ *Id.* When late in the interview the interviewer asked whether “at any time did any part of that go inside your body or inside your private parts,” Y appeared to answer “inside.” *Id.* When asked if it hurt, she said, “no.” The “inside” answer was difficult to hear on the recording. Earlier in the interview, she had clearly answered “only outside” to the same question, and a written description of the interview records that she answered “no” to the second question. Admin. Rec. at 32. OCS has taken the position in this case that no penetration occurred. See Admin. Rec. at 11-12; statement of OCS counsel. That position is consistent with the forensic examination of Y. Admin. Rec. at 29-46. The interviewer did not follow up on the apparent “inside” answer, and it is not clear what Y meant. Given that neither party brought this issue to my attention or requested that I consider it as evidence for one side or the

Her list of the three acts in the interview was consistent with what her mother reported that Y had disclosed to her.³¹

Y told the interviewer that the episode ended when she said, “E, can you please stop. I’m very tired.” She reported that he then said, “Y, I’m sorry. Can you please forgive me.” She repeated these statements twice during the interview.³² The statements were identical to what her mother said Y had disclosed on July 26th.³³

Y provided some details. She said that F was in the bed also, and drew a picture that showed F on the left side, her on the right, and Mr. B in the middle.³⁴ She recalled that Mr. B was wearing shorts. She said that his “private” was outside of his shorts, but she did not see it. She was laying down and he was on his hands and knees over her. She remembered that her clothes were on, but she did not remember what she was wearing. The touching occurred under her clothes. It did not hurt.³⁵ She reported that it occurred on a school night, but she could not remember when it occurred or whether it was summer or winter.³⁶

During the interview, Y was fidgety and playing with the papers on the table. She was obviously shy, but did not have to be coaxed or cajoled into answering questions about what happened. Her manner was matter-of-fact. She was not fearful, apprehensive, or emotional.

In general, the videotape of Y, standing alone, is reasonably credible. She provided sufficient detail, and was consistent enough in her telling and retelling, to show that she was not merely making something up—she appeared to be describing something that she likely believed was real. In my view, her lack of emotion in telling the story does not detract from her credibility. Telling the story as an event that she did not exactly understand, but was unpleasant, rather than traumatic, is consistent with her reported response to the incident itself—“E, can you please stop. I’m very tired.”

With regard to spontaneity, the question is whether the statement was “made without undue suggestions by someone else.”³⁷ The initial inquiry is not whether the child was coached by a third party (that is a separate inquiry), but whether the interview techniques were suggestive

other, I will not rely on it or otherwise discuss possible inferences that could be drawn either from the statement or from the apparent “inside” answer not being consistent with her other statements.

³¹ Admin. Rec. at 11.

³² Unnumbered OCS Exhibit (DVD recording).

³³ Admin. Rec. at 11.

³⁴ Admin. Rec. at 49.

³⁵ Unnumbered OCS Exhibit (DVD recording).

³⁶ *Id.*

³⁷ *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1219 (Alaska 1991).

or leading.³⁸ Here, the interviewer did not coax Y or provide suggestions for what might have happened.

With regard to the factor of age, the court has explained, based on expert reports, that children under six “are unable to practice real deception.”³⁹ Here, Y was seven, so she would be at an age when a child could practice deception. Subject to many factors, however, including what a child has experienced and the child’s individual personality, we would generally expect a seven-year-old to be less capable of guile than an older child. Here, Y presented as a typical seven-year-old, not a child who has been aged beyond her years by abuse or hard usage. Thus, on this record, Y’s age is not determinative, although it slightly favors finding her statement credible.

Y’s inability to say when the abuse occurred, however, is perplexing. She reports that it occurred on a school night. She could not remember whether it was summer or winter.

OCS has identified the date of the alleged abuse as occurring between June 19-27, based on the time that Ms. D was away from home at the training.⁴⁰ School was not in session in June.⁴¹ Therefore, if the abuse occurred, it occurred during the summer, not on a school night. The interview on July 28th was sufficiently close to the alleged event that we would expect Y to remember when the event occurred, that it occurred in summer, and that it was not a school night. Her inability to remember these facts raises some doubt about her credibility.

Her confusion about timing, however, does not by itself make her statements unreliable. Many possible explanations could be found for why Y floundered on the issue of the timing of the incident. Children can be confused about time, and memories can blur even after a short time. Memories of unpleasant events can be repressed. Children can shut down and fatigue can set in during a stressful interview. No party has provided expert testimony with regard to the reliability of Y’s statement. Here, although her failure to recall the timing raises some doubt, the overall assessment remains that her recorded statement, standing alone, was reasonably credible.

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³⁸ *In re A.S.W.*, 834 P.2d 801, 805 (Alaska 1992) (noting that “[t]he four-year-old’s statements on the videotape are spontaneous and natural” without discussing respondent’s allegation that spouse had coached child).

³⁹ *Broderick*, 808 P.2d at 1219. In *Broderick*, for the purpose of summary judgment, the court cited to “expert material” advising that young children would have “few internalized limits and lack[] the ability or sophistication to be deceptive, devious or calculating, even over a short period of time.” *Id.*

⁴⁰ Admin. Rec. at 7.

⁴¹ I take official notice of the No Name City School District calendar based on information available at [URL redacted]. I note that the record does not specify whether Y attended private school or summer school. Therefore, although the “school night” statement weakens Y’s credibility, it is not conclusive.

2. Does the record contain evidence that Y may have been susceptible to suggestion?

At least two of the factors identified by the court for reviewing statements by children go to the issue of whether the child may have been subject to suggestion from a third party: (1) the language used by the child (whether it was adult terminology or childish language); and (2) the motive to fabricate.

The court has instructed that the “use of ‘childish terminology,’” such as “mean lady,” “wee wee,” and “bum bum,” give a child’s hearsay statement “the ring of verity.”⁴² Here, Y is seven and articulate, so we would not expect her to use similar baby talk. Although she used the word “private” when referring to both male and female genitalia, many adults might use similar terminology to avoid embarrassment. In general, Y’s use of terminology is reasonably age-appropriate. Nothing in her statement jumps out as coached based on her choice of terms.

The motive to fabricate is a significant issue here. Y spoke during the interview about how much she missed F when he was in Arizona. According to OCS, Y knew that Mr. B and Ms. D were in a custody dispute regarding F.⁴³ She knew that after the couple divorced, she would always be with her mother full time. Y may have been influenced by a desire to have her brother with her, especially if she understood that making an accusation of sexual abuse against Mr. B could result in F living with Y and her mother.

Ms. D also had a motive to facilitate Y having a false memory. According to Mr. B, his divorce proceedings with Ms. D had been on an amicable track until she viewed pictures of him on Facebook with Ms. B. In his view, Ms. D’s emotional and angry response to seeing the posting gave Ms. D a motive to facilitate Y’s making a false report of sexual abuse. In addition, Mr. B testified that Ms. D had a potential motive other than emotional revenge. If Ms. D was able to establish any sort of sexual endangerment for herself or her dependent, the army would almost certainly grant her request for a compassionate transfer—a type of transfer that the army will freely use to ensure that victims or potential victims of sexual harassment or abuse are protected from harm. Because Ms. D was highly motivated to leave Alaska, Mr. B suspected that she would be looking for an opportunity to argue for compassionate leave. Finally, Y’s accusation would provide Ms. D with arguments that she should receive full custody of F. This could have been an additional factor motivating Ms. D to encourage, and provide an opportunity for, Y to make a false report.

⁴² *Broderick*, 808 P.2d at 1219.

⁴³ Admin. Rec. at 12.

The cases provide mixed guidance regarding how to evaluate the presence of a motive to fabricate. In *In re A.S.W.*, the father, who was accused of sexual abuse, raised an allegation that his wife had a motive to fabricate because she wanted a divorce based on grounds recognized by her religion.⁴⁴ The court gave no credence to this issue because the father had no evidence of coaching and did not call any witness who could shed light on the issue.⁴⁵ In *Jared S. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, however, the court approved the superior court's decision giving weight to the child's hearsay statement in part because of the absence of a custody dispute (and thus an absence of motive to fabricate).⁴⁶ That decision implies that here, we should give some weight to Ms. D's motive to fabricate, and consider whether it is a reason for finding Y's statement less credible. In *In re XY*, the father's motive and opportunity to fabricate a story about the mother's boyfriend was a significant factor in disregarding the child's videotaped interview.⁴⁷ There, however, the evidence of fabrication was much stronger, and included the child's having recanted the statement.

Here, the motive to fabricate is also significant, but, unlike *In re XY*, no direct evidence supports a conclusion that Y's version was tainted. The motive to fabricate does undercut Y's statement, but, without evidence of collusion, motive alone is not sufficient to disregard Y's statement.

3. Does the record contain evidence that corroborates or undercuts Y's statement?

In evaluating the admissibility of hearsay statements by children, the court has emphasized the importance of evidence that corroborates the child's accusations.⁴⁸ In *Jared S.*, the superior court noted the child's nightmares as corroborating evidence.⁴⁹ In *Broderick v. King's Way Assembly of God Church*, the court noted the child's fear when approaching the day care where the alleged abuser worked.⁵⁰ The decision in *In re XY* advised that corroborating evidence could include "trauma, shame, fear" and "symptoms of sexual abuse."⁵¹

⁴⁴ *A.S.W.*, 834 P.2d at 803.

⁴⁵ *Id.* at 805 n.9.

⁴⁶ No. S-11836, 2006 WL 1957903 at 4.

⁴⁷ OAH No. 10-0312-DHS.

⁴⁸ *Cf., e.g., A.S.W.*, 834 P.2d at 806 (ruling that "completely uncorroborated hearsay evidence" will not satisfy high evidentiary standard for CINA adjudications). Although the court's discussion of corroborating evidence was in an entirely different context not applicable here, it provides useful guidance.

⁴⁹ No. S-11836, 2006 WL 1957903 at 4.

⁵⁰ 808 P.2d at 1214.

⁵¹ *Id.*

Here, Ms. D reported to OCS that Y disclosed the abuse after learning that she would have to be spending time with Mr. B alone in the future (when Mr. B returned from Arizona and Ms. D would be away).⁵² According to Ms. D, Y was apprehensive about this prospect, and, when asked why, disclosed the abuse.⁵³ This could be corroborating evidence of fear and apprehension by Y, except that it is hearsay within hearsay (an out-of-hearing report by an OCS worker regarding an out-of-hearing statement by Ms. D), which is given little weight. Moreover, during the interview, Y was specifically asked what it was that prompted her on July 26th to tell her mother about the incident. Y replied only that her mother needed to know to keep her safe.⁵⁴ She did not confirm that it was the prospect of further time alone with Mr. B that led to the disclosure. Thus, this case does not have any reliable evidence of the fear, trauma, symptoms, or nightmares that were discussed as corroborating evidence in other cases.

The evidence regarding Ms. D's role in the disclosure undercuts Y's credibility to some extent. First, as discussed above, the timing of the disclosure—following the Facebook posting that caused Ms. D to react in a jealous and confrontational manner—makes it more likely that Ms. D may have prompted or facilitated Y's version of an event that may or may not have occurred. Second, according to OCS's notes, two days after the July 26th disclosure, Ms. D was remarkably placid about the incident: "G didn't seem to show an overwhelming amount of sensitivity and empathy toward Y's situation, speaking matter-of-factly vs. showing emotion regarding such a heinous act."⁵⁵ Ms. D's lack of emotion is not particularly remarkable—Ms. D is trained to deal with sexual harassment and abuse, and remaining calm would be an asset for her. According to Mr. B, however, she did not remain calm when confronting him on the telephone about either the Facebook posting or her determination to contest the divorce and gain full custody of F. Although many explanations for her demeanor are possible, none was offered. An unexplained lack of *empathy* by Ms. D for her daughter does slightly tend to increase the likelihood that Ms. D may have had some role in facilitating the content of Y's statement.

In sum, the evidence outside the content of Y's statement, particularly the unexplained role of Ms. D and the motive to fabricate, tends to undercut, rather than corroborate, Y's version of events. Nevertheless, overall, at this point of the analysis, we are left with a frank and open statement by a seven-year-old child. The record has no actual evidence that either Ms. D or Y

⁵² Admin. Rec. at 8, 11.

⁵³ *Id.*

⁵⁴ Unnumbered OCS Exhibit (DVD recording).

⁵⁵ Admin. Rec. at 9.

were motivated to fabricate—all of the analysis here is based on inference from circumstantial evidence.⁵⁶ Following the advice of *In re XY* that “a child’s narrative that is coherent, spontaneous and appropriately detailed bears characteristics of credibility,” without other direct evidence, we would tend to believe the child.⁵⁷ Without corroborating evidence, however, the ability to rely solely on Y’s statement is subject to being undercut by other credible evidence in the record.

The other direct evidence in this record yet to be evaluated is the testimony of Mr. B that he did not abuse Y. Given that the child’s version of events is generally believable, with some doubts, this case will turn on whether Mr. B is a credible witness. We turn next to the evaluation of Mr. B’s testimony.

B. Is Mr. B a credible witness?

In general, Mr. B was a credible witness. His testimony was internally consistent—he did not contradict himself at the hearing. It was also consistent with the statement he made to the OCS investigator.⁵⁸

In addition, Mr. B freely admitted to facts that were not in his favor. When asked whether Y was truthful, he replied that she, like other children, would occasionally lie to avoid getting into trouble. He then added, however, that he could always tell when she was lying because she would be nervous. He volunteered his view—against his own interest—that in watching the video, he could not detect any of the usual signs when Y is not telling the truth. When asked whether Y is susceptible to suggestion from others, Mr. B, again against his interest, replied that she was not.⁵⁹ Mr. B’s testimony against his interest slightly increased his credibility because it appears that he was being honest in his testimony.

In addition, Mr. B testified to two corroborating facts. First, he said that he distinctly recalled that during Ms. D’s June trip, Y did not sleep in his bed. He particularly remembered this because Y had made the request to sleep with him, and he said, “no,” and explained that she could sleep with her mother when she returned because he and F would be leaving on a trip.

⁵⁶ In some cases, circumstantial evidence will outweigh direct evidence. *See, e.g., Commercial Fisheries Entry Comm’n, State of Alaska v. Baxter*, 806 P.2d 1373, 1375 (Alaska 1991) (“ [i]t is well settled that substantial evidence to support an administrative agency’s finding of fact may take the form of circumstantial evidence or indirect proof.”). The point here, however, is that, although the speculation about the motive to fabricate weakens Y’s statement, it does not outweigh it.

⁵⁷ OAH No. 10-0312-DHS at 15 n.126.

⁵⁸ Admin. Rec. at 13.

⁵⁹ B testimony.

Because this testimony grounds his memory with a specific fact that occurred, it makes his version slightly more likely.

Second, he said that the drawing by Y could not be correct. When Y has slept in his bed (during other absences, but not the June absence), he always sleeps on the right side. Y would always be in her mother's place on the left, and F would always be in the middle.⁶⁰ Because Y's picture has it wrong, Mr. B believes that Y's testimony is more likely fabricated. Here, however, I disagree with Mr. B. The child may have made a mistake in her drawing or the family may have been in a different position when the abuse occurred. This testimony does not make Mr. B's version more likely.

To further bolster his credibility, Mr. B called two character witnesses. He also provided a confidential psychological evaluation of himself.

Z U is Ms. B's daughter, who was one-year-old when Ms. B and Mr. B were married. Mr. B served as her father, and raised her from infancy. She testified that Mr. B was a good parent. She had observed Y with Mr. B and saw that Y wanted to be with him. She had no concerns about leaving her own daughter of a similar age with Mr. B.⁶¹ Mr. B's ex-wife, C B, offered testimony that Mr. B was a hard worker who was never inappropriate with children.⁶² Both witnesses testified that Mr. B had never shown signs of pedophilia. This character evidence tends to corroborate Mr. B's credibility, but does not significantly affect the overall analysis.

The psychological evaluation, conducted by L M, a Licensed Psychological Associate, concluded that

E does not appear to share characteristics with parents who are known to neglect or physically abuse their children. He appears to be low risk for neglecting and/or abusing his children as measured by the [Child Abuse Potential] Inventory. He also appears to be a low risk to commit sexual violence.⁶³

Mr. M did not testify. The conclusions in his report appear to make it somewhat less likely that Mr. B committed the sexual abuse described by Y. The conclusions cannot be given much weight, however, because the evaluation addresses propensity to commit a bad act. Without further explanation about why this decision should consider propensity, the facts are much more

⁶⁰ *Id.* I assume that Mr. B meant "right" and "left" as looking at the picture of the bed, not as lying in the bed.

⁶¹ U testimony.

⁶² C B testimony.

⁶³ Admin. Rec. at 67.

important. In addition, the report does not identify the likelihood of a false negative.⁶⁴ If a false negative is reasonably possible, then we must be cautious about relying too heavily on this assessment.

A much more important factor here than the character witnesses and the hearsay psychological evaluation is the fact that Mr. B was subject to cross-examination by OCS. Indeed, according to Mr. B, he was also subject to rigorous questioning by the CID, but was never charged with a crime.

Generally, one way we test for truth is to probe a witness's testimony during cross-examination. As the Alaska Supreme Court has noted, "cross-examination has been described ' . . . as beyond any doubt the greatest legal engine ever invented for the discovery of truth.' To that end, it is the vehicle by which the credibility of adverse witnesses is tested."⁶⁵ Here, if Mr. B was lying, some weaknesses or inconsistencies in his story might be revealed by the cross-examination. None was. Accordingly, even acknowledging that Mr. B would have an incentive to give testimony in his favor, his credibility as a witness is relatively strong.⁶⁶

C. Has OCS met its burden of proof?

This case is troubling because the child's statement is, at one level, inherently believable. Her report of the conversation,

"E, can you please stop. I'm very tired."

"Y, I'm sorry. Can you please forgive me."

sounds very much like a real conversation, reported by a child speaking without any outward sign of guile or deceit. Even with all the reservations about Y's statement discussed in this decision, I conclude that Y believes that conversation occurred. When the conversation occurred, however, is unknown. The subject of the conversation could be any number of things, which may or may not include abuse.

⁶⁴ The report does note that Mr. B's index score on the Child Abuse Potential Inventory is substantially below even the lower cutoff score that is used when trying to avoid a false negative. Admin. Rec. at 61. Indeed, Mr. B's score on this scale is so low, it could be interesting to hear how a professional would interpret it. Given no testimony about this measure, however, and the fact that it is based on self-reporting by the respondent, the report will be given only slight weight.

⁶⁵ *Evans v. State*, 550 P.2d 830, 836 (Alaska 1976) (quoting 5 J. Wigmore, Evidence s 1367, at 32 (Chadbourn rev. 1974)).

⁶⁶ To be clear, this decision is not establishing a rule of law that a respondent who does not crack under cross-examination will be not be substantiated for abuse. Indeed, this may be the rare case where, in the absence of evidence corroborating the child's version, and with a respondent who gave believable direct testimony, the fact that OCS had an opportunity to cross-examine the respondent and did not reveal any weakness in his version of events becomes a significant factor.

The other factors in the record trigger too much doubt for OCS to rely solely on Y's statement. Ms. D's role, her motive and opportunity to suggest facts to Y, Y's own motive to fabricate or go along with a suggestion, and the lack of corroborating evidence, all raise doubt regarding Y's statement. Y's inability to recall the time of the event, and her misstatement about it being a school night, increase the doubt. Finally, Mr. B's strong testimony that the abuse did not occur, and his credibility as a witness, unshaken by cross-examination, must be given more weight than Y's statement. In sum, OCS has not proved that Mr. B abused Y.

IV. Conclusion

OCS has not met its burden of providing that E B committed sexual abuse of Y N during June 19-27, 2016. The substantiation of maltreatment of a child, as alleged in Case ID 000000, and the placement of Mr. B on the Child Protection Registry, is overturned.

DATED this 10th of April, 2017.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 19th day of May, 2017.

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

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