

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

In the Matter of)
)
O P) OAH No. 19-0547-SAN
_____)

DECISION

I. Introduction

O P and E Q have two minor children. They had an altercation on January 9, 2019, which resulted in Ms. Q phoning the police. After the Office of Children’s Services (OCS) became aware of the January incident, it subsequently substantiated allegations of child maltreatment against Mr. P, which consisted of him placing his minor daughter R at a substantial risk of mental injury by exposing her to domestic violence. Mr. P appealed.

Because OCS has shown that it is more likely true than not true that Mr. P assaulted Ms. Q in front of R, which placed her at substantial risk of mental injury, the substantiation is upheld.

II. Facts¹

O P and E Q have two minor children, daughter R and son S. R was 9 as of 2019. S was 10. Mr. P and Ms. Q were separated and had an informal custody arrangement. An incident occurred on January 9, 2019 when Mr. P was at Ms. Q’s home to pick up the children for his visitation. That is the incident that gave rise to OCS issuing its substantiated finding of maltreatment. There is a substantial dispute over what occurred during that incident.

Mr. P testified as follows:

- He and Ms. Q separated at the end of July 2018. Although they maintained separate household, they maintained an occasionally intimate relationship.
- They had worked out an informal week on/week off child custody/visitation plan.
- The normal transfer process involved the children taking the bus to his home after school.
- On January 9, 2019, Ms. Q telephoned him and asked him to pick the children up from her home instead of them taking the bus to his home.

¹ The following facts were established by a preponderance of the evidence.

- He went to Ms. Q's home at approximately 5:00 p.m. to pick the children up. He parked outside and Ms. Q texted him, asking if he was going to sit outside. After the children did not come out to the car, he walked up to the house.
- Ms. Q's home has an arctic entryway. He knocked on outside door. Ms. Q came to the outside door, opened it, and walked into the home. He went into the arctic entry, staying outside the main portion of the home. Ms. Q invited him into the main portion of the home. He declined.
- Ms. Q then started yelling at him. She had a garbage bag with the children's clothes in it. He reached for it and she slammed the inner door on his arm. He did not reach out or grab Ms. Q, nor did he slam her head against the door. He did not remember where R was, but there was no visual contact between him and R.
- He walked out. Ms. Q came out of the house yelling at him and accusing him of taking the children away from her.
- When he got to the car, S was seated in the car.
- Mr. P had a chance meeting with one of the police officers that investigated Ms. Q's complaint. He spoke to the police officer, Officer W, who told him that he was uncomfortable making the report, that Ms. Q was not injured and did not complain of injury, and that R did not speak to the officer.

Ms. Q contacted the police very shortly after the incident, at 5:52 p.m. Ms. Q was then interviewed by the police, which was videoed by the police. Ms. Q recounted that Mr. P has been physically and verbally abusive in the past. She stated that he came to the house to pick up the children. R said she did not want to go with her father. Mr. P became angry and pushed Ms. Q's head into the door and grabbed her hair, which caused Ms. Q to experience pain.²

The video shows R speaking to one of the policemen. In that video, she said that she told her father that she did not want to go with him. When her mother tried to stand up for R, she saw her father push her mother's head into the door and pull her hair. R said she does not like to be with her father. The video shows that R was interviewed separately from her mother, with her mother in a different portion of the home. Ms. Q did not coach her daughter, assist her daughter

² Agency Record (AR) 36 (Police Report); Video filed on June 23, 2020.

with her statement, and otherwise assist R with the interview. In addition, the police officer did not ask leading questions.³

Criminal charges were filed against Mr. P. They were subsequently dismissed by the prosecutor without prejudice.⁴

OCS received a report, on February 13, 2019, that Ms. Q, who allegedly had a history of drug abuse, may have relapsed. The reporter also said that Ms. Q slapped S the week before.⁵ OCS initially went to Ms. P's home on March 1, 2019 for an unscheduled visit. No one was home and the OCS caseworker left his card on the door.⁶

The OCS caseworker then went to R and S's school on March 4, 2019 and had an unscheduled interview with them. The interviews were conducted separately. Ms. Q was not present. During their separate interviews, both R and S stated that Mr. P told them that their mother was a drug user. R brought up the January 2019 incident during the interview and told the interviewer that she saw her father pull her mother's hair and hit her mother's head against the door. S said that he was sitting in the car during the January incident, and did not see anything else. He also said his mother slammed the door on his father's "pinkie."⁷

On March 12, 2019, the OCS caseworker had a scheduled interview with Ms. Q. During that interview, she recounted a troubled relationship history with multiple incidents of domestic violence and denied any history of substance or alcohol abuse. In addition, she stated that on January 9, 2019, that Mr. P insisted on coming to her home to pick up the children, and that Mr. P pushed his way into the home and hit her head against the doorframe.⁸

The OCS caseworker interviewed Mr. P on March 13, 2019. In his interview, Mr. P detailed significant relationship issues with Ms. Q and stated that he and Ms. Q both had significant substance abuse issues in the past, and that he was concerned that Ms. Q was again abusing drugs. He denied assaulting Ms. Q on January 9 and instead stated that she slammed the door on his arm.⁹

³ AR 36 (Police Report); Video filed on June 23, 2020.

⁴ City A Trial Court Case 1XX-00-00000. There was also a domestic violence restraining order case filed by Ms. Q against Mr. P, which ended up ultimately being dismissed. City A Trial Court Case 1XX-00-00000.

⁵ AR 8.

⁶ AR 11.

⁷ AR 11 – 13; Mr. Sweitzer's testimony.

⁸ AR 14 – 15; Mr. Sweitzer's testimony.

⁹ AR 16 – 19; Mr. Sweitzer's testimony.

OCS subsequently notified Mr. P on March 27, 2019, that it had made a substantiated finding that he had maltreated R by subjecting her to a risk of mental injury.¹⁰ Mr. P requested a hearing to challenge the finding. Mr. P's hearing was held on June 15, 2020. Mr. P and Mr. Sweitzer from OCS testified. Ms. Q and the children did not testify. All the parties' exhibits were admitted into evidence. Closing arguments were made on July 24, 2020.

III. Discussion

A. The Child Protection Registry

OCS maintains a child protection registry.¹¹ Those reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.¹² At the conclusion of an investigation, OCS may find that an allegation has been substantiated. A substantiated finding is one where the available facts gathered from the initial assessment indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child's health or welfare is harmed or threatened.¹³

Alaska Statute 47.17.290(3) states that "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 the child's health or welfare is harmed or threatened thereby."¹⁴ The statutory definition of maltreatment is found in the "child in need of aid" provisions: "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."¹⁵ A "child in need of aid," under AS 47.10.011, in relevant part, means a child who has been "subjected to ... conduct by or conditions created by the parent [that] have (A) resulted in mental injury to the child; or (B) placed the child at substantial risk of mental injury as a result of ... (ii) exposure to conduct by a household member [that constitutes certain enumerated criminal offenses]."¹⁶

¹⁰ AR 1 – 3.

¹¹ AS 47.17.040.

¹² AS 47.17.040(b).

¹³ OCS Child Protection Manual, CH. 2.2.10.1 (Rev. 5/16/15), *available at*: <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>

¹⁴ AS 47.17.290(2).

¹⁵ AS 47.17.290(9).

¹⁶ AS 47.10.011(8)(A), (B)(ii).

OCS substantiated maltreatment by Mr. P. Its notice, and the agency record, demonstrated that it was substantiating maltreatment that was comprised of Mr. P placed R at risk of mental injury by allegedly exposing her to an act of domestic violence, to wit, Mr. P assaulting her mother in R's presence.¹⁷

OCS's burden is therefore to prove, by a preponderance of the evidence, that Mr. P maltreated R by placing her at risk of mental injury by assaulting her mother, Ms. Q, in front of her.

B. Substantiated Findings for Risk of Mental Injury

Alaska Statute 47.10.011(8)(B)(ii) describes "substantial risk of mental injury" as "exposure to conduct by a household member ... against another household member that is a crime under AS 11.41.100-11.41.220, 11.41.230(a)(1) or (2), or 11.41.410-11.41.432 [or] an offense under a law or ordinance of another jurisdiction having elements similar to [the previously enumerated crimes]... ." The enumerated crimes in AS 11.41 are all crimes of violence ranging from murder and manslaughter to assault.

The underlying allegation in this case is straightforward. Mr. P is alleged to have assaulted Ms. Q by grabbing her hair and slamming her head into the door frame. If those facts are established, then Mr. P will have committed an act that comprises assault in the fourth degree under AS 11.41.230(a)(1) ("person recklessly causes physical injury to another person").¹⁸

Mr. P, both in his interview with OCS, and in his testimony denied that he assaulted Ms. Q on January 9, 2019. Instead, he stated that she assaulted him by slamming his arm in the door. On the other hand, Ms. Q and R both told OCS that Mr. P grabbed Ms. Q's hair and slammed her head into the door frame right in front of R. In addition, OCS provided the video of the police interview with both Ms. Q and R that occurred shortly after the alleged assault occurred. Mr. Q

¹⁷ It must be noted that the Division's Notice does not explicitly provide this information. However, this case is similar to the recent Commissioner's decision in OAH Case No. 19-0979-SAN (Commissioner Health & Social Services, June 11, 2020), where the Commissioner held that despite OCS's notice being procedurally defective, because the party had participated extensively in prehearing proceedings and received a copy of the entire agency record, that the defects in the original notice were effectively cured. *See* OAH Case No. 19-0979-SAN *Final Decision*, p. 9, fn. 42. This case was first filed in June 2019 and did not go to hearing until June of 2020. The OCS agency record was distributed to Mr. P in July 2019. In addition, Mr. P, who was represented by counsel did not object to the adequacy of the notice.

¹⁸ The fact that Mr. P was initially charged with Domestic Violence Assault, a violation of City A Borough Code 42.10.010(c), in City A Trial Court Case 1XX-00-00000, and that case was subsequently dismissed by the City A Attorney's Office without prejudice, is not probative as to whether an assault occurred or did not occur, and is not be considered as factor in this case.

testified he went to Ms. Q's home about 5 p.m. that day. Ms. Q called the police at 5:52 p.m. and was interviewed immediately thereafter. In that video, both Ms. Q and R told the police that the assault occurred. Notably, R was interviewed separately. Ms. Q was not in the same room to coach her or to assist her in speaking to the police officer.

R's statements to the police are very credible, given the lack of coaching and the fact that the interview occurred very shortly after the incident. In addition, R brought up the January incident to the OCS caseworker on her own. The caseworker did not know about the January incident—he was investigating a report that Ms. Q had substance abuse issues and had slapped her son.

The police report, the video, and the interviews conducted by OCS of Ms. Q and R were all consistent. Notably, R and Ms. Q's recorded statements on the video are very credible, given the fact that they occurred very soon after the incident, and that R's statement was made outside her mother's presence. In contrast, Mr. P was not credible. For example, he testified that one of the police officers who went to Ms. Q's home to investigate the January incident told him that R did not speak. The video recording shows that R did speak, and it is highly unlikely that a police officer would have made such a statement to Mr. P. Consequently, the preponderance of the evidence shows that Mr. P assaulted Ms. Q on January 9, 2019, that Ms. Q experienced pain due to the assault, and that R was present and observed that assault. That assault meets the statutory definition of an assault under AS 11.41.230(a)(1): Mr. P “recklessly cause[d] physical injury to another person.”

For findings of a “substantial risk of mental injury,” OCS must prove that during the January 9, 2019 incident, Mr. P caused the children to experience “exposure to conduct by a household member . . . against another household member” which constituted domestic violence.¹⁹ Mr. P perpetrated domestic violence against Ms. Q during the incident. The only issue is whether the children were “exposed” to it. As found above, R observed the assault. Thus, the preponderance of the evidence shows that Mr. P caused R to be exposed to his domestic violence against her mother.

Under AS 47.10.011(10), maltreatment can be established when a person creates a risk of mental injury in a child by exposing a child to domestic violence. The Alaska Supreme Court has strongly emphasized “the devastating impact that witnessing domestic violence can have on

¹⁹ AS 47.10.011(8)(B)(ii).

children.”²⁰ Given this recognition of the potential impact that domestic violence can have on children, the law allows us to conclude that the person who committed the assault against a family member put the child at a substantial risk of mental injury. As a result, OCS has met its burden of proof. It has shown that Mr. P maltreated R by placing her at a substantial risk of mental injury when she observed him assaulting Ms. Q.

It must be acknowledged that Mr. P argued that, in evaluating the evidence in this case, that some weight should be given to the fact that the criminal case against him was dismissed and that the Superior Court Judge did not find grounds to support a long-term domestic violence restraining order. Mr. P did not argue that either of these actions had a preclusive effect in this case. In addition, Mr. P did not lodge either a transcript of the long-term domestic violence hearing or the court clerk’s log notes for that hearing. Because the criminal case dismissal was done by the prosecutor without prejudice, it is not possible to draw an inference as to the basis for that dismissal. Similarly, without some indication as to the trial court’s reasoning in the domestic violence restraining order matter, an inference cannot be drawn from the results in that case. Accordingly, no weight is given to either of these matters.

IV. Conclusion

OCS’s substantiated finding that Mr. P maltreated his daughter R by placing her at a substantial risk of mental injury is affirmed.

Dated: July 31, 2020

Signed

Lawrence A. Pederson
Administrative Law Judge

²⁰ *In re J.A.*, 962 P.2d 173, 178 (Alaska 1998), citing *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 140 (Alaska 1997); see also *Martin N. v. State*, 79 P.3d 50, 55 (Alaska 2003 (“witnessing domestic violence is mentally harmful to children”).

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 26th day of August 2020.

By: Signed
Name: Jillian Gellings
Title: Project Analyst

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