

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

In the Matter of: )  
 )  
E.T. )  
\_\_\_\_\_ ) OAH No. 21-0016-SAN

**DECISION**

**I. Introduction**

E.T. drove intoxicated with his three minor children, resulting in criminal charges and substantiated findings by the Department of Health and Social Services, Office of Children’s Services (“OCS”) that E.T. maltreated his children by neglect and physical abuse. After appealing the OCS findings, E.T. pled guilty to driving under the influence (“DUI”) and child endangerment while committing a DUI. OCS moved for summary adjudication, reasoning that these convictions alone support its substantiated findings of neglect and physical abuse.

By pleading guilty to the criminal charges, E.T. has admitted to driving his children while intoxicated and cannot dispute those facts here. These facts do support substantiated findings for purposes of the Child Protection Registry. However, the findings OCS made include labels and legal citations that are incorrect or misleading. Its notice of these findings was also inadequate. Accordingly, summary adjudication is granted in part. In the interest of efficiency, this matter is remanded to OCS to modify its substantiated findings rather than proceed to hearing on additional factual issues.

**II. Undisputed Facts**

E.T. pled guilty a DUI in 2007 and to a DUI and child endangerment while committing a DUI in 2014.<sup>1</sup>

On 00/00/2019, E.T. was arrested after driving intoxicated with his three children in the car.<sup>2</sup> OCS investigated the incident after it was reported to them and determined that E.T.’s

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<sup>1</sup> See Court docket records for 3PA-00-00000CR and 3PA-00-00000CR, available at <https://courts.alaska.gov/main/search-cases.htm>. Court records to show the final disposition of a case are appropriate for official notice. 2 AAC 64.300 (ALJ may take official notice of judicially noticeable facts); cf. *F.R. v. State*, 862 P.2d 857, 864 (Alaska 1993) (“We agree that courts freely take notice of court records, especially their own. However, they typically do so in order to take judicial notice of such facts as that a prior suit was filed, who the parties were, and so forth.”).

<sup>2</sup> R. 000001-4, 9-10.

behavior constituted child maltreatment. OCS thus notified E.T. in November 2020 that it was placing him on its Child Protection Registry.<sup>3</sup> E.T. timely filed this administrative appeal.

On 00/00/2021, while this appeal was pending, E.T. pled guilty to a DUI with a blood alcohol level above 0.80, under AS 28.35.030(a)(2), and three counts of first-degree child endangerment by transporting a child while committing a DUI, under AS 11.51.100(b).<sup>4</sup>

This matter is scheduled for hearing on 00/00/2021. But OCS has filed a motion for summary adjudication, arguing that this matter can be resolved without hearing based on E.T.'s criminal convictions. E.T. did not respond to the motion.

### **III. Discussion**

Summary adjudication is appropriate when there is no genuine issue of material fact in dispute and some or all of a case can be resolved as a matter of law.<sup>5</sup> OCS asserts E.T.'s criminal convictions for DUI and DUI-related child endangerment provide those undisputed facts and that its substantiated findings should be affirmed on those facts alone.

#### **A. E.T.'s Convictions Establish Certain Facts Beyond Dispute.**

When an issue is resolved in one legal proceeding, it can “collaterally estop” — *i.e.*, prohibit — a person from challenging that issue in subsequent legal proceedings. For example, when a person pleads guilty to a crime, the elements of that crime can be considered established in a later civil matter so long as the person had an opportunity for a full and fair hearing and the crime at issue is a serious criminal offense.<sup>6</sup>

E.T.'s criminal convictions for DUI or child endangerment while committing a DUI are subject to collateral estoppel. The Alaska Supreme Court has held that “[d]riving while intoxicated is a serious criminal offense.”<sup>7</sup> And E.T. would have had a fair opportunity for a hearing in the District Court proceedings for these DUI and DUI-related crimes. Thus, it is appropriate to consider the elements of these crimes to be established for this civil matter and beyond dispute here.

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<sup>3</sup> R. 000001-4. OCS maintains this registry for conducting background checks for limited purposes on persons seeking to provide certain services. AS 47.17.040.

<sup>4</sup> R. 000041-44.

<sup>5</sup> 2 AAC 64.250(a).

<sup>6</sup> *Lamb v. Anderson*, 147 P.3d 736, 742 (Alaska 2006) (“[A] conviction based on a no contest plea will collaterally estop the criminal defendant from denying any element in a subsequent civil action against him that was necessarily established by the conviction, as long as the prior conviction was for a serious criminal offense and the defendant in fact had the opportunity for a full and fair hearing.”).

<sup>7</sup> *Moore v. Peak Oilfield Service Co.*, 175 P.3d 1278, 1280 (Alaska 2008).

What facts do these convictions establish? E.T. drove while intoxicated at least three times, in 2007, 2014, and 2019.<sup>8</sup> And with the 2014 and 2019 incidents, he drove intoxicated with at least one of his children in the car.<sup>9</sup> Alaska law considers driving intoxicated with a child is “endangering the welfare of a minor” sufficient to make it a criminal offense.<sup>10</sup> Thus E.T.’s convictions also establish that he endangered his children.

**B. The Labels and Legal Bases for OCS’s Findings Are Incorrect and Misleading.**

OCS made six substantiated findings — one “neglect” and one “physical abuse” for each of E.T.’s three children in the car at the time of his DUI.<sup>11</sup> The legal basis OCS listed for each of these six findings, however, is the same: AS 47.17.290(9) and AS 47.10.011(10).<sup>12</sup>

The laws OCS cites are pertinent, but its manner of describing them is incorrect and misleading. The statute OCS alleges E.T. violated, AS 47.17.290(9), is merely a definition — specifically for the term “maltreatment” as that term is used in Chapter AS 47.17.<sup>13</sup> Incidentally, the term “maltreatment” does not appear in the operative provisions of this Chapter; it appears in definitions and in the statement of the Chapter’s purpose.<sup>14</sup>

In the chart included with the substantiated finding, OCS also refers to “[AS] 47.17.290(9) as described in: AS 47.10.011 subsection (10).”<sup>15</sup> But these are separate statutes from separate statutory schemes. The statute AS 47.10.011(10) does not “describe” the maltreatment definition set forth in AS 47.17.290(9). Indeed, the maltreatment definition does not even apply to AS 47.10.011(10) because it is part of a whole other statutory chapter.<sup>16</sup> Rather, AS 47.10.011(10) sets forth one of the bases on which a court may find a child to be “in need of aid” for purposes of the Child in Need of Aid statutes.<sup>17</sup> Both statutes can be pertinent for the Registry, but they do not apply to or describe each other as OCS suggests.

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<sup>8</sup> AS 28.35.030(a)(2).

<sup>9</sup> AS 11.51.100(b).

<sup>10</sup> *Id.*

<sup>11</sup> R. 000001-3.

<sup>12</sup> *Id.*

<sup>13</sup> AS 47.17.290(9).

<sup>14</sup> AS 47.17.010; AS 47.17.290(3).

<sup>15</sup> R. 000001-3.

<sup>16</sup> AS 47.17.290 (limiting definitions to use of those terms “[i]n this chapter”).

<sup>17</sup> AS 47.10.011(10).

It is also incorrect and misleading to label AS 47.17.290(9) or AS 47.10.011(10) as “neglect” or “physical abuse.” Again, AS 47.17.290(9) is the statutory definition for “maltreatment” and AS 47.10.011(10) is risk of harm because of habitual use of intoxicants. Neglect and physical harm are both addressed in different provisions of the Child Protection and Child in Need of Aid statutes.

Setting aside OCS’s inartful articulation of its findings, there are several potential bases for substantiated findings given the facts at issue here. The Child Protection Registry may reflect “substantiated findings under AS 47.10 [Child in Need of Aid] or AS 47.17 [Child Protection].”<sup>18</sup> Chapter AS 47.10 are the laws courts use to determine if a child is a child in need of aid. One of those laws addresses neglect for purposes of the CINA statute:

For purposes of this chapter, the court may find neglect of a child if the parent, guardian, or custodian fails to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development, though financially able to do so or offered financial or other reasonable means to do so.<sup>19</sup>

Another law describes a finding of physical harm for CINA purposes:

For the purposes of this chapter, the court may find physical harm to a child or substantial risk of physical harm to a child if

- (1) the child was the victim of an act described in AS 11.41.100-11.41.250, 11.41.300, 11.41.410-11.41.455, or AS 11.51.100 and the physical harm occurred as a result of conduct by or conditions created by a parent, guardian, or custodian; or
- (2) a negligent act or omission by a parent, guardian, or custodian creates a substantial risk of injury to the child.<sup>20</sup>

And then there is the law OCS cited, providing for a finding that a child is a child in need of aid if the parent’s habitual use of intoxicants poses substantial risk of harm to the child.<sup>21</sup>

The AS 47.17 Child Protection chapter, which establishes the system under which the substantiated findings at issue here are reported and investigated, requires reporting of “child abuse or neglect” and investigation of such reports<sup>22</sup> Within the Child Protection statutes, child abuse or neglect is defined as:

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<sup>18</sup> AS 47.17.040(a).

<sup>19</sup> AS 47.10.014.

<sup>20</sup> AS 47.10.015.

<sup>21</sup> AS 47.10.011(10).

<sup>22</sup> AS 47.17.010.

[T]he 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 that the child’s health or welfare is harmed or threatened thereby.<sup>23</sup>

The term “maltreatment” in this definition is itself a defined term that 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.”<sup>24</sup> The term “neglect” is also separately defined as “failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child.”<sup>25</sup>

### **C. The Undisputed Facts Support a Substantiated Finding of Neglect.**

The fact that E.T. drove his children while intoxicated is sufficient to support a substantiated finding of neglect. Neglect may be found when a parent fails to provide a child with necessary care.<sup>26</sup> Care of a child includes keeping that child safe from unnecessary harm. E.T. did the opposite. By driving intoxicated, he put his children in a situation that threatened substantial, avoidable risk to their safety and wellbeing. This risk is so significant that Alaska law considers it child endangerment and E.T. pled guilty to three counts of that crime. He thus failed to provide necessary care, which constitutes neglect.<sup>27</sup>

### **D. The Undisputed Facts Support a Finding of Substantial Risk of Physical Harm.**

The fact that E.T. drove his children while intoxicated, and that the law considers this child endangerment, is also sufficient to support a substantiated finding of substantial risk of physical harm. This risk can be found if “a negligent act or omission by a parent . . . creates a substantial risk of injury to the child.”<sup>28</sup> It is certainly negligent, if not worse, to drive intoxicated with a blood alcohol level above 0.80 with children in the vehicle. Intoxicated driving is illegal precisely because of the risk of harm it poses to the driver, passengers, and others on the road. Indeed, the Alaska legislature has deemed this behavior criminal child

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<sup>23</sup> AS 47.17.290(3).

<sup>24</sup> AS 47.17.290(9).

<sup>25</sup> AS 47.17.290(11).

<sup>26</sup> AS 47.17.290(11) (“failure by a person responsible for the child's welfare to provide necessary . . . care.”); *see also* AS 47.10.014 (“fails to provide the child with . . . care and control necessary for the child’s physical and mental health and development.”). These are the laws OCS should have listed as the basis for a substantiated finding of neglect.

<sup>27</sup> *See In re KQ*, OAH No. 20-0012-SAN (Health and Social Services 2020) (available online at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6608>) at 21 (driving intoxicated “was neglectful because it placed the children at a substantial risk of harm.”)

<sup>28</sup> AS 47.10.015(2).

endangerment. E.T.’s convictions for DUI and DUI-related child endangerment would therefore warrant summary adjudication on a substantiated finding of substantial risk of physical harm.

Unfortunately, this is not the finding OCS made. Instead, OCS made a finding of “physical abuse” and cited AS 47.10.011(10) as the legal basis for this finding. In its summary adjudication motion, OCS refers to “substantial risk of physical harm,” but its notice to E.T. — the finding on appeal here — does not.<sup>29</sup>

#### **E. The Undisputed Facts Do Not Support a Finding of Physical Harm.**

OCS included three findings of “physical abuse,” but neither AS 47.10 nor AS 47.17 include any reference to this term. Rather, these laws address “physical harm.”

Even if OCS had correctly labelled its findings as “physical harm,” the fact that E.T. drove his children while intoxicated would not by itself support these findings. A child who is a victim of DUI-related child endangerment under AS 11.51.100 can be found to have been physically harmed, but only if actual physical harm resulted from the DUI.<sup>30</sup> Physical harm means physical pain or impairment.<sup>31</sup> E.T.’s convictions do not include any indicia, let alone undisputed facts, indicating that his children experienced physical pain or impairment.<sup>32</sup>

#### **F. The Undisputed Facts Do Not, by Themselves, Support a Finding of Risk of Harm Because of Habitual Use of Intoxicants.**

The law OCS relies on for all of its findings states that a child may be considered a child in need of aid if the parent’s addictive or habitual use of intoxicants causes “substantial risk of harm to the child.”<sup>33</sup> E.T.’s three DUI convictions over several years certainly suggest a pattern of driving while intoxicated. And at least two of those times this behavior put his children at serious risk of harm. But based on the facts established by collateral estoppel from his convictions, it remains speculative whether E.T. is addicted or habitually uses intoxicants. The convictions would support such a finding. But summary adjudication considers the law in light of undisputed facts. Considering only the undisputed facts here — that E.T. drove intoxicated

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<sup>29</sup> Compare R. 000001-3 with Motion for Summary Adjudication at 2-4.

<sup>30</sup> AS 47.10.015(1).

<sup>31</sup> See 7 AAC 54.900(13) (“‘physical harm’ has the meaning given ‘physical injury’ in AS 47.10.990”); AS 47.10.990(28) (“‘physical injury’ has the meaning given in AS 11.81.900(b)”); AS 11.81.900(b)(48) (“physical injury” means a physical pain or an impairment of physical condition”).

<sup>32</sup> Cf. *In re KQ*, OAH No. 20-0012-SAN at 20 (“While OCS is correct that [risk of physical harm] can justify a maltreatment finding, it is error to label it ‘physical abuse.’”), 21 (driving intoxicated “cannot be the sole basis by which it is also (and therefore) ‘physical abuse.’”).

<sup>33</sup> AS 47.10.011(10).

three times, two of which with one or more children in the car — these facts alone are not sufficient to justify substantiated findings under AS 47.10.011(10) as a matter of law.

In its summary adjudication motion, OCS cites to E.T.’s treatment records, including a diagnosis of Alcohol Use Disorder, in the record.<sup>34</sup> But the collateral estoppel effect of E.T.’s convictions does not preclude him from disputing these or other portions of the record. True, E.T. chose not to respond to OCS’s motion. But because that motion is based on collateral estoppel, it may not have been apparent to E.T., particularly as a *pro se* party, that failing to oppose the motion would also result in other portions of the record being treated as undisputed. Accordingly, only the convictions are considered as undisputed facts here. And those convictions alone are insufficient.

#### **G. OCS Did Not Give E.T. Adequate Notice of the Allegations Against Him.**

OCS’s 00/00/2020 substantiated findings gave E.T. notice of its findings, stated that it received a report of maltreatment on 00/00/2020, stated that E.T. was the alleged perpetrator, listed the alleged violations and victims, set forth the text of the statute OCS alleges was violated, and advised E.T. of his appeal rights.<sup>35</sup> While this gave E.T. notice of several important issues, overall the notice was inadequate.

Several months earlier, in a June 11, 2020 decision signed by the Commissioner’s office, a notice substantially similar to E.T.’s was held to be constitutionally inadequate.<sup>36</sup> In particular, the notice in that case did not provide the date of alleged abuse, the action that allegedly violated governing statutes, or the consequences of being placed on the Registry.<sup>37</sup> The decision further noted that OCS “acknowledges the current notice form is deficient, and indicates it intends to amend the [form] Adverse Action letter now that the issue has been squarely addressed.”<sup>38</sup> The decision instructs OCS to “promptly” make this change so that “future notices will contain a brief written summary of the essential facts constituting the abuse, maltreatment, or neglect, including the general date and location, the victim by initial, and the statute violated. . . [as well

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<sup>34</sup> Motion for Summary Adjudication at 2, 4.

<sup>35</sup> R. 000001-5.

<sup>36</sup> *In re NC*, OAH No. 19-0979-SAN (Health and Social Services 2020) (available online at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6562>) at 7-9.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.* at 9.

as] identify the Child Protection Registry by statute and include at least some description of the consequences of appearing on it.”<sup>39</sup>

Five months later OCS issued its notice to E.T. That notice does not include the information that the 00/00/2020 decision ordered OCS to provide in all future notices. E.T.’s notice was thus inadequate for the same reasons set forth in the 00/00/2020 decision. Ms. Scholberg was not ultimately deprived of this information — OCS provided it during the course of this case. But OCS should have provided this information at the outset. Because this matter is being remanded to OCS to modify its substantiated findings, OCS is further instructed to ensure the modified findings provide adequate notice.

#### **IV. Conclusion**

E.T.’s criminal convictions for DUI and DUI-related child endangerment provide undisputed facts that E.T. repeatedly drove his children while intoxicated and that this behavior put his children in danger. Those facts support substantiated findings for purposes of the Child Protection Registry, but not entirely in the manner OCS made those findings. It would be inefficient to proceed with an evidentiary hearing on the facts when portions of the findings themselves are legally deficient. Accordingly, summary adjudication is granted in part and the matter is remanded to OCS to modify its findings as follows:

1. For the findings of “neglect,” summary adjudication is granted that E.T. neglected his children by driving while intoxicated but denied as to AS 47.10.011(10) being the legal basis for this finding. The finding is remanded to OCS to correct the legal citation to AS 47.10.014 and AS 47.17.290(11).
2. For the findings of “physical abuse,” summary adjudication is granted that E.T. posed a substantial risk of physical harm by driving his children while intoxicated, but denied as to labelling this “physical abuse” or to AS 47.10.011(10) as the legal basis for this finding. This finding is remanded to OCS to correctly label it “Substantial Risk of Physical Harm” and correct the legal citation to AS 47.10.015(2).
3. Summary adjudication is further denied as to whether E.T. caused a substantial risk of harm under AS 47.10.011(10) because the undisputed facts alone are not sufficient for this finding. Whether there is a factual basis for a substantiated

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<sup>39</sup> *Id.*



finding under AS 47.10.011(10) remains an open issue. On remand, OCS may consider whether to make additional, separate findings based on AS 47.10.011(10).

4. In modifying its substantiated findings, OCS is instructed to provide adequate notice as set forth in *In re NC*, OAH No. 19-0979-SAN, at 9.

When OCS modifies its findings on remand, E.T. will have another opportunity to appeal.

Dated: July 29, 2021

Signed  
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Rebecca Kruse  
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 13<sup>th</sup> day of September, 2021.

By: Signed  
\_\_\_\_\_  
Name: Christine R. Marasigan  
\_\_\_\_\_  
Title: Program coordinator II  
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[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]