

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

In the Matter of )  
 )  
E A. M ) OAH No. 17-0311-SAN  
 ) Agency No.  
\_\_\_\_\_)

**DECISION GRANTING MOTION FOR SUMMARY ADJUDICATION**

**I. Introduction**

This case involves E M’s appeal of two substantiated findings of child maltreatment entered against him by the Office of Children’s Services. The two findings were for committing physical abuse of his infant son, and for putting the child at risk of mental injury by exposing him to domestic violence. The case was rescheduled numerous times while Mr. M was being prosecuted for related criminal charges in the state court system. After he was convicted of domestic violence assault and “family violence” (for assaulting his son’s mother in the presence of the child), the case was set for a hearing to be held on March 2, 2018. OCS then filed a motion for summary adjudication, in which it indicated that it was overturning the physical abuse finding, and it argued that as a matter of law, Mr. M’s criminal convictions entitled it to an order sustaining the risk of mental injury finding.

A status conference was held on February 23, 2018, at which time the undersigned administrative law judge (ALJ) informed the parties that the motion for summary adjudication was granted, because Mr. M’s criminal convictions conclusively established the facts necessary to prove the elements of the risk of mental injury substantiated finding. The March 2, 2018 hearing was vacated by order dated February 26, 2018. This decision describes the rationale for granting OCS’s motion for summary adjudication.

**II. Facts**

Mr. M’s appeal concerns a protective service report (PSR) received by OCS on January 27, 2017, which arose out of an incident that took place on January 26, 2017. After investigating the allegations in the PSR, OCS substantiated two findings of child maltreatment against Mr. M: (1) that he had caused risk of mental injury to his son, based on the allegation that he had engaged in domestic violence with the child’s mother in the presence of the child; and (2) that he had allegedly physically abused his son, apparently by slapping the child to make him stop crying. Mr. M was arrested in connection with the January 26, 2017 incident and was criminally

charged with “Assault D.V.” for assaulting the child’s mother, “Assault D.V.” for assaulting the child, and “Family Violence” for assaulting the mother in the presence of the child.

Mr. M appealed the two findings of maltreatment by submitting a written request for an administrative hearing on or about March 16, 2017. Over the course of the next 10 months, at least ten telephonic case planning and status conferences were held to discuss the status of the criminal charges and their impact on the scheduling of Mr. M’s administrative hearing. For most of this period, Mr. M was incarcerated, awaiting his criminal trial, and he was in favor of holding the administrative hearing in abeyance while his criminal proceedings moved forward to a conclusion. In early December 2017, the trial was held, and Mr. M was convicted of assaulting his son’s mother and of doing so in the presence of the child, but he was acquitted of assaulting his son. A case planning conference was held in this matter on February 5, 2018; at that time, Mr. M indicated that he did not wish to wait any longer for his administrative hearing. Accordingly, an order was issued on February 6, 2018 setting a schedule, with the hearing set to take place on March 2, 2018. During several of the previous status conferences, as well as during the February 5 conference, OCS had indicated that it intended to move for summary adjudication based on the results of the criminal trial. Thus, the February 6 order stated that “[i]f OCS intends to file a motion for summary adjudication in this matter, it should be filed as soon as possible, in order to leave adequate time for Mr. M to respond to the motion before the March 2, 2018 hearing.”

OCS filed its motion for summary adjudication on February 14, 2018. An order was issued giving Mr. M until close of business on February 27, 2018 to file his opposition. Ultimately, Mr. M filed his opposition a few days early, on the morning of February 23, 2018. After carefully reviewing the motion and Mr. M’s opposition, the ALJ informed the parties during a teleconference on February 23 that the motion was granted.

### **III. Discussion**

#### ***A. The relevant statutes and regulations***

The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.<sup>1</sup> 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

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<sup>1</sup> 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).

health and safety of the child, OCS can investigate, make a finding that the report of abuse, maltreatment, or neglect has been substantiated,<sup>2</sup> and place the child's parent or caretaker on OCS's "central registry," which essentially amounts to a "watch list."<sup>3</sup> Alternatively, if the level of abuse, maltreatment, or neglect is more serious, and the child is in need of immediate assistance, OCS can initiate CINA proceedings in Superior Court.<sup>4</sup> In some instances, OCS may pursue these remedies at the same time that the parent in question is being criminally prosecuted for the acts of maltreatment, as it has done in the case of Mr. M.

OCS may issue a substantiated finding of abuse or neglect based upon probable cause.<sup>5</sup> If a person appeals a substantiated finding, OCS has the burden of proving at an administrative hearing, by a preponderance of the evidence, that the alleged acts of abuse or neglect actually occurred.<sup>6</sup>

***B. Summary adjudication motions in general***

Motions for summary adjudication are authorized under the regulations governing hearings before the Office of Administrative Hearings.<sup>7</sup> Summary adjudication motions in administrative proceedings are analyzed according to the same principles applied to motions for summary judgment in Alaska court proceedings. Summary adjudication will be granted if there are no material facts in dispute and one party is entitled to prevail as a matter of law.<sup>8</sup>

Summary adjudication is "a means of resolving disputes without a hearing when the central underlying facts are not in contention . . . . If facts that are not disputed establish that one side or the other must prevail, then an evidentiary hearing is not necessary."<sup>9</sup> Therefore, for OCS's motion to succeed, it would need to demonstrate that Mr. M's criminal convictions establish the facts underlying OCS's substantiated finding of maltreatment against Mr. M. In that event, summary adjudication would be appropriate, and an administrative hearing would not be held. If OCS's motion failed to make that showing, then an evidentiary hearing would be required to resolve the risk of mental injury finding.

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<sup>2</sup> This is typically referred to as a "substantiated finding of abuse or neglect."

<sup>3</sup> See AS 47.17.010 - AS 47.17.290; 7 AAC 54.010 - 7 AAC 54.900.

<sup>4</sup> See AS 47.10.005 - AS 47.10.142.

<sup>5</sup> *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011).

<sup>6</sup> *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Social Services, 2013).

<sup>7</sup> 2 AAC 64.250.

<sup>8</sup> See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); *Estate of Miner v. Commercial Fisheries Entry Commission*, 635 P.2d 827, 834 (Alaska 1981); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

<sup>9</sup> *In Re K.S.*, OAH No. 07-0600-DHS (Commissioner of Health & Social Services, 2007).

**C. OCS's summary adjudication motion**

OCS's motion for summary adjudication asserts that there are no material facts in dispute and, therefore, that its substantiated finding against Mr. M should be upheld as a matter of law. OCS seeks a ruling that, as a matter of law, Mr. M's convictions for Assault D.V. and Family Violence conclusively dispose of his appeal of the risk of mental injury finding against him in this case. OCS points out that the Assault D.V. conviction conclusively establishes that he engaged in domestic violence against the mother of his child, and that the Family Violence conviction establishes that he committed acts of domestic violence in the presence of the child. OCS argues that these facts are sufficient to support the substantiation of the risk of mental injury finding.<sup>10</sup>

Mr. M's opposition to the motion focuses on his argument that he received an unfair trial and an "incorrect verdict" in the criminal proceeding in state court. He argues that the child's mother perjured herself in the criminal trial, that her testimony was inconsistent and self-contradictory, and that his own statements and testimony were more consistent and credible. He also argues that he has appealed his criminal convictions, and therefore a hearing should be held where he can testify to what actually happened during the incident that gave rise to the January 27, 2017 PSR.

Mr. M's arguments against summary adjudication, however, fail to take into account the fact that he was present throughout his criminal trial, that he was represented by counsel, that he had a full opportunity to litigate his version of the facts during that trial, and that the criminal convictions establish all of the elements necessary to support the substantiated risk of mental injury finding relating to the January 26, 2017 incident.

Essentially, OCS is arguing in its motion that the doctrine of *collateral estoppel* should be applied here to give the criminal conviction binding effect in this proceeding. 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;

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<sup>10</sup> In making these arguments, OCS cites to a prior OAH decision in a case involving substantiated findings of child maltreatment, *In re M.M.*, OAH No. 08-0531-DHS (Commissioner of Health & Social Services, 2008). Copies of that decision and of two subsequent OAH decisions cited herein are attached to this decision.

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

This doctrine binds the parties to factual findings, as well as legal conclusions, that have been the subject of prior litigation.<sup>11</sup> The doctrine “aim[s] to prevent parties from again and again attempting to reopen a matter that has been resolved.”<sup>12</sup> The principle of collateral estoppel applies in administrative proceedings as well as in court proceedings.<sup>13</sup>

The Commissioner of Health and Social Services recently issued a decision applying the collateral estoppel doctrine to uphold substantiated findings of neglect, based on a CINA adjudication order.<sup>14</sup> Because a criminal conviction requires that the jury base its verdict on findings that are “beyond a reasonable doubt,” the collateral estoppel doctrine applies with even greater force in this case, where Mr. M was convicted by a jury of his peers of Assault D.V. and Family Violence.

Here OCS had the burden of establishing facts, by a preponderance of the evidence, that demonstrate that Mr. M put his son at risk of mental injury by exposing him to domestic violence. A child is put at risk of mental injury when adults engage in domestic violence in the child’s presence.<sup>15</sup> The fact that Mr. M engaged in domestic violence was conclusively established by the Assault D.V. conviction rendered by the jury at Mr. M’s trial. And the fact that Mr. M’s son was exposed to domestic violence was conclusively established by the Family Violence conviction, which was rendered under Anchorage Municipal Code §8.10.050(B) (defining the crime of Family Violence as the act of committing “the crime of assault ... with knowledge or reckless disregard of the presence of a child or children”).

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<sup>11</sup> *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).

<sup>12</sup> *Id.*; see also *State, Child Support Enforcement Div. v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

<sup>13</sup> 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).

<sup>14</sup> *In Re D.O. and T.X.*, OAH Nos. 15-1531-SAN, 15-1554-SAN (Commissioner of Health and Social Services, 2016); a copy of the decision is attached hereto.

<sup>15</sup> See *In re M.N.*, OAH No. 15-1326-SAN (Commissioner of Health & Social Services, 2016) (if a jury verdict conclusively establishes the elements of a substantiated finding, summary adjudication affirming the finding is appropriate) (copy attached hereto).

Thus, all three of the elements of the collateral estoppel doctrine are met in this case. The doctrine is being “asserted against a party ... to the first action,” i.e., Mr. M. The issues in this case are essentially “identical” to the issues decided in the first action. And the issue in the first action, the criminal prosecution, was “resolved by a final judgment,” i.e., the judgment of conviction entered by the criminal court based upon the jury’s verdict. Therefore, the criminal conviction conclusively establishes all of the elements necessary to support the substantiated finding that Mr. M caused risk of mental injury to his son during the incident of January 26, 2017, and summary adjudication is appropriately granted to OCS.<sup>16</sup>

#### **IV. Conclusion**

OCS’s motion for summary adjudication is granted, and the substantiated finding that Mr. M put his son at risk of mental injury by exposing him to domestic violence during the incident of January 26, 2017 is hereby affirmed. OCS’s substantiated finding of physical abuse against Mr. M is overturned.

DATED: March 6, 2018.

By: Signed  
Andrew M. Lebo  
Administrative Law Judge

#### **Adoption**

The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order 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 3 day of April, 2018.

By: Signed  
Name: Erin Shine  
Title/Agency: Special Assistant, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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<sup>16</sup> If Mr. M’s appeal is successful and he is able to overturn his criminal conviction, he can petition OCS to overturn the substantiated finding at that time.