

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

In the Matter of )  
 )  
S T ) OAH No. 21-0372-SAN  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION GRANTING SUMMARY ADJUDICATION**

**I. Introduction**

S T is the father of L T. The Office of Children’s Services seeks to substantiate an allegation that Mr. T physically abused L per AS 47.10.011(6). OCS has the burden of proof to establish, by a preponderance of the evidence, that the abuse occurred. If OCS carries the burden, the physical abuse allegation is substantiated for purposes of the child protection registry maintained under AS 47.17.040. This confidential registry can be used for certain governmental decisions in Alaska and elsewhere, including decisions about professional licensing, adoption, and foster care placement.

Although this case was initiated in March 2021, it was held in abeyance allowing a related Child in Need of Aid (CINA) case to first proceed. In that case, OCS filed an emergency petition for adjudication that L was a child in need of temporary custody.<sup>1</sup> The basis for the CINA case was the same incident giving rise to the substantiation in this case. An adjudication trial in the CINA case occurred before the City A Superior Court. Following that trial, on June 23, 2021, the Superior Court Judge issued a decision. It concludes that Mr. T’s conduct established that L is a child in need of aid per AS 47.10.011(6) and (9).

Under the doctrine of collateral estoppel, the establishment of substantial physical harm and neglect by Mr. T in the CINA case substantiates, as a matter of law, OCS’s allegation of physical abuse in this proceeding. Accordingly, OCS’ motion for summary adjudication is GRANTED and its determination, that the evidence substantiates Mr. T physically abused L is affirmed.

**II. Background**

Mr. T and his wife, N T, are the parents of L. The three reside together on City B, outside of City A, Alaska. At the time of this incident on January 20, 2021, L was 18 months old.<sup>2</sup>

<sup>1</sup> *In re K.S.*, Superior Court Case No. XX-21-00000CN.  
<sup>2</sup> R. 5-6.

The report giving rise to this incident was filed by a mandated reporter. It indicates, L T was brought to City A Hospital on that date by his father due to an injury to his leg. When questioned about how the injury occurred, Mr. T's story was inconsistent.<sup>3</sup> Ultimately, it was determined that L had suffered a non-accidental fracture to his femur while in Mr. T's sole care and control.<sup>4</sup>

Based on that investigation, OCS initiated the CINA by filing an emergency petition for adjudication of child in need of aid and for temporary custody.<sup>5</sup> An adjudication trial was ultimately held, an order was issued regarding the adjudication on June 23, 2021, and a disposition hearing occurred on August 4, 2021. Both Mr. T and Mrs. T were represented by separate attorneys and participated throughout the adjudication trial and disposition hearing process.<sup>6</sup> At the adjudication trial, the parties called 15 witnesses. There were also exhibits and videos presented.<sup>7</sup> Ultimately, the Superior Court Judge found that L is a child in need of aid based on the acts or omissions of both parents under AS 47.10.011(6) and (9).<sup>8</sup>

On February 12, 2021, OCS had also issued a notice to Mr. T advising him that it had entered a substantiated finding of physical abuse against him and intended to place his name on the child protection registry, due to his treatment of L.<sup>9</sup> Mr. T, through his attorney, appealed the substantiation and the matter was referred to the Office of Administrative Hearings for a hearing.

OCS has now filed a motion for summary adjudication in this case, relying on the Superior Court's findings concerning physical harm and neglect in the CINA case.<sup>10</sup> Mr. T opposes the motion, arguing that because the Superior Court's order in the CINA case is on appeal, it cannot be relied on for preclusive effect.<sup>11</sup>

### **III. Discussion**

#### ***A. The Summary Adjudication Standard***

OCS's motion for summary adjudication is governed by 2 AAC 64.250. Under that regulation, a party may request summary adjudication on one or more issues in an administrative

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<sup>3</sup> *Id.*

<sup>4</sup> R. 7-34.

<sup>5</sup> R. 36-46.

<sup>6</sup> R. 58-84.

<sup>7</sup> R. 61.

<sup>8</sup> R. 80-84.

<sup>9</sup> R. 1-2.

<sup>10</sup> Office of Children's Services Motion for Summary Adjudication (December 17, 2021).

<sup>11</sup> Opposition to Motion for Summary Adjudication (January 14, 2022).

proceeding if a genuine dispute does not exist on an issue of material fact. Where a motion for summary adjudication is supported by an affidavit or other documents, the defending party may not rely on mere denial, but rather must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required.<sup>12</sup> In this case, OCS's motion for summary adjudication is supported by copies of the petition filed, and the order issued in, the CINA case.

**B. The Relevant Statutes and Regulations**

Alaska's child protection statute, AS 47.17, defines "child abuse or neglect" to mean "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[.]"<sup>13</sup> The statute then defines one of these terms – "maltreatment" – to mean "an act or omission that results in circumstances under which there is reasonable cause to suspect that a child may be a child in need of aid," as defined under the separate Child in Need of Aid (CINA) statute, AS 47.10.011.<sup>14</sup>

Of the various situations that can support a Child in Need of Aid finding under the CINA statute, OCS relies on AS 47.10.011(6). Per that statute, a child can be found to be "in need of aid" under the CINA statute if "the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately."<sup>15</sup>

When a parent challenges a substantiated finding of abuse or neglect under the child protection statute, OCS has the burden of proving that the substantiation should be upheld. This burden has both a factual and a legal component. That is, OCS must prove as a matter of fact that certain conduct occurred, and as a matter of law that the conduct warrants a substantiated finding.<sup>16</sup>

**C. The Superior Court's Order Regarding Adjudication in the CINA Action Compels a Finding of Substantiated Physical Abuse in This Case**

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<sup>12</sup> 2 AAC 64.250(b).

<sup>13</sup> AS 47.17.290(3).

<sup>14</sup> AS 47.17.290(9).

<sup>15</sup> AS 47.10.011(6).

<sup>16</sup> *In re E.O.*, OAH No. 16-1407-SAN (Commissioner of Health & Soc. Svcs. 2017).

The order regarding adjudication, issued by the City A Superior Court in the CINA case on June 23, 2021, contains a number of findings directly applicable to this case.<sup>17</sup> First, it found, by a preponderance of the evidence, that L was a child in need of aid under AS 47.10.011(6). More specifically, the order found that Mr. T “failed to provide adequate care and control of L at the time of L’s injury, and failed to provide adequate medical attention immediately following L’s injury.”<sup>18</sup> It also found that Mr. T’s “conduct, or at the very least . . . negligent act or omission, created a substantial risk of physical harm.”<sup>19</sup>

In *State of Alaska v. United Cook Inlet Drift Association*,<sup>20</sup> 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;
- (3) The issue in the first action must have been resolved by a final judgment on the merits.

This doctrine binds the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation.<sup>21</sup> The doctrine “aim[s] to prevent parties from again and again attempting to reopen a matter that has been resolved.”<sup>22</sup> The principle of collateral estoppel applies in administrative proceedings as well as to court proceedings.<sup>23</sup>

The criteria for application of the doctrine of collateral estoppel are satisfied here. First, OCS is effectively asserting collateral estoppel against Mr. T, who is a party in the CINA case.

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<sup>17</sup> All references in this paragraph are to the Superior Court’s order regarding adjudication and as contained within OCS’s supplemental agency record in this case, dated December 8, 2021. See R. 58-81.

<sup>18</sup> R. 71.

<sup>19</sup> R. 70.

<sup>20</sup> 895 P. 2d 947, 950-951 (Alaska 1995).

<sup>21</sup> *Wilson v. Anchorage*, 977 P.2d 713, 726 (Alaska 1999); *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006).

<sup>22</sup> *Id.*; see also *State, Child Support Enf. Div. v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

<sup>23</sup> See *United States v. Utah Constr. and Mining Co.*, 384 US 394, 422 (1966); see also 2 *Am. Jur. 2d*, Administrative Law at § 493; Davis, *Administrative Law*, Chapter 18 (3d ed. 1972); *Rest. (2d) 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”); 1 Koch, *Administrative Law and Practice* § 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 prior authority).

Second, the issue to be precluded from relitigation here by operation of the doctrine (physical abuse of L based on the injury he sustained while in Mr. T’s exclusive care on January 20, 2021) is the same incident and facts giving rise to the decision in the CINA case. Finally, the issue of physical abuse in the CINA case, has been resolved by a final judgment on the merits.<sup>24</sup>

Accordingly, the Superior Court's findings and conclusions in the CINA case have preclusive effect in these administrative proceedings. In arguing to the contrary, Mr. T asserts that the adjudication order has been appealed to the Alaska Supreme Court.<sup>25</sup> He argues that because the adjudication order is being reviewed on appeal, it is not “final” for purposes of issue preclusion, until after the review is completed. Mr. T cites *Usibelli Coal Mine, Inc. v. State, Department of Natural Resources*, for this proposition.<sup>26</sup>

The Court’s decision in *Usibelli* does suggest that a factor which can be considered in determining the “finality” of a judgment for purposes of potentially giving it preclusive effect is whether the parties were fully heard, the court supported its decision with a reasoned opinion, and the decision was subject to appeal or was in fact reviewed on appeal.<sup>27</sup> However, of those three factors, only one even arguably benefits Mr. T. This is because he already had an opportunity to be fully heard and the City A Superior Court, in its 24-page order regarding adjudication, issued a well-supported and reasoned opinion after having considered the testimony of no less than 15 witnesses.<sup>28</sup> Therefore, it is only consideration of the appeal factor that is even potentially applicable here.

But as to Mr. T’s presently appending appeal of the CINA adjudication order, nothing in either *Usibelli* or any other Alaska cases suggest that a pending appeal prevents giving preclusive effect to the decision being appealed from. In fact, Alaska precedent conclusively hold just the opposite. As the Alaska Supreme Court has repeatedly held, a pending appeal of a criminal conviction is irrelevant for the purpose of determining whether a party is precluded under the doctrines of res judicata or collateral estoppel from relitigating the facts that form the basis of the conviction in a subsequent civil action arising from the same operative facts.<sup>29</sup> This

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<sup>24</sup> R. 82-84 (order of disposition (August 27, 2021)).

<sup>25</sup> Opposition to Motion for Summary Judgement.

<sup>26</sup> *Id.* at 2 (citing *Usibelli Coal Mine, Inc. v. State, Dep’t of Natural Res.*, 921 P.2d 1134, 1142 (Alaska 1996)).

<sup>27</sup> *Usibelli Coal Mine, Inc.* 921 P.2d at 1142.

<sup>28</sup> R. 58-81 (Order Regarding Adjudication).

<sup>29</sup> *Lane v. Ballot*, 330 P.3d 338, 342-43 (Alaska 2014). *See also, Wyatt v. Wyatt*, 65 P.3d 825 (Alaska 2003).

is because as the Court has articulated, the appealing party possesses a remedy in the event their appeal is successful. That remedy is, following reversal on appeal, to file a motion to vacate the judgment resting on the preclusive effect of the earlier judgment. Doing so will provide the appealing party appropriate and adequate relief if their appeal is successful.<sup>30</sup>

Also, while the cases cited above are cases in which a party to a civil proceeding was seeking to rely on the preclusive effect of a finding or determination made in a criminal case, under these facts, that is a distinction without a difference. Our Court's pronouncement of this rule, giving preclusive effect to decisions on appeal, has also been applied outside of criminal convictions.<sup>31</sup>

What is import is that the same facts at issue in this case were already conclusively established and determined by the Superior Court in the CINA case. Mr. T was a party to both cases and had an opportunity to defend and assert his position in the earlier CINA case. Finally, that case was ultimately completed with a final decision on the merits. Under Alaska law, it is irrelevant that Mr. T has now appealed that decision.

In summary, based on the Superior Court's findings and conclusions in the CINA case, applicable here under the doctrine of collateral estoppel, there are no disputed factual issues necessitating an evidentiary hearing in this case. The Superior Court's finding in the CINA case that Mr. T caused substantial physical harm to L establishes physical abuse by Mr. T in this case.

#### **IV. Conclusion and Order**

OCS's Motion for summary adjudication is granted. Its determination of February 12, 2021, finding the evidence substantiates the allegation that Mr. T physically abused L under AS 47.10.011(6), is affirmed.

DATED this 27<sup>th</sup> day of January 2022

*Signed*  
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Z. Kent Sullivan  
Administrative Law Judge

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<sup>30</sup> *Id.* In the context of an administrative determination such as this one, Mr. T would need to initiate any such post-reversal request for relief by petitioning OCS.

<sup>31</sup> *Lyman v. State*, 824 P.2d. 703, 705-06 (Alaska 1992).

## Adoption

The undersigned, by delegation from of 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 18<sup>th</sup> day of February, 2022.

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

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