

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

In the Matter of	)	
	)	
K.N	)	OAH No. 22-0667-SAN
_____	)	

DECISION

I. Introduction

K.N is the mother of a minor child O. She had an altercation with her husband on April 28, 2022, which resulted in the Alaska State Troopers being called. After the Office of Children’s Services (OCS) became aware of the April incident, OCS subsequently made two substantiated findings of child maltreatment against Ms. N. Those substantiated findings consisted of Ms. N maltreating her daughter by (1) placing her daughter at a substantial risk of mental injury by exposing her to domestic violence, and (2) neglecting her daughter by her substantial impairment “by the addictive or habitual use of an intoxicant” that resulted in her daughter being placed “in a substantial risk of harm.” Ms. N appealed.

The evidence in this case demonstrates by a preponderance of the evidence that Ms. N placed her daughter at a substantial risk of mental injury by exposing her to domestic violence. However, OCS did not show by a preponderance of the evidence that Ms. N was substantially impaired “by the addictive or habitual use of an intoxicant” placing her daughter “in a substantial risk of harm.” Accordingly, the substantiation for child maltreatment due to placing her daughter at risk of mental injury is affirmed. However, the substantiation for child maltreatment in the form of neglect is reversed.

II. Course of Proceedings

OCS sent Ms. N notice of June 20, 2022, that it had made two substantiated findings she maltreated her minor daughter O based upon a report that it received on April 28, 2022. In its notice, OCS stated that it found that she had placed her daughter at a risk of mental injury, and that she had neglected her daughter.¹

Ms. N appealed OCS’s substantiated findings of child maltreatment on July 6, 2022. OCS subsequently filed a motion for partial summary adjudication, which was premised upon

¹ Agency Record (AR) 1 - 4.

Ms. N's criminal conviction for a violation of AS 11.41.230(a)(3), Assault in the Fourth Degree, a Class A misdemeanor. OCS's motion for partial summary adjudication was denied.

Ms. N's case proceeded to hearing. The hearing was held on May 4 and 17, 2023. Ms. N represented herself. OCS was represented by Kimberly Ford, a Program Coordinator 2 with OCS.

III. Facts

Ms. N has several children. This case only involves O. Ms. N is married to D. N.. He is not O's father. Mr. N has a substance abuse problem that has caused him significant legal problems. His criminal history includes convictions for vehicle theft, drug possession charges, weapon charges, and forgery.²

Ms. N and Mr. N were not living together on April 28, 2022. Ms. N asked Mr. N to come over. Mr. N was under the influence of methamphetamine at the time.³ O, who was 12 at the time, was present in the home. Ms. N and Mr. N had an altercation that resulted in Ms. N making a 911 call to the Alaska State Troopers at 4:28 a.m. on the 28th. The parties' accounts of the events that resulted in that call substantially diverge.

A. The Troopers' Reports and Testimony

The Troopers received a 911 call from Ms. N stating that Mr. N was high on methamphetamine and had gotten physical with her, and that he had left the residence. The Troopers went to Ms. N's apartment. She initially refused to open the door and said that Mr. N was gone. She then opened the door and Trooper Oncay smelled the odor of alcohol coming from Ms. N. Ms. N was crying and said that she was not hurt.⁴

Trooper Hudson located Mr. N in a neighboring apartment. He was only wearing basketball shorts and boxer shorts. He had multiple fresh scratches on his face, including at least one that had broken the skin. Mr. N told Trooper Hudson that he and Ms. N got into an argument, where she hit him, scratched him, and chased him with a knife. Mr. N got out of the apartment and went to a neighbor's apartment.⁵ The Troopers took photos of Mr. N that show abrasions on his face.⁶

² Mr. N's testimony.

³ Mr. N's testimony.

⁴ Trooper Oncay's testimony; AR 22 – 23.

⁵ Trooper Hudson's testimony; AR 24.

⁶ AR 26 – 32.

Trooper Oncay asked Ms. N why she chased Mr. N with the knife and asked what happened to the knife. Ms. N did not directly respond, started to cry, and asked if she needed a lawyer.⁷

O came to the door while Trooper Oncay was speaking to Ms. N. Trooper Oncay did not observe any injuries on O. Trooper Oncay interviewed O outside Ms. N's presence. She told Trooper Oncay that she woke up to hear her mother and Mr. N arguing. She thought she heard Ms. N hitting Mr. N and heard Mr. N saying that Ms. N was threatening him with a knife. O stated that she opened her door and saw Ms. N swinging a knife at Mr. N, and tried to intervene, where Ms. N elbowed her out of the way. After Mr. N left the residence, O saw Ms. N stab the door repeatedly. O said that Ms. N was the aggressor. While O was speaking to the Trooper, she repeatedly stated that she did not want her mother to get into trouble. O was able to point out the knife to the Trooper, who took it into evidence. He took photographs showing stab/puncture marks in the door.⁸ Trooper Oncay testified that O told him that Ms. N came home intoxicated earlier in the night; this factual assertion is not contained in Trooper Oncay's written report.⁹

Ms. N was subsequently arrested. O was present. Trooper Sergeant Stuart observed Ms. N being manic. She was hysterical, screaming and yelling during the process, in a manner that was more than he usually observed during an arrest.¹⁰ Trooper Oncay also observed Ms. N being extremely upset.¹¹

B. Criminal Charges

Ms. N was criminally charged based upon the events of April 28, 2022. She was charged with two counts of violating AS 11.41.220(a)(1)(A), Assault in the Third Degree, a Class C felony, two counts of violating AS 11.41.230(a)(1), Assault in the Fourth Degree, a Class A misdemeanor, and one count of violating AS 11.46.486(a)(1), Criminal Mischief in the Fifth Degree, a Class B misdemeanor.¹² Based upon her guilty plea, she was convicted of one count of violating AS 11.41.230(a)(3), Assault in the Fourth Degree, a Class A misdemeanor.¹³

C. Ms. Simmerman's Testimony

⁷ Trooper Oncay's testimony; AR 22 – 23.

⁸ Trooper Oncay's testimony; AR 22 – 23, 35 – 37.

⁹ Trooper Oncay's testimony; AR 22 – 23.

¹⁰ Trooper Sergeant Stuart's testimony; AR 23.

¹¹ Trooper Oncay's testimony; AR 23.

¹² AR 139 – 145.

¹³ AR 148 – 149.

JoAnne Simmerman is an OCS Protective Services Specialist who started working with Ms. N in 2020 on an earlier OCS case. She was assigned to this case after OCS received a report from the Alaska State Troopers. She initially attempted to interview both Mr. N and Ms. N. She was unable to do so.¹⁴ She relied upon the police report made the substantiated finding that Ms. N had maltreated O. The basis for the substantiated mental injury finding was O's exposure to domestic violence, and the basis for the finding of neglect was based upon a conclusion that O had been exposed to criminal activity in which intoxication was apparently a factor, coupled with Ms. N's prior history with OCS, and Ms. N having had a driving while intoxicated conviction in her past. Ms. Simmerman did later have access to urinalysis results because Ms. N signed a release after OCS did its initial assessment. Those results were negative.¹⁵

Ms. Simmerman was asked about whether Ms. N had undergone substance abuse treatment during her prior CINA case. Ms. Simmerman's response was that she "believed she did prior to [Ms. Simmerman's involvement]," and that Ms. N was allowed to address her issues through her counseling.¹⁶

D. Ms. N's Testimony.

Ms. N testified that while she had a couple of drinks the evening in question that she was not drunk but was not impaired. She stated that she and Mr. N got into a fight because he came to her home "high" and that he initially lied to her about being under the influence. She stated that he made up a story about being assaulted by her, because he was out on probation, and that he was worried about having to go to jail. She denied having assaulted Mr. N. She stated that the stab/puncture marks on the door were caused by her having had a dart board there and playing darts.

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E. Mr. N's Testimony.

Mr. N testified at the hearing. He testified that when he came over to see Ms. N the night in question, that he lied to her about his drug use and that he was under the influence of methamphetamine. He acknowledged that she had had a couple of drinks but that she was not impaired.

¹⁴ Ms. Simmerman's testimony; AR 44, 48 – 49.

¹⁵ Ms. Simmerman's testimony.

¹⁶ Ms. Simmerman's testimony.

He testified about his substantial criminal history, which included vehicle theft, drug possession charges, weapon charges, and forgery. In his testimony, he stated that he panicked and was worried about going to jail, so he scratched himself and told the Troopers a false story that Ms. N had assaulted him. Mr. N also testified that he did not see Ms. N with a knife in her hand, merely her cell phone, and that he did not see her damage the door with a knife, and that the puncture wounds in the door had been there for some time and were caused by Ms. N having had a dart board on the door. Mr. N testified that O likes to exaggerate and make up things. He speculated that she might have made her statement to the Troopers based on what she heard Mr. N telling Ms. N what he was going to tell the Troopers.

Mr. N further testified that he had testified in front of a grand jury telling them that he made up the story about being assaulted by Ms. N.

Mr. N and Ms. N are currently separated. Ms. N is currently pregnant with Mr. N's child.

F. Ms. N's Witnesses

Ms. N presented a number of witnesses: P.H, J.J, E.B, C.T, and U.V. All of them uniformly testified that Ms. N was a loving parent, who was in no way abusive or neglectful of her children. All of them testified that O was prone to exaggeration and dramatization, that Ms. N had complained to them about Mr. N's drug use and was frustrated to the point that she was thinking about calling his probation officer.

Ms. T is a neighbor of Ms. N's in the same apartment complex. She testified that she has never seen Ms. N have enough to drink so that she was unable to safely parent. Ms. J is 19 years old and has known Ms. N for 10 to 11 years. She testified that she thought that she was at Ms. N's the night that the incident occurred, and that while Ms. N had been drinking, she was not impaired, and that she was coherent, etc. Ms. J said that night was the last time she saw Ms. N drink.

G. Ms. N's Prior History With OCS

Ms. N has had multiple ongoing contacts with OCS dating back to 2008. In 2008, her former spouse had a substantiated finding about him, but there was not one against Ms. N.¹⁷ In 2011, there was an OCS investigation regarding whether Ms. N utilized excessive discipline. OCS did not make a substantiated finding in that case.¹⁸ Shortly thereafter in 2011, there was

¹⁷ AR 161.

¹⁸ AR 162 – 163.

two OCS investigations regarding Ms. N and possible substance use and physical abuse. OCS did not make a substantiated finding against Ms. N in either case.¹⁹

In 2014, there was a substantiated finding of neglect made against Ms. N based upon alcohol use.²⁰

In 2015, OCS investigated Ms. N twice for neglect, not related to substance abuse. It did not substantiate a finding of neglect in either case.²¹

In 2016, OCS investigated Ms. N's home. It did not substantiate a maltreatment finding.²²

In 2018, Ms. N's was investigated by OCS multiple times. One of those cases involved Ms. N being arrested for driving while intoxicated. However, maltreatment was not substantiated in any of those cases.²³

In 2019, there were multiple investigations of Ms. N for maltreatment. Two of those did not result in a finding of maltreatment.²⁴ However, OCS conducted two later investigations, which resulted in findings of neglect and physical abuse against Ms. N, and her domestic partner. The findings included allegations of alcohol abuse by Ms. N rising to the level of physical abuse based on events occurring on October 24, 2019.²⁵ However, Ms. N became involved in a related Child In Need of Aid case in the trial courts, where she stipulated to adjudication that her daughters, which included O, were children in need of aid under AS 47.10.011(9).²⁶ Because of that stipulation, OCS overturned its substantiated findings.²⁷

IV. Discussion

A. The Child Protection Registry

OCS maintains a child protection registry.²⁸ Those reports are confidential but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.²⁹ At the conclusion of an investigation,

¹⁹ AR 164 – 174.

²⁰ AR 175 – 181.

²¹ AR 186 – 197, 201 - 203.

²² AR 204 – 209.

²³ AR 210 – 242.

²⁴ AR 243 – 251.

²⁵ AR 252 – 269.

²⁶ AR 117 – 123.

²⁷ AR 271.

²⁸ AS 47.17.040.

²⁹ AS 47.17.040(b).

OCS may find that an allegation has been substantiated. A substantiated finding is one where the available facts gathered from the initial assessment indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child's health or welfare is harmed or threatened.³⁰

Alaska Statute 47.17.290(3) states that "child abuse or neglect means the 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."³¹ The statutory definition of maltreatment is found in the "child in need of aid" provisions: "Maltreatment 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."³²

OCS substantiated maltreatment by Ms. N. Its notice, and the agency record, demonstrated that it was substantiating two separate types of maltreatment.

The first allegation of maltreatment is that Ms. N placed O at a risk of mental injury by exposing her to domestic violence. A "child in need of aid," under AS 47.10.011(8), in relevant part, means a child who has been "subjected to ... conduct by or conditions created by the parent [that] have (A) resulted in mental injury to the child; or (B) placed the child at substantial risk of mental injury as a result of ... (ii) exposure to conduct by a household member [that constitutes certain enumerated criminal offenses]."³³

The second allegation of maltreatment is that O was a "child in need of aid" under AS 47.10.011(10), being that Ms. N had neglected her because her ability to care for O had "been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child."³⁴

B. Substantiated Findings for Risk of Mental Injury

Alaska Statute 47.10.011(8)(B)(ii) describes "substantial risk of mental injury" as exposing a child "to conduct by a household member ... against another household member that is a crime under AS 11.41.100-11.41.220, 11.41.230(a)(1) or (2), or 11.41.410-11.41.432 [or] an

³⁰ OCS Child Protection Manual, CH. 2.2.10.1 (Rev. 5/16/15), *available at*: <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

³¹ AS 47.17.290(2).

³² AS 47.17.290(9).

³³ AS 47.10.011(8)(A), (B)(ii).

³⁴ AS 47.10.011(6), (8) – (10).

offense under a law or ordinance of another jurisdiction having elements similar to [the previously enumerated crimes]” The enumerated crimes in AS 11.41 are all crimes of violence ranging from murder and manslaughter to assault.

The underlying allegation in this case is straightforward. Ms. N is not alleged to have actually stabbed Mr. N. She is alleged to have assaulted Mr. N by attacking him with a knife and scratching him. If either the knife attack or the scratching are established, then Ms. N will have committed an act that comprises assault in either or both the third degree under AS 11.41.220(a)(1)(A) (“recklessly . . . places another person in fear of imminent serious physical injury by means of a dangerous instrument”) or in the fourth degree under AS 11.41.230(a)(1) (“person recklessly causes physical injury to another person”).

It should be noted that Ms. N was initially criminally charged with two counts of violating AS 11.41.220(a)(1)(A), Assault in the Third Degree, a Class C felony, two counts of violating AS 11.41.230(a)(1), Assault in the Fourth Degree, a Class A misdemeanor. If she had been convicted of any of those charges, then OCS would have proven its case through the legal doctrine of collateral estoppel. However, she was not and collateral estoppel does not apply in this case.³⁵ Regardless, the fact that Ms. N was not convicted of a violation of AS 11.41.220(a)(1)(A), or AS 11.41.230(a)(1) does not operate in her favor. This is for two independent reasons. First, a dismissal by the prosecution is not an acquittal. Second, even if Ms. N had gone to trial and been acquitted of these charges, that would be because the prosecution had not proven its case beyond a reasonable doubt, whereas in order to prevail in this case OCS need only prove that the conduct occurred by the lesser evidentiary standard of a preponderance of the evidence. It is therefore necessary to determine what actually happened on April 28, 2022 and whether it meets the statutory standard of “expos[ing] [O] to conduct by a household member ... against another household member that is a crime under AS 11.41.100-11.41.220, 11.41.230(a)(1) or (2).”

Ms. N denied that she assaulted Mr. N on April 28, 2022. She said he created the injuries due to his fear of going back to jail and explained the “stab” marks on the door as having been caused by playing darts.

³⁵ See the *Order Denying Partial Summary Adjudication* issued on April 13, 2023 for a discussion of the elements required to establish collateral estoppel and why they were not established in this case.

Mr. N told the Troopers that Ms. N chased him with a knife and scratched him. He then testified that she did not and that he made up a story about being chased with a knife and being scratched, indeed creating his own injuries, to avoid going back to jail. He further testified that he told the grand jury that his statement to the Troopers was a lie.

O, on the other hand, made a clear statement to the Troopers that she saw her mother chasing Mr. N with a knife, and tried to unsuccessfully stop her. She was also a bit reluctant to make her statement to the Troopers, given her repeated concerns about not getting her mother in trouble. Ms. N, Mr. N, and all of Ms. N's witnesses attempted to discredit O's statement by testifying that she was prone to exaggeration.

O did not tell the Troopers that she saw Ms. N scratch Mr. N. Accordingly, this discussion will only address whether she saw Ms. N chase Mr. N with a knife.

Examining the evidence on this point as a whole leads to the conclusion that O's statement is credible for several reasons. First, it was contemporaneous with the event and O made the statement while being concerned about the effect it would have on her mother. Second, the puncture/stab marks in the door corroborate her statements as does the fact that she was able to direct the Troopers to the knife. In contrast, Ms. N had clear motivation to be less than truthful in this case because she did not want to have a substantiation finding made against her. Mr. N also had a clear motivation to be untruthful in his testimony: Ms. N is now pregnant with his child and he and Ms. N are currently separated, i.e., he has reason to testify in Ms. N's favor. The fact that Mr. N was located in a neighboring apartment only half-clothed, also demonstrates that he exited Ms. N's apartment rapidly under exigent circumstances. Accordingly, OCS has shown by a preponderance of the evidence that Ms. N chased Mr. N with a knife while O was present.

Ms. N chasing Mr. N with a knife meets the statutory definition of an assault in the third degree under AS 11.41.220(a)(1)(A) ("recklessly . . . places another person in fear of imminent serious physical injury by means of a dangerous instrument").

In order for a finding to be made that Ms. N placed O at a "substantial risk of mental injury," OCS must prove that during the April 28, 2022 incident, Ms. N caused O to experience "exposure to conduct by a household member ... against another household member that is a crime under AS 11.41.100-11.41.220, 11.41.230(a)(1) or (2), or 11.41.410-11.41.432."³⁶ As

³⁶ AS 47.10.011(8)(B)(ii).

discussed immediately above, O observed the assault, which comprised a crime under AS 11.41.220(a)(1)(A). Thus, the preponderance of the evidence shows that Ms. N caused O to be exposed to her committing domestic violence against Mr. N.

Under AS 47.10.011(8)(B)(ii)), maltreatment can be established when a person creates a risk of mental injury in a child by exposing a child to domestic violence. The Alaska Supreme Court has strongly emphasized “the devastating impact that witnessing domestic violence can have on children.”³⁷ Given this recognition of the potential impact that domestic violence can have on children, the law allows us to conclude that the person who committed the assault against a family member put the child at a substantial risk of mental injury. As a result, OCS has met its burden of proof. It has shown that Ms. N assaulted O by placing her at a substantial risk of mental injury when she observed her assaulting Mr. N.

C. Substantiated Finding of Neglect

Neglect is statutorily defined as 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 To substantiate neglect, OCS must not only meet this definition but must also show that that O’s “health or welfare is harmed or threatened thereby.”³⁹

The OCS Initial Assessment Summary, which substantiated neglect, determined that Ms. N was under the influence of alcohol at the time, and found:

Ms. N’s ability to parent is substantially impaired by her substance use. There is reasonable potential for O to be seriously injured as well as reasonable potential for psychological harm.⁴⁰

The allegations in this issue involve alcohol use by Ms. N. The evidence, however, does not show that Ms. N was intoxicated at the time of the April 28, 2022 episode. She had alcohol on her breath. It is undisputed that she had been drinking that night. Trooper Oncay testified that O told him that Ms. N came home intoxicated that night. However, his written report does not contain that assertion. His written report, which was done contemporaneously, is considered more probative on this point, and does not establish intoxication.

³⁷ *In re J.A.*, 962 P.2d 173, 178 (Alaska 1998), *citing Borchgrevink v. Borchgrevink*, 941 P.2d 132, 140 (Alaska 1997); *see also Martin N. v. State*, 79 P.3d 50, 55 (Alaska 2003) (“witnessing domestic violence is mentally harmful to children”).

³⁸ AS 47.10.014.

³⁹ AS 47.17.290(2).

⁴⁰ AR 13.

The Trooper testimony and reports provide that Ms. N had an exaggerated response at the time of her arrest. However, the Trooper testimony and associated reports do not indicate the presence of standard indicia of intoxication such as slurred speech, impaired locomotion, etc. Nor is there any evidence of a breathalyzer having been conducted. And her exaggerated response when she was arrested could easily be attributable to the emotional stress of the situation, including being arrested in front of her daughter. In short, while the evidence shows that Ms. N had been drinking, there is insufficient evidence to conclude that Ms. N was intoxicated at the time.

The portion of the CINA statute relied upon, AS 47.10.011(10), requires a showing that the “ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child.” The evidence in this case shows that there was an incident in 2014, which resulted in a substantiated maltreatment finding involving alcohol, and a 2018 arrest for DUI. Given the passage of time, these are insufficient to show that Ms. N’s “ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant” which has “resulted in a substantial risk of harm to [her] child.”

While Ms. N stipulated to adjudication in her 2020 CINA case where there were allegations of alcohol abuse, her stipulation was to her daughters being children in need of aid under AS 47.10.011(9), not AS 47.10.011(10) – the provision related to substance abuse. And while there is a presumption that “resumption of use of an intoxicant within one year after rehabilitation is prima facie evidence” of a substantial impairment to the ability to parent and that the child is at a risk of substantial harm,⁴¹ there is insufficient evidence in the record to invoke this presumption: Ms. Simmerman’s testimony was that treatment occurred prior to her involvement with Ms. N, which began in 2020, and that Ms. N was to address her issues through her normal counseling. This means that the stipulation to adjudication in the 2020 CINA does not provide support for a finding of substantial impairment due to addictive or habitual use of an intoxicant, nor is there a presumption that can be invoked to support a finding of substantial impairment due to addictive or habitual use of an intoxicant. Accordingly, OCS has not met its burden of proof on this issue.

V. Conclusion

⁴¹ AS 47.10.011(10).

OCS has the burden of proof in this case by a preponderance of the evidence. It did not meet its burden on the issue of whether Ms. N maltreated her daughter, in the form of neglect due to substance abuse. However, it did meet its burden with regard to maltreating her daughter by placing her at risk of mental injury by exposing her to domestic violence. Accordingly, OCS' substantiation of maltreatment in the form of neglect is reversed, while the substantiation of maltreatment in the form of mental injury is substantiated.

Dated: June 14, 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 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.]