

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

In the Matter of)	
)	
T J)	OAH No. 17-0538-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children’s Services (OCS) received a report that T J had physically abused his minor son D and his minor stepson H. OCS investigated and substantiated the allegations. It notified Mr. J that his name would be placed on the Child Protection Registry. Mr. J requested a hearing to challenge OCS’s substantiated finding that he had physically abused D and H.¹

OCS had the burden of proof in this case. It did not meet that burden. As a result, the substantiated finding and Mr. J’s subsequent placement on the Child Protection Registry is REVERSED.

II. Facts

Mr. J has a blended family. It consists of his wife, M S, his daughter U (currently 16), his son D (currently 7), and his stepchildren (Ms. S’s children) H (currently 11), Y (currently 8), and Z (currently 4). They reside in No Name City 1.

On March 15, 2017, a Wednesday, OCS received a report that D was overheard telling his step-brother that he been physically assaulted by Mr. J. D said that Mr. J had choked him, threw him on the floor and the bed, and thrown him against the wall. The reporter stated that D had no marks on him, and that D was not scared to return home.²

Ms. S and Mr. J were married and started living together in October 2015. Ms. S was in No Name City 2 during March 2017 for training. Mr. J and the children went to No Name City 2 after March 15, 2017 for a surprise visit. That visit occurred before March 22, 2017. She did not see any marks on the children, did not receive any reports of excessive discipline, and did not observe the children being wary of Mr. J. Ms. S acknowledged that spanking had been used as a discipline technique in the past.³

¹ OCS initially made a substantiated finding that Mr. J mentally abused the minor child Y, in addition to the substantiated findings of physical abuse pertaining to D and H. At hearing, OCS stated that it was withdrawing and would non-substantiate its finding that Mr. J had mentally abused Y. Accordingly, this finding will not be addressed further.

² AR 7; Ms. P’s testimony.

³ Ms. S’s testimony.

OCS initiated an investigation of the case. It began the investigation by interviewing the children on March 22, 2017, which was after the family visit to Ms. S in No Name City 2. The OCS investigator was accompanied by a military family services worker during the March 22, 2017 interviews.

D told the investigator that Mr. J grabbed him by the neck, that he could not breathe, that Mr. J slammed his head on a cabinet, then brought him upstairs, hit him on a wall, threw him down on the bed, and hit him repeatedly. It happened on a school day before spring break, and he thinks it happened after school. He told the investigator that Ms. S was in No Name City 2, and that U, H, and Y were present.⁴ During a follow-up interview on April 27, 2017, D told the investigator that he was glad his grandmother was in the home, that Mr. J had slapped him, and that his grandmother helped his dad to not slap him. D did not provide any timeframes or context.⁵

The investigator spoke to Y on March 22, 2017. Y told the investigator that last Tuesday, which would have been March 14, 2017, that Mr. J grabbed D by the neck and slammed D's head on the counter. He said that U and H were also there.⁶ The investigator did a follow-up interview with Y on April 27, 2017. Y was relatively incommunicative during that interview. He said positive things about Mr. J and his siblings/step-siblings.⁷

The investigator spoke to H on March 22, 2017. H said that Mr. J had grabbed him by the neck about two years prior, that he could not breathe, and that his mother, Ms. S, made Mr. J stop. He said that Mr. J had grabbed D by the neck once, but that happened a few months or a year ago.⁸ The investigator did a follow-up interview with H on April 27, 2017, during which H said that he misspoke and that Mr. J had grabbed him by the back of the neck, and not the front of the neck.⁹ Ms. S testified that she did not see Mr. J strangle H, and that the incident never happened.¹⁰

The investigator spoke to U on March 22, 2017. U did not disclose any incidents, but did state that spanking was used for discipline.¹¹ The investigator met with U on April 27, 2017 for a

⁴ Ms. P's testimony; AR 21.

⁵ Ms. P's testimony; AR 26.

⁶ Ms. P's testimony; AR 22.

⁷ Ms. P's testimony; AR 26.

⁸ Ms. P's testimony; AR 21.

⁹ Ms. P's testimony; AR 26.

¹⁰ Ms. S's testimony.

¹¹ Ms. P's testimony; AR 20.

follow-up interview. U declined to participate.¹² U testified that she has seen spanking, but no bruises, and no out-of-control discipline. She has not witnessed any strangling, slamming, or punching.¹³

The investigator interviewed Mr. J on March 22, 2017. During that interview, Mr. J said that the incident in question occurred when D was fighting with one of his brothers, and that when he started to approach D, D slipped and hit his head on a cabinet. Mr. J said he grabbed D, took him upstairs, and threw him on the bed.¹⁴

Mr. J testified that the incident with D occurred when D was not ready, he was just in his socks and underwear, was not eating, and was yelling and arguing with his brothers. D fell. Mr. J picked him up – holding him under the arms, took him upstairs, threw him on the bed, hugged him, and had a discussion, during which they both calmed down. D got dressed and Mr. J took the boys to daycare – this was during spring break so school was not open. Mr. J acknowledged that he had yelled at the boys and scared them.¹⁵ Mr. J was a credible witness. Although it was not possible to observe Mr. J physical demeanor during this telephonic hearing, he was calm and composed during the hearing, and did not contradict himself nor testify in an evasive or confusing manner.

The investigator also interviewed the coordinator for D’s after school daycare on March 22, 2017. The coordinator said the Mr. J and D had really good interactions, and that D was very active and could be explosive when angry.¹⁶

After the March 22, 2017 incident, Mr. J and Ms. S agreed to a safety action plan with OCS, which they complied with. A B, Ms. S’s ex-husband, the father of H and Y filed and obtained a restraining order on their behalf. Mr. J had to leave the home, which Ms. S testified as devastating the children.¹⁷ Mr. B also filed a motion to change custody, which was denied. The trial court judge found that that there was inappropriate discipline and parenting by Mr. J, which Mr. J was actively seeking to rectify, and that there were insufficient grounds to modify custody.¹⁸

¹² Ms. P’s testimony; AR 26.

¹³ Ms. J’s testimony.

¹⁴ Ms. P’s testimony; AR 23.

¹⁵ Mr. J’s testimony.

¹⁶ AR 23.

¹⁷ Ms. S’s testimony.

¹⁸ See Court log notes from August 23, 2017 and October 9, 2017 Order lodged by Mr. J, No Name City 1 Superior Court Case No. 4XX-17-00000 Civil.

Q J is Mr. J's mother. She stayed with the J/S family from February to June of 2016. She witnessed spanking, and thinks that H bullies Y, and that H has difficulty with authority figures. She saw Mr. J spank the children, but did not think it was overdone. She recounted that D has behavior problems, where he throws fits. She also stayed at the J/S family in April through May 2017, as part of the family safety action plan. During that time, she thought the boys were acting worse. H also told her that he had lied about Mr. J to OCS, but that the investigator told him that she was going to go with his first story – which would have been the allegation about choking approximately two years prior.¹⁹ Ms. J was a credible witness. While it was not possible to observe her physical demeanor, because she was a telephonic witness, her demeanor over the phone was calm and matter-of-fact.

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.²⁰ 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 and make a finding that the report of abuse, maltreatment, or neglect has been substantiated.²¹

Substantiated abuse, maltreatment, 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).²² 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.²³ Cases involving the central registry established by AS 47.17.040 are not subject to the Administrative Procedure Act (AS 44.62.330 - AS 44.62.630).²⁴ The central registry is the only registry involved in this case.²⁵

¹⁹ Ms. J's testimony.

²⁰ 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).

²¹ This is typically referred to as a "substantiated finding of abuse or neglect."

²² AS 47.17.040(a).

²³ AS 47.17.040(b).

²⁴ 7 AAC 54.255.

²⁵ There is also a "centralized" registry, which is used for licensing background checks. See AS 47.05.330. This case does not involve placement on that registry.

OCS may issue a substantiated finding of abuse, maltreatment, or neglect based upon probable cause.²⁶ A substantiated finding by OCS will be affirmed following an administrative hearing if OCS proves, by a preponderance of the evidence, that the abuse actually occurred.²⁷

There is certainly evidence that Mr. J has engaged in corporal punishment, at a level, as concluded by the trial court judge, which is inappropriate. However, the issue is whether it arises to the level of abuse.

The evidence in this case is notable for what it does not show. First, there were no marks. Physical contact of the type described by D, throwing him against a wall, and hitting him multiple times, would have resulted in some type of marks or bruising. The reporter did not notice any, and said D was not scared to go home. Ms. S's testimony was that she did not notice any marks. The daycare operator said that D and Mr. J had good interactions, and that D was explosive when angry. Presumably, the daycare operator would have noticed if D was scared of his father.

Then there is D being overheard telling his stepbrother about Mr. J assaulting him. According to the investigator's interview, D said that his stepbrothers and sister were present during the incident. If they were present, D would not have needed to inform his stepbrother about the event. U, the older sister, denied seeing the incident.

There is also a question of timing. D said the incident might have happened after school. H said that Mr. J had grabbed D by the neck a month or two prior. Y said it happened on what would have been March 14, 2017. A recent incident as dramatic as that recounted by D, which was supposedly witnessed by all the children, would have resulted in more consistent statements.

H, Ms. S's son and Mr. J's stepson, described being choked by Mr. J and that his mother stopped Mr. J. No real timeline was provided, except that it happened approximately two years prior. Ms. S and Mr. J did not get married and live together until October 2015, approximately a year and half before the March 22, 2017 interview during which H described being choked. Ms. S denied that any such incident occurred. Although Ms. S is married to Mr. J, and faced custody issues with her children, there was nothing to suggest that she was not credible in her testimony. In addition, she was forthcoming about the prior use of general corporal punishment, spanking, in the home. Further, H in his April 2017 follow up interview, recanted his earlier statement about

²⁶ *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011) (available online at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS100312.pdf?_ga=2.136013938.2105652554.1497906011-931794347.1416513843).

²⁷ *See generally, In Re T.M.*, OAH No. 13-1200-SAN (July 7, 2014) (available online at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN131200.pdf?_ga=2.258099657.2105652554.1497906011-931794347.1416513843).

being choked by Mr. J. Ms. J's credible testimony corroborates H's recantation of his original statement about Mr. J choking him.

OCS's case is therefore lacking in that the evidence is not wholly consistent, and that there is no evidence of bruising, such as would result from the degree of physical force that is described. There are no forensic interviews – no video or audio taped interviews. OCS's case consisted entirely of hearsay. In contrast, Mr. J was a credible witness, as were Ms. S and Ms. J. OCS has the burden of proof. While it has shown that physical discipline was employed, it has failed to show by a preponderance of the evidence that it rose to the level of abuse, or that Mr. J physically abused either D or H.

IV. Conclusion

OCS's substantiated finding that Mr. J physically abused D and H and the subsequent placement of Mr. J on the Child Protection Registry is REVERSED.

DATED: January 11, 2018.

By: Signed _____
Lawrence A. Pederson
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 7th day of February, 2018.

By: Signed _____
Erin Shine
Special Assistant to the Commissioner
Department of Health and Social Services

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