

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

In the Matter of	)	
	)	
U K.D	)	OAH No. 19-0970-SAN
	)	
In the Matter of	)	
	)	
U K.D	)	OAH No. 20-0397-SAN
	)	

DECISION

I. Introduction

U K.D is the father of two young children, S and F. On May 6, 2019, OCS received a report that he had maltreated both children. Following an investigation, OCS notified Mr. D on July 31, 2019, that it had made a substantiated finding that he had neglected both children.¹ OCS received another report on December 29, 2019 regarding only S. Following an investigation, OCS notified Mr. D on April 7, 2020, that it had made a substantiated finding that he had neglected S.

OCS has the burden of proof in this case by a preponderance of the evidence. As discussed in detail below it met its burden with regard to the substantiated finding that Mr. D had neglected both S and F on May 5 and 6, 2019. It, however, did not meet its burden with regard to the December 29, 2019 substantiated finding of neglect of S. As a result, OCS's July 31, 2019 substantiated findings of neglect are upheld. However, the April 7, 2020 substantiated finding of neglect is reversed.

II. Facts

A. Introductory Facts

U.D and E.G are the parents of S and F. S was 5 years old in 00/00/2019 and 6 years old in 00/00/2019. F was 2 years old in 00/00/2019 and 3 years old in 00/00/2019.² Mr. D and Ms. G have a very volatile relationship, which

¹ In its July 31, 2019 substantiated finding notice, OCS also made a substantiated finding that Mr. D had placed the children at the risk of mental injury. See OCS Ex. 1. At the beginning of the January 18, 2023 portion of the hearing, OCS withdrew that substantiated finding that was based on risk of mental injury. Accordingly, the "risk of mental injury" component is no longer substantiated and will not be addressed further.

²

AR 7.

is notable for them each having filed multiple petitions for domestic violence protective orders against each other.³ Following two separate incidents in May and December 2019, OCS made substantiated findings that Mr. D had maltreated both S and F by neglecting them on May 5 and 6, 2019, and had maltreated S by neglecting him on December 29, 2019.⁴

B. Procedural History

Mr. D requested a hearing to challenge the substantiated findings as to both incidents. A consolidated hearing was held on both incidents on January 18 and 27, 2023. Mr. D represented himself and testified on his own behalf. He did not present any other witnesses. OCS was represented by Jennamarie Test, one of its Social Services Program Officers. OCS' witnesses were: Georgette Williams, who was the OCS Protective Services Specialist who investigated the incidents; Charles Lee, a City A police officer formerly employed by the City B Police Department; current City B Police Department Officers Megan Swangel and Allen Hild; and Katheryne Calloway, a Protective Services Manager with OCS.

All the parties' exhibits were admitted without objection. The exhibits include OCS' notes of interviews with Mr. D, Ms. G, and B. N. D. - Ms. G' mother; its notes of contacts with both S. and F.; police reports; body camera recordings; and audio recordings of the police contacts that occurred during both the May 5-6 incident, and the December 29 incident.

C. Factual Findings

The following factual findings are made by a preponderance of the evidence and are based upon the testimony presented at the hearing, and the exhibits introduced into evidence. Because this consolidated case separately considers the May and December incidents, each incident is addressed separately below.

1. May 5-6, 2019 incident

Mr. D, Ms. G, and both boys were at the same party the evening of May 5, 2019. Both adults were drinking.⁵ At some point, Mr. D left the party with both boys to return home. Mr. D walked, while the boys rode their bikes.⁶ Mr. D was admittedly intoxicated when he left the party.

³ See AR 49 -100.

⁴ AR 1 -3, 34 - 35.

Ms. Williams' testimony; Mr. D's interview and Ms. G' interview, AR 21, 27. Mr. D's interview, AR 27.

After Mr. D arrived at the home, he was joined by his brother, T.T, who had also been at the party and had also been drinking. During the investigation that followed, Mr. D told the OCS protective services specialist that he had called Mr. T to come over to be the sober caregiver for the children.⁷ He also testified that he called Mr. T to come over so that there would be a sober caregiver for the children.⁸

Ms. G did not return to the home with Mr. D but later, after a phone call with Mr. D, she and her mother went to Mr. D's home.⁹ Ms. G found Mr. D asleep in his bedroom. There was vomit in the bed at the time. She rolled Mr. D over to get him out of the vomit, at which point he woke up.¹⁰ Mr. D was still quite intoxicated and threatened Ms. G.¹¹

Ms. G called the police shortly before midnight on May 5, 2019. They arrived at Mr. D's home and found Ms. G, her mother, and several other people in the yard, while Mr. D and Mr. T were standing on the porch. Mr. D, clad only in his underpants, was threatening to shoot people.¹²

The police took control of the situation. Because Mr. T attempted to interfere with the police, officers placed him in a patrol car and had him perform a breathalyzer test.¹³ His blood alcohol level as tested on the scene with a portable breathalyzer was .086.¹⁴ Mr. T was arrested for disorderly conduct.¹⁵

Mr. D, in his interactions with the police, was visibly severely intoxicated. He revealed he had a loaded gun in his home, but he did not know where the gun was. The police eventually found the loaded gun in Mr. D's jacket, behind the couch, where it was not easily accessible.¹⁶

The children were asleep in the home during this event.¹⁷

⁷ Mr. D's interview, AR 27.

⁸ Mr. D's testimony.

⁹ Ms. G' interview, AR 21.

¹⁰ Ms. G' interview, AR 21.

¹¹ Ms. G' interview, AR 21.

¹² Police body camera footage, AR 171 - 173.

¹³ AR 14 - 15; Officer Lee's testimony.

¹⁴ Audio recording, AR 00175.

¹⁵ AR 151 - 153.

¹⁶ AR 14 - 16; Police body camera footage, AR 171 -173; Officer Lee's testimony.

¹⁷ AR 15.

Mr. D was arrested for disorderly conduct.¹⁸ He was taken to Correctional Center A, where his blood alcohol was .205 when tested with a portable breathalyzer.¹⁹

OCS received a report of harm regarding this incident on May 6, 2019. It investigated the incident and subsequently notified Mr. D on July 31, 2019, that it had made a substantiated finding that he had neglected both S and F. The basis for that substantiated finding was twofold: first, that he was intoxicated while caring for the boys, with no sober caregiver for them, and second, that he had an unsecured firearm accessible to the children.²⁰

2. December 29, 2019 incident

The second part of this case involves an unrelated incident seven months later. That incident began with Mr. D and Ms. G both drinking at a local bar late in the evening of December 28, 2019.²¹ Mr. D opted to have Ms. G drive him home. However, Ms. G first drove to the home of her mother, who was caring for the boys.²²

Ms. G wanted to pick up S and take him with her and Mr. D to Mr. D's home. Mr. D testified that he did not think that it was safe for Ms. G to drive with S in the car because she was intoxicated and told her no.²³ Ms. G nonetheless picked up S and they drove to Mr. D's home. Mr. D again had a loaded gun with him; this time, it was lodged in between the front passenger seat and the center console. S was in the backseat.²⁴

As Ms. G drove, she and Mr. D had a verbal disagreement which resulted in Mr. D attempting to contact the police.²⁵ Mr. D told the police that he called 911 because of his history of conflict with Ms. G and because he was concerned that she would call the police on him.²⁶

¹⁸ AR 148 - 150.

¹⁹ AR 16.

²⁰ AR 009. There was also evidence presented at hearing about the children having access to alcohol. However, that is not listed in either the substantiated finding or the assessment summary. AR 1 -3, 9 - 10.

²¹ Mr. D's interview and Ms. G' interviews, AR 45; Mr. D's testimony.

²² Mr. D's interview, AR 45; Mr. D's testimony.

²³ Mr. D's testimony and his interview, AR 45.

²⁴ AR 106, 109. Officer Swangel's testimony; Officer Hild's testimony.

²⁵ Mr. D's testimony. The testimony is imprecise whether he tried to call 911 or used the Apple\ SOS feature. Regardless, Officer Hild's supplemental police report references Mr. D contacted 911 on his Apple watch, AR 109.

²⁶ AR 109.

When they arrived at Mr. D's home, another altercation ensued which resulted in Ms. G calling 911 at approximately 1:16 a.m. on December 29. Ms. G reported that she called 911 because Mr. D had pushed her and was refusing to return her car keys.²⁷

After the police arrived, they determined that Ms. G had been driving and had her perform a field sobriety test and a preliminary blood alcohol breath test. She registered .098 breath alcohol on the breathalyzer.²⁸ She was arrested for DUI and taken to Correction Center A, where a DataMaster breath alcohol test taken at 2:53 am., returned a result of .068.²⁹

When the police spoke to Mr. D about how he, Ms. G, and S had arrived at his home, he told them that Ms. G was intoxicated, that he did not think she was not safe to drive with S in the car, and that he told her that they should not be picking up S and taking him to his home. He told the police officer that Ms. G then told him to "'shut the f... up. I'm driving. It's my car,'" and that they argued in the car while she drove to his home.³⁰

The City B Police reported the incident to OCS.³¹ OCS investigated the incident and made a substantiated finding that Mr. D had maltreated S in the form of neglect because he "allowed" Ms. G to drive with S in the car when she was intoxicated, and he had a loaded gun in the vehicle.³² OCS notified Mr. D of its substantiated finding of neglect on April 7, 2020.³³

III. Discussion

The OCS findings that Mr. D is contesting through this proceeding are substantiated findings of child maltreatment under AS 47.17, Alaska's Child Protection statute. That statute creates a reporting and investigating mechanism for suspected child abuse and neglect, with the purpose of "protect[ing] children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment."³⁴

The Child Protection statute broadly defines "child abuse or neglect" to mean "the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a

²⁷ G' interview, AR 45; AR 106.

²⁸ AR 104.

²⁹ AR 104.

³⁰ AR 106.

³¹ AR 108.

³² AR41-42.

³³ AR 34-35.

³⁴ AS 47.17.010.

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[.]"³⁵

OCS's July 31, 2019 (May 5-6, 2019 incident) and April 7, 2020 (December 29, 2019 incident) notices to Mr. D each informed him that it had made a substantiated finding of "child maltreatment under Alaska Statute (AS) 47.17.290(9) and described in AS 47.10.011" The notices further went on to notify him that the specific finding was of child maltreatment based on "neglect" under AS 47.10.011(9).

AS 47.17.290, is the "Definitions" section of the Child Protection statute, and the cited subsection defines "maltreatment" as any "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" Alaska's Child in Need of Aid statute.³⁶ AS 47.10.011(9), referred to in OCS's notice, is a portion of the Child In Need of Aid statute. It refers to "conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect"³⁷ Neglect is then defined in the Child in Need of Aid statutes as being when a "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."³⁸

OCS has the burden of proof in this case by a preponderance of the evidence. This means that for its substantiated finding regarding May 5-6, 2019, to be upheld, it must show that Mr. D neglected S and F on that date. It means that for its substantiated finding regarding December 29, 2019, it must show that Mr. D neglected S on that date.

A. May 5-6, 2019

The evidence in this case shows by a preponderance of the evidence that Mr. D was highly intoxicated the evening of May 5 through the early morning of May 6, 2019. Mr. D, who was admittedly intoxicated, left a party the evening of May 5, 2019, walking home while intoxicated and his two young children, ages 2 and 5, with him. He was then at his home with the children without any other adults present until Mr. T joined him.

³⁵ AS 47.17.290(3).

³⁶ AS.47.17.290(9).

³⁷ AS 47.10.011(9).

³⁸ AS 47.10.014.

Mr. D argued that he asked Mr. T to come to the home because he needed a sober caregiver for the boys. However, the evidence shows that when Ms. G called the police and they showed up at the home, Mr. T was intoxicated as demonstrated by his behavior interfering with the responding officers to the extent that they placed him in a patrol car to remove him from the situation and breathalyzed him. The portable breathalyzer test results showed that Mr. T had a blood alcohol level of .086.

A person with a blood alcohol level of .08 is intoxicated to the point that they may not legally drive.³⁹ The portable breathalyzer test administered to Mr. T therefore showed he was above that limit. Mr. D argued that the portable breathalyzer results could not be relied upon because it is less accurate than the testing machines used at the police stations.

In addressing Mr. D's argument, it should be noted that the stringent evidentiary rules applicable to trial court proceedings do not apply to these administrative hearings.⁴⁰ Instead, the standard is whether the evidence is "of the type on which a reasonable person might rely in the conduct of serious affairs."⁴¹

In 1996, the Alaska legislature passed AS 28.90.020, which presumes that results from a blood alcohol chemical test "administered by a properly calibrated instrument approved by the Department of Public Safety" "is not affected by the instrument's working tolerance." The Alaska Supreme Court discussed the background of this statute and the applicable case law in *Barneby v. Dept. of Administration, Div. of Motor Vehicles*.⁴² As discussed in that decision, the pertinent statute, AS 28.90.020, allows breathalyzer results from a "properly calibrated instrument approved by the Department of Public Safety" to be used, regardless of whether there is an inherent margin of error.⁴³ No evidence was presented that the portable breathalyzer used by City B Police was either not properly calibrated or was not approved by the Dept. of Public Safety. Accordingly, the portable breathalyzer results of .086 was sufficient to establish that Mr. T was legally intoxicated when he was at Mr. D's home with the children. In addition, Mr. T's interference with the police demonstrates that he was impaired: a person fully in control of his faculties would not have had to be sequestered by the police due to his interference.

³⁹ AS 28.35.030(a)(2).

⁴⁰ 2 MC 64.290(b).

⁴¹ 2 MC 64.290(a)(l).

⁴² *Barneby v. Dept. of Administration, Div. of Motor Vehicles*, 473 P.3d 682 (Alaska 2020).

⁴³ *Barneby*, pp. 690 -691.

The facts of this case show that Mr. D was an intoxicated person who was caring for a two-year-old and a five-year-old on May 5-6, 2019. He had the children in his care while he was admittedly intoxicated without any other adult being present from the time he left the party until Mr. T arrived at his home. When Mr. T arrived later at Mr. D's home, he too was intoxicated. In other words, Mr. D did not have a non-impaired person of a sufficient age to care for the children from the time he left the party onward.⁴⁴ Even if Mr. T had not been intoxicated, that would not excuse the earlier part of the night when Mr. D left the party with the children until the time Mr. T arrived.

For OCS to prevail, it must prove that Mr. D "fail[ed] to provide the [his boys] with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the [their] physical and mental health and development."⁴⁵ The evidence shows, by a preponderance of the evidence, that Mr. D's intoxication when he was responsible for his children's care resulted in him not providing adequate care and control necessary for their physical health. As a result, OCS met its burden of proof and established that Mr. D "neglected" his children on May 5-6, 2019.⁴⁶

B. December 29, 2019

As to the December 2019 incident, OCS must separately prove that Mr. D neglected S during that event. While the evidence of that incident is concerning, OCS did not meet its burden of showing that Mr. D committed conduct constituting neglect.

The evidence shows that Ms. G was driving while impaired with S in the car. Mr. D was a passenger in the vehicle. His gun was located in the vehicle, lodged between the front seat and the console. What is notable about this incident in the context of the neglect finding is that Mr. D was not driving and did not choose to pick S up. To the contrary, both the police report and his testimony support a finding that he protested Ms. G's decision to do so, and she brushed aside his concerns. Mr. D's testimony was that he told her

⁴⁴ AS 11.51.110 creates criminal liability when a person is "impaired by an intoxicant" when caring for a child under 10 years old and there is no unimpaired person 12 years or older "to care for the child." Although this is not a criminal case, that statute makes it clear that an intoxicated person cannot care for a child under 10 years without there being an unimpaired person, who is at least 12 years old, present.

⁴⁵ AS 47.10.014.

⁴⁶ OCS's substantiated finding and preliminary analysis also references there being a loaded gun in the home as a basis for its finding. However, Officer Lee's credible testimony was that the weapon was not easily accessible. Accordingly, this does not furnish an independent basis for OCS's substantiated finding.

no and was disregarded. There was no evidence controverting his testimony. Given the consistency of his testimony with his statements to the police at the time of the incident, and the lack of any controverting evidence, his testimony was credible.

Ms. G was in control of this situation. Mr. D was not. His credible testimony, coupled with his statements to the police, shows that he did not acquiesce to the situation. It is difficult to contemplate how he could have corrected the situation, other than physically taking the child from Ms. G, which would have its own repercussions, especially given the volatile nature of their relationship. It is entirely foreseeable that him trying to stop Ms. G from taking S in the car could have resulted in an allegation that domestic violence occurred in front of the child. And, his getting out of the car and calling 911 would most likely not have corrected the situation. As such, he cannot be deemed liable for the transport of S, which also included there being a loaded gun in the vehicle, because the situation was created by another party, and he did not have the ability to rectify it. Consequently, OCS has not met its burden of proof with regard to the December 29, 2019 incident.

IV. Conclusion

Because OCS met its burden of proof showing that Mr. D neglected S and F on May 5 -6, 2019, the substantiated findings issued on July 31, 2019 are affirmed. OCS, however, did not meet its burden of proof showing that Mr. D neglected S on December 29, 2019. Its substantiated finding issued on April 7, 2020 is reversed.

Dated: March 13, 2023

Signed

Lawrence A. Pederson
Administrative Law Judge

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 18 day of April, 2023.

Signed

Chrissy Vogeley
Special Assistant II

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