

special limitations apply to hearsay. All evidence must be of the kind “on which a reasonable person might rely in the conduct of serious affairs.”¹

At the hearing, testimony was taken from three witnesses. The first was C F, the highly experienced forensic nurse who examined the children on July 22, 2016. The second was M N, the longtime forensic interviewer for the “Location A” child advocacy center in City A, who had interviewed the two girls the same evening. The third was D L, also a very experienced forensic nurse; she had reviewed the forensic records in her capacity as an expert retained by Ms. J. Ms. J herself did not testify, although she had done so in the criminal trial and her testimony from that case was made part of the record in this one.²

Documentary evidence (including certain video and audio recording) was submitted in the form of Agency Record items 1-533 and Respondent’s Exhibits A-D. Their final status is set out in the table below.

Record or Exhibit	Status	Notes on Admission
1-28	Admitted	
29 - 108	Admitted	May not be relied on as a source for the of the Location A interviews (actual video recordings will be used, instead of using the purported quotes and characterizations here)
108 - 190	Admitted	
191 - 229	Admitted	See 2/24/20 order
230 - 276	Not offered	
277 - 283	Admitted	See 2/24/20 order
284 - 292	Not offered	
293 - 296	Admitted	See 2/24/20 order
297	Not offered	
298 - 299	Admitted	See 2/24/20 order

¹ 2 AAC 64.290(a)(1).

² The children were in the same category, not testifying in this case but permitted to testify in the criminal one. As discussed in Part IV-B below, the criminal trial testimony of the girls was essentially valueless.

300 - 303	Not offered	
304 - 309	Admitted	See 2/24/20 order
310 - 311	Not offered	
312 -322	Admitted	See 2/24/20 order
323	Not offered	
324 – 331	Admitted	See 2/24/20 order
332 – 380	Not offered	
381 - 388 Crim Trial Audio	Admitted	Only testimony admitted; Ech conferences, jury selection, objections, argument, etc. not offered or admitted.
389 – 529 Log Notes	Admitted for limited purpose	May be used only as a table of contents to audio, not as substantive evidence
530 -533 Verdicts	Admitted	
A	Admitted	As corrected 2/11/20
B - D	Admitted	

In addition, many of the exhibits used in the two-week criminal trial (the recording of which is A.R. 381-388) were made part of the record in this case through a supplementary submission in June 2020. These consisted of State’s Exhibits 2-9, 16-47, and 49, and Defendant’s Exhibits A, H, I, and J ³ Note that this means we have two Exhibits “A” in this case. This decision will always identify the Superior Court materials with the prefix “Criminal Trial.”

III. General Factual Background

The facts in the text of this section are not controverted.

U and B J are the biological children of E J and G O. In July of 2016 their ages were five and three, respectively. Their parents were divorced, and they were spending most of each year in State A in the primary physical custody of their mother, Ms. O.

³ The restriction placed on Defendant’s Exhibit A by the Superior Court was not applied in this forum. See 7/20/20 order.

T J and E J were living together in Alaska in the summer of 2016, preparing to get married. T was a nurse and E was in the military. T did not have any children of her own at the time. The Js married in early July.

In June of 2016, T traveled to State A and brought U and B back to Alaska for a summer visitation. The girls then lived with both E and T, although E was frequently not present in the home. On July 15 or 16, E J departed for training, leaving T as the sole caregiver for the ensuing week.

During June and July, Ms. J was struggling with her new role as the children's stepmother.⁴ She expressed enormous frustration with the girls' misbehavior in texts to her husband.⁵ Ms. J's perspective was that the girls were unused to having rules enforced and were resistant to the expectations of the new household.⁶ Discipline in the J household, used by both adults, encompassed corporal punishment of various kinds, including cold showers.⁷

In late June, Ms. J administered a spanking to U with a belt that caused welts and bruising.⁸ E J was disturbed by the event, telling Ms. J, "they are most definitely bruised and I'm pretty sure that it is the technical definition of child abuse . . . don't let . . . it happen again."⁹

As mentioned previously, E J left Alaska on an extended trip on July 15 or 16. The trip was scheduled to be three weeks long. The day before he left, Mr. J used a belt in disciplining the children. There is no evidence that anyone observed any lasting marks on the children from this spanking in the period between July 15 and July 22.¹⁰

On July 17, T J expressed a particularly high level of frustration with the girls, telling her husband that "I truly felt like I would rather be raped [than] how the children were treating me."¹¹ U "got her butt whooped" that day,¹² and was spanked again just after midnight (early on the morning of the 18th).¹³ Just after midnight two days later, Ms. J reported to her husband that

⁴ This characterization is adopted from Ms. J's closing argument.

⁵ A.R. 199-229.

⁶ *E.g.*, A.R. 201, 205. Ms. J was probably correct about this.

⁷ Although the use of cold showers for discipline is "controversial" (L testimony), the technique is not part of the abuse allegation in this case.

⁸ A.R. 204.

⁹ A.R. 206

¹⁰ Criminal Trial testimony of T J.

¹¹ A.R. 215.

¹² *Id.*

¹³ A.R. 216.

she “beat” both children and that she was “scared.”¹⁴ The children did not sleep well that night, and at 5:24 a.m. on the 20th she reported, “Butts whooped.”¹⁵

A special area of frustration for Ms. J was the trouble B was having with bed-wetting. On July 20, she texted her husband: “Going to kill them... 2nd time B peed in the bed.”¹⁶

At 9:57 p.m. on July 21, Ms. J texted her husband, “Your kid might have some bruises tumbling down stairs .. I’ve got ice packs on her face.”¹⁷ Subsequent texts indicated that B had “swollen lips, slightly bloody nose, and bruises” and “she’ll probably have a shiner under her right eye.”¹⁸ She reported to her husband that B was “Not watching where she was walking ... and not being in bed like she was supposed to.”¹⁹ She reported to another texting correspondent that B was “Playing on the stairs instead of being in bed at bedtime.”²⁰

The following morning, G O had the following text exchange with Ms. J:

CF: Can I talk to one of the girls

TJ: Right now they are both in worlds of trouble for lying and misbehaving.

TJ: And we are at the vet.

CF: OK, I will video with them later.

TJ: I work tonight and they’ll be at the sitters. I can message you tomorrow. After I get off work

TJ: B face planted on the stairs last night playing instead of being in bed ..

CF: Ok that’s fine. And is it bruised?

TJ: She’ll probably just have black eyes.. I’ve been icing it down since..

CF: Ok

TJ: Swollen lip is gone..

CF: Ok

CF: Will you send me a picture of her face on here

TJ: [sends picture]

TJ: She caught the edge of the stairs... and she hasn’t been sleeping.²¹

¹⁴ A.R. 218.

¹⁵ *Id.*

¹⁶ A.R. 218, entry 493 (ellipsis in original).

¹⁷ A.R. 219 (partial ellipsis in original).

¹⁸ A.R. 220.

¹⁹ *Id.* (ellipsis in original).

²⁰ A.R. 306.

²¹ A.R. 197-198. The picture is at A.R. 187-188, but note that the text conversation is incomplete and out of order in that portion of the record.

After seeing the photograph, Ms. O notified the City A Police Department, requesting a welfare check. Officer K V visited the home early that afternoon and interviewed T, B, and U J together, making a body-cam video and writing a detailed report.²² Just before he arrived, three-year-old B had pooped in her pants, and Ms. J, who was fed up with toilet accidents, was having B wash the poop out herself.²³ This meant that B was soiled with feces during the first part of the welfare visit. While this added to the dismaying impression made of the officer, it is not part of the abuse allegation.

The girls' statements to the officer will be covered in more detail in Part IV, but B indicated she had fallen on the stairs. T J told the officer the following in response to the question "Do you know where she was when she fell on the stairs?":

I saw her hit. I heard a noise 'cause I have a baby monitor downstairs so when they open their door I heard it. Looks like she slipped, hit her face there, and there's blood on the stair itself. Looks like she was probably running upstairs. I just saw her slip down. Clipped her face there. [pointing to stair]

When the officer inquired whether she had taken B to the hospital, she explained that she is an emergency room nurse, and said B:

didn't lose consciousness, she had a little bit of a bloody nose, swollen lip, I iced it down, kept her up with me in my room to make sure she was okay overnight. If she was exhibiting any signs of a concussion I was going to take her to the hospital today.

Asked about the cheek bruises, she knocked on the stair, saying, "They're kind of solid stairs, with the marble, underneath." A few minutes later, in response to more probing, she added:

I saw her faceplant, that's what I *saw* occur, is when she faceplanted. I was at the top of the stairs coming down, 'cause I heard the noise. . . . Saw her up on the stairs when I came around the corner, faceplanting, down, because I think I surprised her a little, slipped down, struck her face upon the edge of, here. [indicating]

She indicated that B had struck her face, probably just below the nose, on the step where she faceplanted (the seventh carpeted step from the top), "and she slid down a little bit, down to, three stairs worth."

While the children were present, the officer asked, "Do you guys ever spank?" Ms. J replied, "Dad does, I don't." This statement was entirely false.²⁴ Her demeanor while delivering

²² A.R. 161-162; Criminal Trial Def. Ex. A. The recorded visit and the report are models of careful, insightful, unbiased work, and they lend credibility to the assessments Officer V made on the spot and in testimony.

²³ A.R. 281, entries 209 and 214. *See also, e.g.*, A.R. 218, entry 498.

²⁴ There is extensive evidence of its falsity. Ms. J admitted its falsity at the criminal trial.

this untrue statement can be observed on the bodycam video. The children do not contradict her, although it is not clear whether they are following this adult portion of the conversation.

In response to a direct question about when the stair incident occurred, Ms. J looked straight at the officer, nodding, and told him “after midnight.” As noted above, Ms. J had already been texting about the event before 10 p.m.

Ms. J denied that any falls or injuries had occurred while taking the girls down the stairs, because “I wouldn’t let them fall while I was holding on to them.”

The officer observed the injuries to B’s face and did not believe Ms. J’s account of how they occurred. After his assessment was passed on to OCS, OCS contacted Ms. J and obtained her permission to have the children interviewed at Location A. These interviews occurred at about 6:00 p.m. on July 22.²⁵

IV. Children’s Accounts

A. At the Time

1. B

When Officer V arrived at the home, T J answered the door and immediately fetched B from the downstairs bathroom, where she was cleaning up, as mentioned previously, from a toilet accident. Officer V asked, “How’d you hurt yourself?” B looked at T and said “No, um I fell down the stairs.” The conversation continued:

- V: You fell?
- B: Up the stairs, ‘n.
- V: What were you doin’ when you fell down the stairs?
- T: Karma, calm down [addressed to the dog]
- B: [after looking at T] Mmm.
- T: It’s okay baby, you can tell him the truth.
- V: You’re not in any trouble.
- B: Um, I was talking to my dad, and um, I got confused [gives a laugh, waives arm and slaps thigh] ’cause um Mommy got me, and I got confused [wobbles head].
- V: What’d you get confused about?
- B: Mommy [waives arm in T’s direction, looks at T, stops talking].
- T: It’s okay baby, you can tell him what happened.

B: [Clutching chest] I got confused fallin' down the stairs myself.

The video shows B with two black eyes. B is clearly aware of the injury, later saying, "it's both of these." She does not contradict T as T discusses her own version of the details of the stair fall with the officer.

Later, as the officer was questioning U about how B hurt herself, B piped up, "She was holding my hand when I needed to go potty." And then she agreed with U's account to the officer, which is summarized below and connects injuries of some kind to a forced trip down the stairs to take a cold shower. B also mentioned a "boo boo" and seemed to point to her right buttock, in a remark soon after her sister's account. But returning to the cause of her facial injuries, she was very clear that they came from falling down the stairs when she needed to go potty. She added that she later talked to her dad.

In the forensic interview at Location A, when asked an open-ended question about how she got "owies" on her face,²⁶ B said "I fell on the stairs when we were gonna take a cold shower, and then, then, then the blood on Mommy's stairs and Daddy's stairs." She went on, "Then Mommy took me upstairs, to talk to Daddy, 'cause I was hurt." She later relates that she was crying in the conversation with her dad, and that T urged him to tell B to "Be brave, B." She was asked, "What made you fall on the stairs?" She responded: "When Mommy told me to put my feet on the ground, I didn't." She reported that the cold shower was because the girls were not listening to their mom. They were given the shower, and then they went to bed. She and U, according to this account, were being held by their arms, tight enough to hurt, as they went down the stairs for the punishment. But as to the fall: "We didn't get hurt from her [T]. I fell down on the stairs myself." After saying this, she dissolved into a kind of laughter, seemingly trying to laugh at herself, but the laughter strikes a listener as unnatural and forced in the context of the conversation. Later in the interview, she related that she gets hurt on her face sometimes. She volunteered without prompting, quite emphatically, that "no one hits me on the face!" and yet she indicated she worried about that.

B also related that at times, when the girls got in trouble with T, they got their "butt whooped" with a belt or a spatula, both with pants on and pants off. Interestingly, she gave herself four quite hard spanks on the left behind to demonstrate, which is an indication that her

²⁵ A.R. 166. The recordings are at A.R. 154-156.

²⁶ The questioner's reference to the face was done by gesture only, and would not appear in a transcript.

behind, or at least that side of it, must not have been particularly tender or sore at the time of the interview.

2. U

During the welfare visit by the officer, there was a somewhat confusing interchange with both girls present, but U at one point gave the following clear account of how her sister got injured: “No, it’s when we were in trouble, you remember? ... When we were in trouble, Mommy grabbed both our arms when we got a cold shower and then sissy didn’t watch where she was going and she fell down three stairs. . . . Yeah I saw her fell down three stairs, [T looks at her quizzically] I *think* I did.”

At Location A, U said she saw B get the injuries to her face “by felling down three stairs without paying attention . . . when we were getting a cold shower going downstairs.” Like B, she reported that T was holding the girls’ wrists as they went down the stairs. She described the incident in the following exchange:

Int: So when you were going to take a cold shower, was Mommy touching you at all? Or were you going by yourself?

U: She holded our wrists when we were going to downstairs to get a cold shower. ‘Cause we don’t even know how to turn on the water.

Int: Mmmhmm.

U: So that’s why she did it.

Int: Yeah. How did that feel on your wrist?

U: It hurted a little bit but not a lot.

Int: Mokay. What was Mommy saying?

U: When we were going down stairs?

Int: Mmhmm.

U: Am not hold the rail, do not hold the rail, keep your feet on the ground and sissy didn’t keep her feet on the ground. I kept my feet on the ground. I holded the rail. Umm, sissy hold, didn’t hold the rail, she didn’t ke’p her feet on the ground.

Int: Mmm. What happened when you were holding the rail?

U: I got my but whooped.

Int: Okay.

U: And sissy got hers face popped, for not putting her feet on the ground.

Int: Mmhm. What did she get her face popped with?

U: Mo— T's hand.

Int: Yeah? What did her hand look like when she popped her?

U: No, I mean her face.

Int: Yeah. What did T's hand look like? Did it look like this? [open hand] Or like this? [fist]

U: Like this [open hand]

Int: Like that.

U: And then she went [slaps herself quite hard, with audible sound, on left side of face], like that.

Int: What did she say when she did that?

U: Um, nothing.

Int: Okay. Did you guys say anything to her, when she was holding on to your arm, or?

U: No.

Int: No? Okay.

* * *

Int: U, when you guys were going to the cold shower, and Mom was holding your arms, were you going up the stairs or down the stairs?

U: Down the stairs.

Int: You were going down the stairs?

U: Yep, with Momma.

Int: With Momma. You guys were both going down the stairs?

U: All three of us.

Int: All three of you. Okay. Um, when you get a cold shower, where do you need a cold shower?

U: Downstairs in our own bathroom.

Int: Downstairs in your own bathroom? Okay. Um, you said that, uh, sister got popped?

U: On the. Oh. When she fell down three stairs.
[Short distraction while U dislodges a microphone]

Int: So, when sister got popped

U: No, she fell down three stairs.
Int: Mmhm.
U: She didn't cry.
Int: Yeah? How many times did she get popped?
U: On her face whenever she wasn't, on her face when she wasn't ehm, keeping her feet on the ground?
Int: Mmhm.
U: Once.
Int: Once? Mokay.
U: I got popped once, too.
Int: Yep? Where did you get popped?
U: Butt.
Int: On your butt?
U: [Nods]
Int: Okay. How come you got popped on your butt?
U: Ehm cause I was holding the rail.
Int: 'Cause you were holding the rail.
U: Yep, when I wasn't s'posta be.²⁷

On the subject of corporal punishment, U reported, like B, that T “whooped” them on their butts with a belt (she did not mention a spatula), both with and without clothes. She also confirmed the cold showers, saying that she and B cried when given them. She reported that the girls were also “sometimes” disciplined with a phone charger, indicating that that also was on the butt. However, she then said she and B had marks on their bodies from being spanked with the phone charger, and that B's mark was on her butt and hers (U's) was on her front. The remark is a little out of place for age and context, and suggests that someone may have pointed out these marks to U at some point prior to her interview.²⁸ Later in the interview she came back to the phone charger marks and was very specific about volunteering where they are located on both her and her sister.

B. In the Criminal Trial

²⁷ A.R. 154, 156.

²⁸ The interview took place before her medical exam, so this would not have come from overheard conversation in the exam. U had been with T and T's mother in the interim between Officer V's welfare check and the Location A's interview.

In the criminal trial, which took place well over three years after the events at issue, both girls testified live. Both had been living with their biological mother, G O, for some time. This led to a major focus at trial being impeachment, the theory being that the girls' live accounts were unreliable because they may well have been coached by a person with animus toward T J.

None of this was of any use to me—neither the live testimony of the girls, nor the evidence offered to suggest that the girls had been coached. Both girls had given accounts in 2016 that were much fresher and more reliable than anything they could offer at the criminal trial. What a child of seven thinks she remembers of an event when she was three, or a child of eight of an event when she was five,²⁹ is of infinitesimal value compared to a videotaped record of what the child recalled the day after the event took place. Further, the 2016 accounts were subject only to influence by T J and, perhaps, Ms. J's mother and husband.³⁰ There was no credible evidence whatsoever that anyone from G's side of the family had had access to the girls before the Location A interview.³¹ Evidence darkly suggesting that the children's biological mother, or relatives on that side of the family, might have wanted the girls to give negative testimony, years later, is simply irrelevant to this decision.

V. Ms. J's Accounts and Credibility

Anyone who has raised small children knows of the difficulties they have in sequencing events and in muddling one memory with another. This process was amply verified by the expert witnesses who testified for both sides. From the girls' accounts, therefore, we have a hazy picture, with some inconsistencies. But one thing that is very clear, when the retellings are taken as a whole, is that there were two stair incidents somehow connected with injuries. One was an uphill fall on the stairs involving B alone, and one involved a forced trip down the stairs to take a cold shower.

Ms. J, who suffers from none of the memory limitations of a three- or five-year-old, has also provided a set of accounts that are not wholly consistent. They are summarized in the table below:

²⁹ U had just turned five in July of 2016, and was eight when she testified; B was three but about to turn four in July of 2016, and seven on the date of trial.

³⁰ B's Location A interview contains a revealing moment when B seems to channel something one of these individuals may have said to her, indignantly declaring "and then G called the *cops* on her." It has parallels to entry 612 on A.R. 223. See also entries 234-237 on A.R. 282.

³¹ Cf., e.g., A.R. 281-282 (girls with Ms. J's mother); Crim. Trial rebuttal testimony of H W.

Account	Substance
To Officer V	Faceplant by B as she came up stairs to bathroom. Slipped downward 3 stairs. T observed this because she had heard something and was coming around the corner. No mention of simultaneously rushing down to help. U was downstairs at the time in the girls’ room. Acted as though no other stair event had occurred that caused any injury, even when children raised it. ³²
To husband	B “might have some bruises tumbling down the stairs” while “[n]ot watching where she was walking . . . and not being in bed like she was supposed to.” No disclosure of any other stair event. ³³
To G O	“B face planted on the stairs last night playing instead of being in bed”. No disclosure of any other stair event. ³⁴
At criminal trial	Took girls by wrist to take them downstairs for “cold shower,” which would actually be lukewarm. B resisted, picking up her feet. T let go of her wrist and let her drop and land hard on her bottom. B “smacked down hard on her butt.” T did not strike her. Afterward let U sleep in parents’ room, and that is where she was during B’s second, “face plant” incident. In this telling of that incident, B fell coming upstairs and, as T was rushing down to help her, B struck the right side of her head. ³⁵

Ms. J’s disclosures about corporal punishment have also varied. To Officer V, she flatly and coolly denied ever spanking the girls, although she said that her husband did. At the criminal trial, she said that she did spank them with a belt and with an open hand, having done so as many as 15 times in the six weeks she had them. However, she indicated her husband spanked them harder and that she did not approve of the amount of force he used. The claim of disapproval was difficult to square with text comments she had made just before the stair incidents, in which she had indicated she wanted her husband to spank the children when he returned.³⁶

Other statements Ms. J has made are problematic as well. At the criminal trial, she portrayed herself to the jury as having reached out to G O to tell her about and show her B’s injuries, because G would want to know as a mom. This hardly seems a fair characterization of what happened. Ms. J had volunteered nothing to G—despite having text discussions with

³² Criminal Trial Def. Ex. A.

³³ A.R. 219-220.

³⁴ A.R. 218.

³⁵ Criminal trial testimony of T J.

³⁶ A.R. 216, entry 448; A.R. 219, entry 507.

several other people about the stair fall or its aftermath—in the 12 hours since she first reported it to her husband.³⁷ Only when G asked to skype with the girls did she mention that B was injured, and only when asked directly for a photograph did she send a photograph. It is also plain that her relationship with G O, far from being a concerned, mom-to-mom collaboration, was one of utter contempt, at least on Ms. J’s side. Thus we have a text on June 13 referring to Ms. O as “the bitch”; another later the same day indicating that Ms. O wanted to skype with her daughters but “I told bitch they were asleep (little lie)”; and another on June 30 complaining that “Bitch wants to Skype with the kids”.³⁸ The self-serving story line of compassionately reaching out to a fellow mom is wholly without credibility.

In the same vein, Ms. J portrayed herself to the jury as having enormous concern for B’s well being after the stair fall, carefully monitoring and assessing her through the night. But in reality, her focus by the next morning seems to have been better expressed in this text: “And she peed on my bed. I’m going to kill her.”³⁹

There has been a disturbing pattern of wanting to shift blame to others rather than take responsibility herself. When she whipped U with a belt in June and left marks that shocked her husband, she blamed five-year-old U for choosing the wrong belt.⁴⁰ Both her husband and U believed she spanked the girls with a phone charger cable at times,⁴¹ yet at the criminal trial she attributed this technique only to E. Against this background, her defense at trial that the girls buttock injuries observed on July 22 might have been caused by her husband (a week before) was implausible and appeared to be an example of the same kind of deflection.

Regrettably, there is a demonstrable history of prevarication and deflection by Ms. J. When one sees her give these statements on videotape or hears her say them on tape, she is impressively smooth in her delivery and seems untroubled by what she is doing. But in the end, the accumulation of contradictions has rendered her an unreliable as a source of information.

VI. Children’s Injuries

³⁷ E.g., A.R. 281 at entry 209; A.R. 326.

³⁸ A.R. 201, 202, 211; *see also* A.R. 21 (July 17, “Seriously, what kind of horrible human being do you have to be to intentionally teach your children to lie . . .”). Despite this clear antipathy, during the welfare visit Ms. J assured Officer V: “I have nothing against [G].”

³⁹ A.R. 281, entry 209 (July 22, 8:33 a.m.).

⁴⁰ A.R. 204, 206.

⁴¹ A.R. 154, 156, 207 at entry 208.

A head to toe medical exam was performed on each child after the Location A interviews late in the evening of July 22. At the time of the exam, B was 3'4½" tall and weighed 33 pounds, while U was 3'8" and 38 pounds.⁴² The chart below describes the observed injuries:

Location	B⁴³	U⁴⁴
Face	Bruising with petechiae ⁴⁵ around orbits of both eyes. 3"x3" area of diffuse purple bruising and petechiae on left cheek/lower jaw. Abrasions on upper lip, lower lip, and right forehead.	Faint yellowing bruise under right eye.
Ears	Bruises and petechiae on and below right ear. Bruises and petechiae anterior and posterior ends of left ear. Abrasions in front of left ear.	Minor bruise on left ear and small abrasion just in front of left ear.
Torso	1" and 2" abrasions on back.	Two lines of faint brown bruising on right lower abdomen, loop pattern. ⁴⁶
Buttocks	Multiple small bruises. Bilateral large bruises on lower part with central sparing (term discussed in Part VII). Large round bruise on upper, outer part of right buttock. ⁴⁷	Large purple bruise on right upper buttock and multiple brown oval bruises on the upper and lateral right buttock. Small abrasion on left buttock.
Thighs	Patchy reddened areas bilaterally on the back of the upper legs, below the buttocks.	Two lines of faint brown bruising on right lateral thigh, loop pattern. ⁴⁸
Other		Patch of brown bruises on back of left knee.

The facial bruises on B can be seen on photographs and video taken by Officer V, although he reports that the images do not do justice to how bruised she appeared to be.⁴⁹ There are also images of all injuries in the records of the forensic medical examination.⁵⁰

⁴² A.R. 34, 118.

⁴³ Basic sources are A.R. 71-105, 118-129, and 135-146, and testimony of C F, RN. Special sources are footnoted separately.

⁴⁴ Basic sources are A.R. 34-70 and testimony of C F, RN. Special sources are footnoted separately.

⁴⁵ Petechiae are small spots on the skin from broken blood vessels. In healthy children, they can be associated with blows and are considered an indicator of possible abuse. F testimony.

⁴⁶ On whether there was a loop pattern, I accept the testimony of C F over that of D L. This is partly because Ms. F actually examined U, and partly because the presence of a loop pattern is consistent with U's disclosure of whoopings with a phone charger cord.

⁴⁷ The bruises are visible at A.R. 89-98 and 143 (the last under special lighting that enhances visibility).

⁴⁸ On whether there was a loop pattern, I accept the testimony of C F over that of D L for the reasons outlined in footnote 46.

⁴⁹ Criminal Trial State Ex. 4-7 and Def. Ex. A.

⁵⁰ A.R. 47-105, 135-146.

VII. Probable Source of Injuries

A. B

1. *Face and Ears*

It was the head injuries that triggered the welfare check and OCS investigation to begin with. In the welfare check, Officer V observed the extensive bruising around the head and did not believe Ms. J's explanation - the uphill face-plant and slide down three carpeted stairs - was a credible explanation in light of what he was seeing and what he heard from the girls.

Officer V's assessment was correct. An uphill faceplant by someone just over three feet tall, followed by a slide back down over the carpeted lips of a few stairs, might easily account for the abrasions on B's lips and forehead. Beyond that, it becomes a less satisfactory explanation.

We can start with the bilateral bruising with petechiae around the eyes. This included bruising and burst blood vessels on somewhat fatty parts of the face, which would have required some force to injure significantly.⁵¹ Tripping while going up the stairs would be an odd way to get this degree of bruising, but it is not an inconceivable explanation.

Moving to the ear bruising on both sides, the uphill stair fall and slide is a highly implausible explanation. B would have to do an initial hard, frontal face-plant, and then turn her head first to one side, then the other, and strike quite hard as she slid, feet first, over three carpeted stair tread noses. Ms. J's expert, D L, felt that was a possible scenario, but she seemed confused about both the structure of the stairs and the described dynamics of the fall. I agree with Officer V and Nurse F that the way this fall has been described simply does not furnish a mechanism for the face and both ears to be injured.

Likewise difficult to attribute to the uphill stair fall is the substantial bruise and petechiae on B's left cheek and lower jaw. The fatty cheek requires quite a bit of force to injure in this way, force that would be difficult to generate in a short backward slide.⁵² Moreover, for this injury there is a much more apt alternative explanation, which we will come to momentarily.

With the stair faceplant inadequate to explain such a range of head injuries, one must look at alternative explanations. Ms. J did not offer any at the time. She did not mention any

⁵¹ F testimony. Ms. F's testimony was considerably more persuasive than Ms. L's in this area; the latter seemed not to have understood the nature and dynamics of the fall as described.

⁵² See F testimony. I am aware that at the criminal trial, Ms. J testified that as she slid, B struck her right side. I did not believe this testimony, both because of credibility concerns about Ms. J discussed previously and because it was part of a revised description of the event offered years later. In any case, the bruising and petechiae were on the other side.

fighting between the girls or accidents while playing or roughhousing. In the criminal trial and hearing, these possible explanations were pushed hard, particularly the fighting theory.

The fighting explanation is highly implausible. As Ms. F pointed out in testimony, children are typically quite open about blaming a sibling when a sibling hurts them. This seems likely true of these girls as well, who were not always complimentary of each other in their interviews. On video, B did not attribute any of the injuries she was asked about to her sister (nor, for that matter, did U attribute any of her bruises to B). And Ms. J did not report that either girl had come to her with recent complaints of being hit hard by the other.

Injury during play is also an improbable explanation for the unexplained subset of B's head injuries. Both experts agreed that accidental ear bruising is very rare, making it a red flag for abuse. There is also no history from any source that would match the prominent cheek/jaw bruise to the kind of serious play mishap that would be needed to cause it.

The interviews with the girls did, however, yield a simple explanation for the cheek and jaw bruising on the left side of B's face, as well, perhaps, for some of the ear bruising. Let us start with U's interviews. With Officer V, U blurted out her impression that her sister had gotten hurt during the downward forced march to the cold shower. Later, in an entirely genuine and convincing account at Location A's (in which she seemed much more eager to cast blame on her sister than on T), she disclosed that, for misbehaving by not keeping her feet on the ground, B got "popped" on the face. She demonstrated a forceful open-handed slap.⁵³ The event seems to have made quite an impression on her, perhaps because (again, based on the girls' accounts) this was not the usual method of discipline in the house.

B herself gave a more confused account, consistent with her age. We should start with the fact that she did concur with her older sister's account on Officer V's video recording, and she was quite clear at Location A that something bad had happened on the stairs when she was being taken to a cold shower and she failed to keep her feet on the ground. But there are other occasions when she is adamant that she herself was the cause of her own injuries. These statements are revealing—they have all the hallmarks of a version that has been drummed into her by an adult. With Officer V, looking apprehensively at T, she related: "Um, I was talking to

⁵³ Ms. J's expert, D L, interpreted a "pop" to be a finger flick. I am flummoxed by this testimony; nothing could be clearer than U's physical demonstration of a forceful slap to the side of the head. The usefulness of all of Ms. L's testimony was undermined by her rigid insistence on a benign theory (essentially, the whole panoply of injuries caused by a "tumble" down the stairs), so that she would even unconsciously change key elements the children's accounts to fit her paradigm. I note, however, that Ms. L did not contest that U's account reflected the child's actual recollection.

my dad, and um, I got confused [gives a laugh, waives arm and slaps thigh] ‘cause um Mommy got me, and I got confused [wobbles head] . . . I got confused fallin’ down the stairs myself.” B did not come across as the sort of precocious three-year-old who would spontaneously slap her thigh, wobble her head, and share a joke about her own confusion and klutziness. This came from someone else.

We see the same thing on the Location A video, where at one point B declares, “We didn’t get hurt from her. I fell down on the stairs myself”, and then dissolves in almost maniacal laughter. It is not the thought process of a preschooler we are seeing. Lastly, in the same vein is her declaration at Location A, without the interviewer having mentioned being struck or hit, that “no one hits me on the face!” This would all be very fine if someone had *asked* her if she ever got hit on the face. But without the context of a question raising that method of injury, the emphatic statement is an indication of something else. Afterward, when asked if she “worried about that,” she nodded silently.⁵⁴

A final possible source of injuries would be a fall on the stairs in connection with the forced trip for a cold shower. Both girls indicated that there was a fall at that time (in addition to the uphill faceplant). If there was such a fall, it was because of the way Ms. J was handling B during discipline. At the criminal trial Ms. J testified that she let go of B’s arm and “let her drop”, “hard”, onto a stair, though she denied any subsequent tumble. While I do not feel Ms. J has been a reliable source of information, this admission, compelled by the accumulation of evidence that her prior explanation was inadequate to explain all the injuries, fits the circumstances and likely has a basis in reality.

What really happened on July 21, 2016? We can be certain—indeed, Ms. J eventually admitted it—that there were two events on the stairs. The first was a march down the stairs for a cold shower punishment. The girls were resisting, U by hanging onto the rail and B by lifting her feet and forcing her mother to drag or carry her. Ms. J forcefully slapped B on the face at that time, and B was hurt in some way, most likely on the cheek, although one or both black eyes may be related and at least one ear injury may be related to the slap. There was also probably a fall on the stairs at this time (caused when Ms. J, by her own account, deliberately let B drop), and this may have produced some of the head bruises. Later, after the girls had gone to bed, B came upstairs to use the bathroom. She fell into the stairs, and some additional injury to the front of her face occurred. There was a tearful conversation with the girls’ father who, it will be

⁵⁴ This exchange is at approximately minute 23 of A.R. 155.

recalled, had told Ms. J not to “let . . . it happen again” when she had bruised the girls in a prior disciplinary action. B must have attributed these new injuries to her mother, but Ms. J convinced the three-year-old that she was “confused” and had done the damage to herself in the uphill stumble. And yet, B had a hard time keeping the story straight. The first stair incident kept creeping back into her subsequent accounts.

2. *Buttocks and Thighs*

B had bilateral large bruises on the lower part of her bottom. The bruising pattern showed “central sparing.” Central sparing is an uninjured area near the gluteal fold. In children who are spanked hard, this is an area that avoids injury because the child knows the blow is coming and will typically clench. Central sparing is an indicator that the buttock injuries were caused by spanking.⁵⁵

In light of their symmetry and location, and the existence of central sparing, the most obvious cause for the bruises would be disciplinary whoopings. We know B received a number of them, including one on July 19 that left Ms. J “scared” and another on July 20. We know that a month before, Ms. J had left serious enough marks from spanking U that E J—a strict disciplinarian in his own right—mentioned “child abuse” and told her not to let it happen again.

Ms. J’s defense in the criminal trial (and to some extent, this hearing as well) suggested that the bruises were caused by E J who, according to Ms. J, spanked the girls before he left about a week earlier. This is possible; bruises can certainly linger a week. But Ms. J herself does not report seeing any injuries following that alleged spanking. If the injuries were caused by spanking, the recent, repeated punishment is overwhelmingly the most likely cause.

The only wholly benign explanation that has been suggested for the bilateral lower buttock bruising is the children sliding down the stairs. This is something Ms. J indicated they had done on occasion at some unspecified point during the summer. However, neither girl attributed any injury to this activity, and nothing in the history we have of the week leading up to July 22 would lead one to expect major bruises from this cause. Nurse F did not find the buttock bruises consistent with that activity.⁵⁶ All in all, corporal punishment is the most likely cause of B’s lower buttock bruises, and the punishment responsible for them was most likely administered by Ms. J.

⁵⁵ E.g., F testimony.

⁵⁶ F testimony.

The other injuries around B's buttocks are more difficult to ascribe to a particular cause. The redness on the upper thighs could be at least partially caused by incomplete toilet training.⁵⁷ The large round bruise on upper, lateral area of the right buttock could have been caused by being dropped or allowed to fall during the downhill stair incident, but I am not able to make a finding to this effect.

3. *Torso*

There is no evidence about the minor back abrasion, and it is consistent with a purely accidental cause.

B. U

1. *Loop Pattern Injuries*

The loop pattern line bruising in two locations on U's body is from whippings by Ms. J with a phone charger cord. We know this because such marks would be difficult to get any other way; because Mr. J and U both mentioned that Ms. J disciplined by this method (Ms. J's denials notwithstanding), and because as to the marks on the abdomen U was extremely specific in attributing them to phone charger cord discipline by Ms. J.

2. *Buttocks*

The bruising on U's buttocks does not have the central sparing seen on B. There is a good possibility that the repeated spankings by Ms. J - either the one delivered on the stairs, or one of the others - caused all of these, but without the classic sparing pattern, there is a greater chance of an alternative cause than with B's lower buttock injuries. My assessment is that it is more likely than not that the superficial, small bruises on U's lower left buttock came from the spankings. The single large and deep bruise, however, is in a location less consistent with spanking, and I do not believe it has been shown to be more likely than not that this injury came from discipline. U, it should be noted, did not know where it came from.⁵⁸

3. *Other Injuries*

There is not enough evidence to assign a cause to the slight bruises under one eye and on one ear. U, who was quite an articulate five-year-old, did not attribute them to Ms. J. While ear bruising is unusual among children, outside the context of abuse, a single bruise as minor as the one on U could well have been acquired roughhousing. The presence of an eye orbit injury is a

⁵⁷ *Id.*

⁵⁸ A.R. 38.

little troubling, but if it had come from a blow (by T or B), I would have expected U to be able to say so, and she did not—she said she did not know where it came from.⁵⁹

There is no reason to believe that the knee bruise is anything other than a normal childhood bump.

VIII. Substantiation

A. *The Nature of Substantiation of Physical Abuse*

OCS has issued a closing letter substantiating physical abuse as to both girls for the injuries found on them on July 22, 2016. OCS concluded that “Ms. J caused both children injuries by hitting them repeatedly in the face and on their bodies with a belt, phone cord, and her hands . . . with great force that goes beyond any normal discipline.”⁶⁰ This finding is reviewed *de novo* in this forum, with the agency required to prove its case for an abuse finding from the ground up, and the respondent given a fuller opportunity to respond and challenge the evidence than is ordinarily available at the initial investigation stage.⁶¹

Alaska Statute 47.17.290(3) defines physical abuse as “the physical injury . . . 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.”⁶² It does not require the physical harm to be substantial.⁶³ However, a chain of definitions across several titles indicates that the injury needs to be inflicted in a manner that would constitute a criminal assault.⁶⁴ And infliction of physical injury by a person entrusted with a child’s care is not an assault “[w]hen and to the extent reasonably necessary and appropriate to promote the welfare of the child.”⁶⁵ Lest there be any doubt that this exclusion encompasses reasonable corporal punishment, a Department of Health and Social Services statute expressly gives parents “the right to exercise reasonable

⁵⁹ A.R. 41.

⁶⁰ A.R. 13. I am not sure OCS intended a finding quite this broad. OCS had only the vaguest of indications that U was ever struck in any significant manner on the face, repeatedly or otherwise. Likewise, evidence that B was struck with a phone charger cord was limited. Upon physical examination, U had only one slight, old facial injury, not linked to a blow, and B bore no marks anyone had traced to a charger cord.

⁶¹ A determination that an allegation is unproven is not necessarily an indication that the OCS concerns were unfounded or that its preliminary conclusions were unreasonable, based on the evidence available at the time. Nonetheless, even a reasonable substantiation decision will be vacated if unproven at hearing.

⁶² *In re John Doe*, OAH No. 06-0112-DHS (Karleen Jackson, Comm’r of Health & Soc. Serv. 2007) (citing AS 47.17.290(2) and section 2.2.10.1 of the Child Protective Services Manual); *see also, e.g., In re X & YZ*, OAH No. 09-0589-DHS (Dep. Comm’r Hefley for Comm’r Streur 2010).

⁶³ There may be a substantiality requirement for the maltreatment prong of the AS 47.17.290(3) definition, but there is none for the physical injury prong.

⁶⁴ A discussion of the chain of definitions is found in, *e.g., In re S.J.*, OAH Case No. 16-0768-SAN (Comm’r of Health & Soc. Serv. 2018) (published at aws.state.ak.us/OAH/Decision/Display?rec=5984). The interplay of these definitions is imperfect, but this case will not be so nuanced as to turn on those imperfections.

corporal discipline.”⁶⁶ Moreover, this department has held that corporal discipline does not necessarily become abuse just because it is “ill-advised” or “improper.”⁶⁷ Substantiation for abuse is not for ordinary parenting mistakes; the threshold is at least “slightly higher.”⁶⁸

OCS makes its initial substantiation findings using a Maltreatment Assessment Protocol, or “MAP.”⁶⁹ The MAP may serve a purpose in guiding OCS workers in their day-to-day assessments, but it has never been made a regulation and its guidelines cannot be treated as hard and fast rules.⁷⁰ In any event, OCS has not submitted it to the record in this case, making it impossible to reference it even for guidance.

B. Corporal Punishment

This decision has found, more likely than not, the following types of corporal punishment and injury by Ms. J:

- B: Slapped in face to punish for resistance in being taken to cold shower; slap caused significant bruising.
- B: Spanked on bottom with belt and hand as discipline for ordinary misbehavior, causing fairly expansive bruising.
- U: Struck with phone charger cord for misbehavior, causing very light loop pattern bruises on abdomen and thigh. Spanked on bottom sufficiently to cause light bruising.

Each of these actions was a physical harm that, outside the context of corporal punishment, would support an assault charge. The question is whether they constitute “reasonable corporal discipline.”

To assist the tribunal, Ms. J’s counsel has assembled an impressive collection of thoughtful articles and out-of-state court cases on corporal punishment.⁷¹ The J analysis relies especially on an article by Columbia University psychologist Elizabeth Thomson Gershoff,⁷² which points out that corporal punishment is widely accepted in American society, to include

⁶⁵ AS 11.81.430(a)(1).

⁶⁶ AS 47.05.065(1)(B).

⁶⁷ *In re L.A.H.*, OAH No. 14-0568-SAN (Comm’r of Health & Soc. Serv. 2015), Decision at 14 (published at aws.state.ak.us/OAH/Decision/Display?rec=5957).

⁶⁸ *Id.*

⁶⁹ The outcome of the MAP tool in this case (but not the substance of the assessment) is at A.R. 15.

⁷⁰ See, e.g., *Noey v. Dep’t of Envir. Cons.*, 737 P.2d 796, 805 (Alaska 1987); *In re U.C.-G.*, OAH Case No. 16-1486-MDS (Comm’r of Health & Soc. Serv. 2017), Decision at 7. OCS has argued this and other SAN cases as though the MAP were a regulation to be followed to the letter, but this decision explicitly rejects that approach.

⁷¹ Written Closing Argument and Briefing on Corporal Punishment (filed March 3, 2020).

spankings administered with an object rather than a hand (28% of parents of 2 to 4-year-olds).⁷³ None of the material cited, however, would support classifying the striking of the three-year-old in the face as within the bounds of reasonable discipline. Indeed, Gershoff uses a “spank or hit” to the “face” as a paradigm for abusive rather than normative corporal punishment.⁷⁴ Because it is more likely than not that Ms. J struck B in the face hard enough to leave an injury, there can be little question that the substantiation for physical abuse as to B must be upheld.

It would be a somewhat closer question whether repeated spankings to the buttocks of a child this age, using a belt and striking sufficiently hard to leave noticeable but not severe bruises, would go beyond the realm of “ill-advised” discipline and into the zone of outright abuse. Ms. J cites a few court cases that have placed this kind of spanking on the ill-advised but not abusive side of the line,⁷⁵ but other cases have implied that it would constitute abuse.⁷⁶ The issue need not be resolved here because the blow to the face is sufficient to sustain the substantiation.

As to U, the buttock bruising attributable to spanking is less significant, but its presence is part of an overall pattern of constant and severe corporal punishment to a child who is barely five. The light loop marks indicating that she was snapped or whipped with a phone charger cord on her leg and abdomen are even more troubling. They indicate that Ms. J administered discipline outside the context of formalized spankings, and was not particular about what part of the child she struck or what she struck with. On balance, I conclude that the record just tips the balance in support of a finding that the treatment of U went beyond ill-advised discipline and into the territory of physical abuse.

Accordingly, the substantiation for both B and U should be sustained.

C. Collateral Consequences

I am mindful that Ms. J holds a nursing license that could be impacted by a substantiation for physical abuse. This could give the present proceeding higher stakes for her than is typical of substantiation cases. Nonetheless, the sole issue to be decided here is whether it is more likely

⁷² E.T. Gershoff, Corporal Punishment, Physical Abuse, and the Burden of Proof: Reply to Baumrind, Larzelere, and Cowan (2002), Holden (2002), and Parke (2002), 128(4) PSYCHOL. BULL. 602 (2002).

⁷³ *Id.* at 603.

⁷⁴ *Id.* At 604.

⁷⁵ *E.g.*, *Clark v. Clark*, 683 N.E.2d 800 (Ohio App. 1996) (applying a slightly different definition of abuse than Alaska’s, finding that occasional paddling of 9-year-old sufficient to leave welts and bruises was “unwarranted” but not abusive).

⁷⁶ *E.g.*, *Burke v. State, Dep’t of Health & Soc. Serv.*, 162 P.3d 1239, 1242 (Alaska 2007) (implying by acceptance, but not holding, that spanking 2-year-old on bare bottom with a spoon is abusive).

true than not true that T J inflicted physical discipline in 2016 that crossed the line to physical abuse. The fact that the finding could have collateral consequences is not a valid basis to raise the standard of proof in this proceeding. Processing the harder question of what this might mean for a nursing license—factoring in the lack of complete certainty about what happened, the pressures on a wholly inexperienced parent when suddenly put in charge of two challenging preschoolers, and the passage of time—are matters for other officials or boards.

IX. Disposition

The substantiation of physical abuse against T J is affirmed with respect to B J and U J. The abuse took the form of unreasonable corporal punishment administered during July of 2016.

DATED this 25th day of August, 2020.

By: Signed
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned, on behalf of the Commissioner of Health and Social Services and 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 Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 6th day of October, 2020.

By: Signed
Name: Jillian Gellings
Title: Project Analyst
Agency: Office of the Commissioner, DHSS

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