

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF FAMILY AND COMMUNITY SERVICES**

In the Matter of)	
)	
N. E.)	OAH No. 23-0165-SAN
_____)	

DECISION GRANTING SUMMARY ADJUDICATION

I. Introduction

The Office of Children’s Services (OCS) substantiated a finding of maltreatment based on an allegation that F. E. was sexually abused by her father N. E. as defined by AS 47.10.011(7). Accordingly, the agency notified Mr. E. of its intent to list the finding in the confidential child protection registry maintained under AS 47.17.040. Mr. E., through his attorney, appealed the agency’s decision.

In February 2023, City A. Magistrate Judge Judson Adams found by a preponderance of the evidence that Mr. E. had committed the sexual offense that is the basis for OCS’s finding in this case.

Based on this finding, OCS now moves for summary adjudication in this administrative appeal. OCS’s motion is granted because, under the doctrine of collateral estopped, Mr. E.’s commission of the offense at issue has been conclusively established. Accordingly, the substantiated finding of sexual abuse is affirmed, and will remain in the child protection registry.

II. Background

D. D. and N. E. are the parents of F.F. E. Approximately 18 months after she was born they separated but reached an informal agreement regarding the shared custody of their daughter. On January 22, 2023, when F. was three years old, she was eating lunch with her mother after spending a weekend with her father. She reportedly touched herself “in her underwear” and asked her mother to look between her legs.¹ She reportedly stated that she “[didn’t] like Dad’s private parts.”² Ms. D. noticed bruising on her daughter’s legs and felt like “things didn’t look right down there.”³

The following day Ms. D. brought her daughter to the Emergency Room, but F. was too agitated to be evaluated.⁴ Due to the concerns of possible sexual abuse, law enforcement and OCS were notified, and arranged for F. to be examined at a Child Advocacy Center in City B.

¹ Record at 7.
² R. 34.
³ R. 67.
⁴ R. 4,5.

At the Child Advocacy Center, Ms. D. met with medical providers and reported that F.'s behavior changed about two months ago. She described her daughter becoming more aggressive towards her, and less willing to go to her father's home.⁵ Additionally, Ms. D. reported that F. frequently returned from her father's home with a urinary tract infection.

A Child Advocacy Center physician conducted a complete medical evaluation of F. and noted that the child presented with yellow-brown bruising to both shins and bilateral erythema⁶ in the lateral folds next to the clitoral hood.⁷ Erythema was also noted extending from peri-hymenal area to both right and left labia minora, as well as from the fourchette to the perineum.⁸ Two small anal fissures were also identified.⁹ During the exam, F. spontaneously stated that, "Daddy put his fingers in my butt" and pointed to her front genital area and back buttock area.¹⁰ When asked how that made her body feel, she said "It hurt."¹¹ A forensic interview was attempted, but F. was too distracted.

A follow up exam was held at the Child Advocacy Center on January 25, 2023.¹² The genital erythema noted in the prior exam appeared improved, and the anal fissures, healed.¹³ During the evaluation F. was provided an anatomy diagram and identified the female chest as "boobies," female genitalia as a "peepee," and female buttocks as the "poopie."¹⁴ On the male diagram she identified the genitalia as "Daddy's peepee."¹⁵ In reference to her father's "peepee" she stated that "it pained my butt and it really hurt," and that her "poopie hurt."¹⁶ She said that her dad touched her "poopie" and pointed to her father's "pee pee" and said that it did not feel good.¹⁷ F. said that her dad "always do it," "it just hurt me," and that "daddy put his finger in [my] butt" and "dad put his finger into [my] germs."

⁵ R. 69.

⁶ "Erythema." Abnormal redness of the skin or mucous membranes due to capillary congestion (as in inflammation). Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/erythema>.

⁷ R. 67-72.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ R. 80.

¹² R. 101-105.

¹³ R. 103 -104.

¹⁴ R. 101.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

F. was also provided helper dolls. She initially placed them side by side and said they were sleeping.¹⁸ Then she took the male doll she identified as “Daddy” and took off his clothes and said he was “going to the potty.”¹⁹ She took the doll she identified as herself, removed its clothes and said “she was going potty.”²⁰ F. placed the dolls back on the bed and started playing “doctor.”²¹

On January 30, 2023 N. E. was contacted by OCS (with an Alaska State Trooper present), and he denied all allegations.²² He stated that Ms. D. is bipolar, has schizophrenia, does not take her medications, and that she might be “putting this in F.’s head.”

At the conclusion of its investigation OCS determined that F. was the victim of child maltreatment under child protection statute AS 47.17.290(3). More specifically, the agency substantiated a finding of sexual abuse perpetrated against F. by Mr. E. as defined by AS 47.10.011(7).

In response to F.’s disclosures, Ms. D. applied to the City A. Court for a long-term Domestic Violence Protective Order (DVPO).²³ When directed to describe the domestic violence on the petition, Ms. D. wrote:

My daughter’s dad and I broke up in November of 2021. Visits have always been a little off with him and his daughter. She came back to me from his house on the 22nd of January. She had bruising between her genitals, and she didn’t appear ok to me. I took her to the ER where I was directed to a building on Address A. She was interviewed and examined without me there. I was told she made statements about him touching her and hurting her between her legs.²⁴

A hearing on the long term DVPO petition was held on February 16, 2023, before Magistrate Judge Judson Adams. Mr. E. was not present, although it was verified on the record he had been properly served notice of the hearing on January 31, 2023.²⁵ Ms. D. testified briefly. At the conclusion of the evidence Magistrate Judge Adams found, based on the petition and Ms. D.’s testimony, that Mr. E. had more likely than not committed a sexual offense against F.E.

¹⁸ R. 102.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² R. 8, 37.

²³ R. 107-112.

²⁴ R. 108.

²⁵ R. 120.

Accordingly, Magistrate Judge Adams granted the yearlong DVPO and barred Mr. E. from having any contact with F., deeming him a credible threat to her physical safety.²⁶

A copy of Magistrate Judge Adams's signed DVPO was emailed to Mr. E. on February 16, 2023.²⁷ It was also hand delivered to his City B. home and explained to him in person by a City A. Judicial Services Officer.²⁸ Mr. E. did not appeal the order.

III. Procedural History

On February 9, 2023, OCS sent Mr. E. a notice informing him of the agency's substantiated maltreatment finding, and its intention of entering the finding into the child protection registry maintained by the agency. Mr. E. appealed the finding, and this matter was referred to the Office of Administrative Hearings on March 6, 2023.

A telephonic case planning conference was held on March 22, 2023. Agency Representative Jessica Fujimoto participated, as did Mr. E. The matter before this tribunal was explained at length. As there was a related Child in Need of Aid (CINA) matter being litigated in the court system, the parties asked that this appeal be held in abeyance until that matter resolved. Accordingly, status updates were submitted by the parties on June 27 and October 4, 2023, indicating that the CINA matter was ongoing.

On November 1, 2023, attorney Darryl Jones submitted an Entry of Appearance as Mr. E.'s counsel in this matter.

On November 8, 2023, OCS filed a motion for summary adjudication, relying on the Magistrate Judge's sexual offense finding in the DVPO matter.²⁹ Specifically, OCS argues that Magistrate Adams's finding that Mr. E. committed a sexual offense against F. establishes the facts of that offense for purposes of this proceeding, as a matter of law. OCS argues that, because Mr. E. did not contest the facts established by Magistrate Judge Adams, the substantiated finding must be upheld as a matter of law.

On November 24, 2023, Mr. E., through his attorney, filed an opposition to the Motion for Summary Adjudication. He notes that a related criminal investigation is ongoing, and that he has been a willing participant in the investigation. He claims to have submitted to a polygraph test and the collection of his DNA and asserts that the assigned detective has indicated that "no incriminating evidence has been discovered." He argues that the forensic exam of F. did not

²⁶ R. 122-128, 18 USC § 922(g)(8)(C)(i).

²⁷ R. 128.

²⁸ *Id.*

²⁹ Office of Children's Services Motion for Summary Adjudication (November 8, 2023).

confirm a finding of sexual abuse and suggests that Ms. D. could have coached her daughter. He asserts that the substantiation should be overturned, and that he should be allowed supervised visits with his daughter.³⁰

IV. Discussion

OCS seeks summary adjudication in its favor, asserting that Magistrate Judge Adams's order establishes that Mr. E. sexually abused F. as a matter of law. OCS contends that Mr. E. is collaterally estopped from contesting that fact in this proceeding, and that, accordingly, the substantiated finding must be upheld.

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 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.³¹

In this case, OCS's motion for summary adjudication is supported by a recording of the Long Term DVPO hearing, log notes from the hearing, a signed and notarized copy of the petition, and a signed copy of the DVPO. OCS also submits a lists of exhibits referenced in the motion, including the medical exam and OCS investigation.

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[.]"³² 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 47.10.011.³³

³⁰ Visitation orders are outside both the scope of this matter and the jurisdiction of this tribunal.

³¹ 2 AAC 64.250(b).

³² AS 47.17.290(2).

³³ AS 47.17.290(8).

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(7). Per that statute, a child can be found to be “in need of aid” under the CINA statute if “the child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent, guardian, or custodian[.]”³⁴

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. 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.³⁵

C. The Long Term DVPO compels a substantiated finding of sexual abuse in this matter

The doctrine of collateral estoppel is “to prevent parties from again and again attempting to reopen a matter that has been resolved.”³⁶ This doctrine binds the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation.³⁷ The principle of collateral estoppel applies in administrative proceedings as well as to court proceedings.³⁸ In this case, OCS argues that Magistrate Judge Adams’s order should be afforded collateral effect as to Mr. E.’s claims.

The Alaska Supreme Court has stated that there are three requirements for the application of collateral estoppel.³⁹

- (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.

The criteria for application of the doctrine of collateral estoppel are satisfied here. First, OCS is asserting collateral estoppel against Mr. E., who is a respondent to the DVPO. Not only

³⁴ AS 47.17 also expressly defines child abuse or neglect to include sexual abuse, and prior substantiation decisions have noted that this definition is sufficient to form a basis for a child maltreatment finding under AS 47.17.

³⁵ *In re E.O.*, OAH No. 16-1407-SAN (Commissioner of Health & Soc. Svcs. 2017).

³⁶ *Id.*; see also *State, Child Support Enf. Div. v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

³⁷ *Wilson v. Anchorage*, 977 P.2d 713, 726 (Alaska 1999); *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006).

³⁸ See *United States v. Utah Constr. and Mining Co.*, 384 US 394, 422 (1966).

³⁹ *State of Alaska v. United Cook Inlet Drift Association*, 895 P. 2d 947, 950-951 (Alaska 1995).

was Mr. E. a named party in the DVPO action, a return of service in the court file indicated he was served notice of the hearing on January 31, 2023. Accordingly, the first element is met - that the party against whom estoppel is being asserted was a party to the first action.

Second, the issue to be precluded from relitigation in this matter - the sexual abuse of F.F. E. by Mr. E. – is the same issue giving rise to the decision in the DVPO case. The DVPO hearing was held on February 16, 2023. The judge verified that Mr. E. was given proper notice of the hearing and an opportunity to be heard pursuant to AS 18.65.100(b). Had he participated, Mr. E. could have called witnesses, testified in his own defense, and raised the arguments asserted in his opposition. But Mr. E. did not participate.

At the hearing, Magistrate Judge Adams directly addressed an issue central to the finding at issue in this appeal. Under AS 18.66.100(a), a person who has been a victim of a crime involving domestic violence may petition the court for a protective order. Crimes of domestic violence include sexual assault, a general offense more specifically defined by degrees of severity over a span of statutes.⁴⁰ The DVPO issued by the City A. Court found by a preponderance of the evidence that Mr. E. committed a crime of domestic violence against his daughter F., specifically a sexual offense under AS.11.41.⁴¹

Finally, the DVPO was a final disposition on the merits, and one which Mr. E. chose not to appeal. Accordingly, the Court's findings and conclusions in that matter have preclusive effect in these administrative proceedings.

For the substantiated finding in this case to be upheld, OCS must show that Mr. E. committed the sexual abuse of F. The City A. Court's findings and conclusions in relation to the petition for the protective order establish, under the doctrine of collateral estoppel, that Mr. E. committed a sexual offense against F. The commission of a sexual offense against a child under AS 11.41 is sufficient to establish "sexual abuse" for purposes of the child maltreatment statute.

In summary, because the doctrine of collateral estoppel applies to the City A. Court's findings, OCS has met its burden of showing that it is entitled to judgment in this case as a matter of law.

V. Conclusion

⁴⁰ AS 18.66.250(2) referencing AS 11.41.410-11.41.470 or an offense in another jurisdiction whose elements are similar to the elements of an offense under AS 11.41.410 - 11.41.470.

⁴¹ R. 120.

OCS's Motion for Summary Adjudication is granted. Its February 9, 2023 (Case ID 000000) substantiated finding of sexual abuse of F.E. by N. E. is affirmed.

DATED: December 13, 2023.

By: Signed
Signature
Danika Swanson
Name
Administrative Law Judge
Title

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

Adoption

The undersigned, by delegation from the Commissioner of Family and Community 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 10 day of January, 2023.

By: Signed
Name: Chrissy Vogeley
Title: Senior Policy Advisor