

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

In the Matter of	)	
	)	
N.D	)	OAH No. 21-0409-SAN
_____	)	

DECISION UPON SUMMARY ADJUDICATION

I. INTRODUCTION

OCS issued substantiated findings of sexual abuse by N.D and E Q.T of their two young children based on both parents engaging in and photographing sexual acts with teenage boys who had been sent to live in their care. Ms. D appealed. Meanwhile, Ms. D testified in a proceeding in superior court regarding the children's removal from her home. Based on the superior court's order on removal, OCS filed for summary adjudication on its substantiated findings here. As discussed below, that court order does not provide evidence to support summary adjudication, nor is it conclusive under the related doctrines of res judicata and collateral estoppel. The admissions Ms. D made in testimony leading to the court's order, however, is evidence that can support summary adjudication. These admissions provide facts demonstrating that she sexually abused teenage children in her household, creating a presumption that her own young children were at substantial risk of sexual abuse as well. Ms. D did not counter this evidence with any contradictory evidence of her own, leaving the facts undisputed. Those undisputed facts support OCS's substantiated findings as a matter of law and therefore summary adjudication is granted.

II. UNDISPUTED FACTS

OCS maintains a child protection registry of any "substantiated findings under AS 47.10 [Child in Need of Aid] or AS 47.17 [Child Protection]." ¹ The registry is available as part of background checks for limited purposes when a person seeks to provide certain services, such as childcare. ²

On February 11, 2021, OCS issued substantiated findings that N.D and E Q.T placed their children M (then age 4) and F (then age 2) at substantial risk of sexual abuse. ³ These

¹ AS 47.17.040(a).

² AS 47.17.040.

³ R. 000001-3, 000006.

findings were based on actions that led Mr. Q.T to be charged with sexual abuse and exploitation of minors.⁴

OCS also filed a child in need of aid (“CINA”) petition on behalf of M and F, asserting the children were in need of aid under AS 47.10.011(7), (8), and (11) — sexual abuse, mental injury, and risk of harm because of parent’s mental illness.⁵ In a May 11, 2021 order, the court found M and F to be in need of aid, but only under AS 47.10.011(8), which is for mental injury.⁶

More recently in the ongoing CINA matter, the court held a three-day hearing to review its findings on removing the children from Ms. D’s home (“Removal Review”). The court ultimately found that it was contrary to the children’s welfare to return to Ms. D’s home.⁷

During the hearing, Ms. D admitted to numerous facts, including the following:

- During the winters of 2016 to 2019, teenagers from State A came to live with Ms. D and Mr. Q.T to be mentored on “how the changes during those [teenage] year worked” and “to avoid the body shaming and the poor self-image.”⁸ They lived together in a 10 by 12 foot tent for two winters and a 12 by 14 foot cabin for the last winter.⁹ All members of the household were generally nude at all times.¹⁰
- Starting in January or February 2017, Ms. D began sexual relations with one of the visiting boys, who was sixteen-years-old at the time. This continued in 2018 and 2019.¹¹
- Another boy who came to live with the family was younger than sixteen in 2017, though Ms. D did not know his exact age.¹² A third teenager came during the 2017-18 and 2018-19 winters, but not in 2016-17.¹³
- Mr. Q.T had sexual relations with all three teenagers while they were living with the family, starting in 2016. Ms. D was aware of this and considered it part of mentoring the teens.¹⁴

⁴ R. 000007-8.

⁵ R. 000056.

⁶ R. 000103.

⁷ R. 000134-142.

⁸ R. 000225, 000227-28. Ms. D’s children, M and F, share the same first name as two of the teenage boys, also M and F. R. 000225. To avoid confusion, the older M and F are referred to as teen boys, not by name. Any references to M and F are to Ms. D’s young children.

⁹ R. 000216, 000225.

¹⁰ R. 000216.

¹¹ R. 000225.

¹² *Id.*

¹³ *Id.*

¹⁴ R. 000227-28.

- M and F were present when Ms. D and Mr. Q.T had sexual relations with the teenage boys.¹⁵
- Ms. D took a photo of Mr. Q.T and the teenage boys ejaculating.¹⁶ She took the photo in the tent, with M and F present, and the photo shows M crawling across the feet of the teenage boys and Mr. Q.T.¹⁷ Ms. D estimated that M was two at the time.¹⁸

OCS moved for summary adjudication based on the superior court's Removal Review

order. Ms. D submitted a response.

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.¹⁹ The facts OCS has alleged here — if established — provide numerous potential bases for affirming findings of sexual abuse. The question for summary adjudication is whether there are *undisputed* facts that support these findings. As the party moving for summary adjudication, OCS “is obligated to point to undisputed facts or admissible evidence establishing a *prima facie* case entitling the movant to judgment as a matter of law.”²⁰ This does not mean that OCS needs to present evidence to support all facts it has alleged or would seek to prove in a hearing on the merits. It means that OCS needs to provide evidentiary support of enough facts to support a legal conclusion that OCS's substantiated findings of sexual abuse should be affirmed. To counter that showing, Ms. D cannot merely deny facts; she must “show, by affidavit or other evidence, that a genuine dispute exists.”²¹

¹⁵ R. 000226; see also Ms. D's response to OCS's summary adjudication motion (“The sexual abuse that occurred with the teenagers . . . [was] sometimes witness by Ms. D's children”; “Ms. D understands that her children have experienced trauma by witnessing the sexual abuse of the teenagers”).

¹⁶ In her testimony, Ms. D read the following from her therapy notes:

N explained that she is worried that photos of her with the sixteen-year-old boys are going to be an issue along with the photo she took of her husband ejaculating with the sixteen-year-old boys. N's biological children were also in the room when the adults were having sexual relations with the sixteen-year-olds.

R. 000222. When asked to identify any inaccuracies, Ms. D did not deny taking the photo of Mr. Q.T and the teenage boys ejaculating. R. 000222-23.

¹⁷ R. 000216, 000224.

¹⁸ R. 000216.

¹⁹ 2 AAC 64.250(a).

²⁰ *Capolicchio v. Levy*, 194 P.3d 373, 380 (Alaska 2008).

²¹ 2 AAC 64.250(b).

While this motion addresses testimony and court orders from Ms. D’s related CINA case, this case is limited to the specific, narrow issue of substantiated findings for purposes of the child protection registry. The sole issue here is whether abuse reported in December 2020 is supported by facts. If facts do show past abuse — or in this case, that past acts created a “substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child’s parent”²² — then OCS’s findings are substantiated. Substantiated findings are recorded in a child protection registry. That registry is not publicly available. It is used only for background checks for certain types of jobs.

A. Court Orders and Briefs are Not Evidence of Stated Facts.

Both parties here struggle with providing evidence. For its motion, OCS relies on the superior court’s recent Removal Review order, arguing that “[t]his order provides sufficient evidence for this tribunal to affirm the findings of sexual abuse as there is nothing left to dispute.”²³ OCS then relies on Ms. D’s testimony from the court’s Removal Review hearing, but by using the court’s order as evidence of this testimony.

A court order has very limited evidentiary value. An order can be evidence of court proceedings and actions taken by a court. And, as discussed below, actions taken by a court that are a final judgment can have an impact on other proceedings. But when facts are presented to a court, a resulting order is not evidence of those facts; the evidence is what was presented to the court. Here, the Removal Review order recounts Ms. D’s testimony and makes findings based on it, but it is not itself evidence of the facts Ms. D provided. Ms. D’s testimony is the evidence. Because OCS was relying on Ms. D’s testimony — but in the wrong form, by pointing to the court order as evidence — OCS was asked to provide recordings of Ms. D’s testimony. That testimony is now in the record and, as discussed below, is evidence that can support summary adjudication.

For her part, Ms. D did not provide any evidence that responds to OCS’s motion. She submitted an unsigned brief denying some facts and legal conclusions, many of which OCS had merely provided as procedural history. A brief is not evidence. And mere denials, without supporting evidence such as a sworn affidavit, cannot defeat summary adjudication.²⁴ Much of

²² AS 47.10.011(7).

²³ Summary Adjudication Motion at 4.

²⁴ 2 AAC 64.250(b).

Ms. D’s brief focuses on her current mindset and justifying her role in what she herself describes as “sexual abuse that occurred with the teenagers.” She also attached an article and book excerpt on domestic violence to her brief, along with an assessment Ms. D filled out on domestic violence. None of this is evidence about whether Ms. D did or did not commit sexual abuse. Ms. D offers that “[i]f the only thing that matters to the court is whether or not these actions occurred . . . then I expect this response will be not be successful.” Whether Ms. D committed certain acts is indeed the central issue here. This is an appeal of substantiated findings of child abuse. Substantiated findings are based on past conduct — specifically, whether abuse reported in December 2020 is substantiated. That inquiry looks only at whether alleged acts by Ms. D did occur. Other proceedings related to Ms. D and her children might look to current or future conditions. For example, the Removal Review examined whether it would be contrary to the children’s welfare, as of March 2023, to be placed in Ms. D’s home. The court thus considered not just Ms. D’s past conduct, but her efforts since allegations of abuse first surfaced.²⁵ The issue here is much narrower. Ms. D may very well have made great strides in her own personal growth, but that does not change past actions. It is the occurrence of past acts, and only those past acts, that is the issue here.

B. The Removal Review Order is not a Final Judgment and Therefore Res Judicata and Collateral Estoppel do not Apply.

As part of its reliance on the Removal Review order, it appears OCS is arguing that the court’s factual findings and legal conclusions should be conclusive here — presumably under the doctrines of res judicata or collateral estoppel. Under res judicata, a party may not re-litigate a cause of action that has already been resolved by a final judgment on the merits in a matter involving the same parties.²⁶ Collateral estoppel similarly bars a party from re-litigating an issue that was resolved against it in a final judgment on the merits.²⁷

²⁵ R. 000135-41.

²⁶ See, e.g., *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006) (“The doctrine of res judicata ‘provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, (3) in a dispute between the same parties (or their privies) about the same cause of action.’”).

²⁷ *State v. United Cook Inlet Drift Ass’n*, 895 P.2d 947, 950–51 (Alaska 1995) (“(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.”).

A critical element for both res judicata and collateral estoppel is that a claim or issue has been resolved by a final judgment on the merits. A court generally enters final judgment at the conclusion of a case. An interim order that is not immediately appealable is not a final judgment and thus res judicata or collateral estoppel would not apply to such an order.²⁸ OAH has previously treated a court order finding children to be in need of aid to be akin to a final judgment for purposes of collateral estoppel, even though it is not actually a final judgment.²⁹ But OCS is not relying on the court's need of aid finding here. Indeed, that order found M and F to be in need of aid based solely on mental injury, and OCS's substantiated findings for purposes of the child protection registry are based on sexual abuse. For this motion, OCS is instead relying on the Removal Review order, which held that the children should continue to be removed from Ms. D's home. This order has none of the trappings of a final judgment. It did not follow final conclusion of the CINA matter. It was not immediately appealable. It did not make any final resolution — it merely found that removal should continue for now. The order is not a final judgment and nor in any way similar to a final judgment. Because it is not a final judgment, res judicata or collateral estoppel do not apply.

C. Ms. D Admitted to Sexual Abuse of Children in the Household, Creating a Presumption that Her Own Children Were at Substantial Risk of Sexual Abuse.

What OCS *can* rely on from the Removal Review proceedings are admissions Ms. D made in her testimony.³⁰ For purposes of establishing sexual abuse, Ms. D made two key admissions. The first is that she had sexual relations with a sixteen-year-old while he was living with her family for months at a time to be mentored.³¹ The second is that Ms. D took a photo of

²⁸ See, e.g., *Conservatorship Est. of K.H. v. Cont'l Ins. Co.*, 73 P.3d 588, 595 (Alaska 2003) (interim order that is not appealable is not a valid final judgment on the merits for purposes of res judicata); *Krossa v. All Alaskan Seafoods, Inc.*, 37 P.3d 411, 418 (Alaska 2001) (order granting partial summary adjudication not a final judgment for purposes of collateral estoppel); cf. *McAlpine v. Pacarro*, 262 P.3d 622, 625-26 (Alaska 2011) (res judicata does not apply to final child custody order because parents may seek to modify such an order).

²⁹ See, e.g., *In re ST*, OAH 21-0372-SAN (Commissioner Health and Social Services 2016) (granting summary adjudication because superior court CINA finding collaterally estopped re-litigation of the same issues for purposes of the Child Protection Registry); *In re DO and In re TX*, OAH 15-1531-SAN and 15-1554-SAN (same) (Commissioner Heath and Social Services 2016).

³⁰ Cf. *Riley v. N. Com. Co., Mach. Div.*, 648 P.2d 961, 966 (Alaska 1982) ("Summary judgment . . . may be based on deemed admissions if such facts are dispositive."); *Wilson v. Pollet*, 416 P.2d 381, 384 (court correctly relied on admission in affidavit for ruling on summary judgment motion).

³¹ R. 000225, 000227-28.

teenage boys ejaculating with Mr. Q.T at a time when at least two of the boys were under the age of 18.³²

Ms. D has not disputed these facts with evidence. As discussed above, Ms. D submitted an unsigned brief, but no sworn affidavit or other evidence contradicting her prior testimony. This brief acknowledges Ms. D participated in sexual abuse of the teenagers living in her care and that “her children have experienced trauma by witnessing the sexual abuse of the teenagers.”³³ The brief also asserts she “did not take pornographic photos of minors,” but whether a photo is “pornographic” or its subject are “minors” are largely legal conclusions. To the extent Ms. D is attempting to deny facts she previously admitted, a mere denial, without supporting evidence, is not sufficient to defeat summary adjudication.³⁴ An unsupported denial is particularly unpersuasive here where the evidence OCS has presented is Ms. D’s testimony, provided under oath, in a proceeding where she was represented by counsel. Ms. D has not demonstrated that these admitted facts are in dispute.

Those undisputed, admitted facts — sexual relations with a sixteen-year-old in her care and photographing children masturbating — demonstrate that Ms. D sexually abused the teenage boys. “Sexual abuse” is defined as the conduct described in certain criminal statutes.³⁵ One of those statutes is unlawful exploitation of a minor, which includes photographing a child under 18 years of age engaged in masturbation.³⁶ Ms. D admitted to photographing children under 18 while they were masturbating.³⁷ That undisputed fact is sufficient to determine that Ms. D engaged in unlawful exploitation of a minor, which in turn constitutes sexual abuse.

Another statute incorporated into the definition of “sexual abuse” makes it a crime for a person to have sexual contact with a child of 16 or 17 when a person (1) is at least 18

³² R. 000216, 000222-24. Ms. D testified that the photo was taken in the tent, which the family lived in with the teenage boys during the 2016-2017 and 2017-2018 winters, and that as of early 2017, at least one of the boys was sixteen and one was younger. R. 000216, 000225.

³³ Ms. D’s Response ¶¶ 7-8.

³⁴ Ms. D’s Response ¶ 6; 2 AAC 64.250(b).

³⁵ AS 47.10.990(33) (“sexual abuse” means the conduct described in AS 11.41.410 – 11.41.460; conduct constituting “sexual exploitation” as defined in AS 47.17.290, and conduct prohibited by AS 11.66.100--11.66.150”). Ms. D pointed out in her brief that she has not been criminally charged. Whether a person is charged with a crime is largely dependent on prosecutorial discretion. The fact that prosecutors have not yet charged Ms. Cherry with a crime does not show that she did not engage in conduct that *could* be charged as a crime. It is the conduct, not the existence or absence of criminal charges, that determines whether a finding is substantiated for purposes of the child protection registry.

³⁶ AS 11.41.455.

³⁷ Ms. D has denied the photo was uploaded or sold, but that is not a necessary element for unlawful exploitation of a minor; taking the photograph alone constitutes unlawful exploitation. AS 11.41.455.

themselves; (2) is at least three years older than the victim; and (3) “occupies a position of authority in relation to the victim.”³⁸ “Position of authority” includes a position substantially similar to a teacher, youth leader, or babysitter.³⁹ Alaska courts have held that an adult living in a household who assumes authority over a child and is a primary caregiver is also in a “position of authority.”⁴⁰ Ms. D admitted to having sex with one boy when he was 16 and 17. Born in 1989, Ms. D was both over 18 and more than three years older than her victim at the time.⁴¹ She was also in a position of authority over this child. The teen was living with Ms. D and Mr. Q.T at the time, under their sole care, in a remote location, much like the primary care givers courts have found to be in positions of authority — or at a minimum substantially similar to a babysitter, which is a position of authority by statute. The teen was also sent to live with Ms. D and Mr. Q.T for purposes of mentorship, similar to what a teacher or youth leader might provide. The facts here thus demonstrate that Ms. D was in a position of authority when she had sexual contact with a 16-year-old. This constitutes sexual abuse under a criminal statute, which in turn constitutes sexual abuse for purposes of the child protection registry.

Accordingly, there are at least two bases for finding Ms. D sexually abused the teenage boys in her household based on undisputed facts — by photographing the teens masturbating and by having sexual contact with a teen that was in her care. The Alaska Supreme Court has held that sexual abuse of one child in a household creates a presumption that the other children in the household are at substantial risk of sexual abuse themselves.⁴² Thus facts demonstrating sexual abuse of any one child in her household provide sufficient facts to show all children were at substantial risk of sexual abuse. Because Ms. D sexually abused teenage boys who were living in her household, M and F were at substantial risk of sexual abuse themselves. That substantial risk of sexual abuse forms the basis for OCS’s substantiated findings. Accordingly, the substantiated findings should be affirmed as a matter of law.

IV. CONCLUSION

³⁸ AS 11.41.440(a)(2). This definition includes other examples of positions of authority.

³⁹ AS 11.41.470(6).

⁴⁰ *Wurthmann v. State*, 27 P.3d 762, 766 (Alaska Ct. App. 2001) (live-in boyfriend who assumed authority over child and acted as a primary caregiver was in a position of authority for purposes of criminal sexual abuse statute).

⁴¹ R. 000006.

⁴² *Rowan B., Sr. v. State, Dep't of Health & Soc. Servs.*, 320 P.3d 1152, 1158 (Alaska 2014) (“when a trial court finds a parent has sexually abused one child in the household, the court may presume that other children in the household are at substantial risk of sexual abuse.”).

Ms. D's own, undisputed factual admissions demonstrate that she placed M and F at substantial risk of sexual abuse. OCS's substantiated findings should be affirmed as a matter of law. OCS's motion for summary adjudication is granted.

Dated: June 12, 2023

Signed

Rebecca Kruse
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 13th day of July, 2023.

By: Signed
Name: Chrissy Vogeley
Title: Special Assistant II

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