

INVESTIGATIVE REPORT

Final Finding and Closure

Executive Summary

*Contents edited to remove confidential information per AS
24.55.160(b)*

**Alaska Ombudsman Complaint A097-2190
July 3, 1998**

Because of the public interest surrounding the Division of Family and Youth Services from the summer of 1997 to present, the Ombudsman has determined as per AS 24.55.160 that it is in the public interest to release an executive report on the findings in this complaint. However, the Ombudsman is constrained under AS 24.55.160(b) to hold confidential all information that is confidential by law.

Because of these statutory constraints and because the Ombudsman determined that the privacy interests of all the parties involved could be jeopardized if extensive details were included, this report has been altered to protect those interests. Therefore, the names of the people in the report have been changed to conceal their identity. The Ombudsman wishes to stress that none of the names used is of a real person.

A Southcentral Alaska couple contacted the Office of the Ombudsman in August 1997 to complain about the actions of the Department of Health and Social Services, Division of Family and Youth Services (DFYS). "Nancy and Harold Dell" complained about the manner in which DFYS handled allegations that a relative of theirs, "Kelly," had neglected and sexually abused Kelly's child, "Oliver." He has lived with Nancy and Harold for three years pursuant to a Superior Court order.

Mr. Dell complained to Ombudsman investigators that DFYS and several other non-DFYS public employees investigating Oliver's abuse had totally mishandled this investigation. Specifically, the Dells

complained that:

- DFYS staff unreasonably refused to analyze physical evidence that Nancy Dell collected and presented to them when she brought Oliver to DFYS because she believed Oliver had been sexually abused.
- DFYS personnel unreasonably didn't act in Oliver's best interest when they reviewed charges that Kelly neglected and abused him.
- DFYS social workers had all necessary information about Kelly's sexual abuse of Oliver but unreasonably did not reach the proper conclusion that the abuse occurred.
- DFYS placed an unreasonable priority on the needs of the parent for visitation and reunification with Oliver. DFYS didn't establish any concise guidelines for Kelly to follow in order to have visitation with Oliver.
- DFYS staff unreasonably did not move to terminate Kelly Dell's parental rights when they were informed of Kelly's neglect and abuse of Oliver and after social workers stated that they would do so.
- A DFYS social worker unreasonably did not come to see Oliver during the time she supervised the case. Furthermore, the social worker lied, saying she did not receive faxes or telephone calls from the Dells.

Harold Dell also said that if DFYS had terminated Kelly's parental rights he would not have had to spend so much of his resources on attorneys and therapists to protect Oliver.

Harold Dell told the Ombudsman that he wanted DFYS to terminate Kelly's parental rights and he remains firmly convinced that DFYS was

wrong in refusing to do so. Harold Dell contended that if DFYS had done so, Oliver would be less vulnerable to Kelly seeking to visit with and regain custody of Oliver.

Mr. Dell also complained that Anchorage Police Department detectives “whitewashed” the abuse allegations and conducted an inadequate inquiry. He questioned the detective’s character and credentials in the area of child abuse. However, the Anchorage detective, as a municipal employee, is not subject to the Ombudsman jurisdiction nor were his actions a subject of this inquiry.

The Ombudsman investigator reviewed the Dells’ documentation and relied heavily on that documentation to represent their side of the story. She also reviewed the three-volume DFYS case files and Superior Court files in the case. This review included physicians and psychotherapists’ reports on therapy with Oliver. She also interviewed police, several DFYS social workers involved in the case, and the assistant attorney general who advised the agency in this case.

The investigator also reviewed statutes, regulations and DFYS policy relating to investigation of abuse allegations. She also reviewed several Alaska Supreme Court rulings relating to child protection standards, termination of parental rights and visitation between a parent and a child. The investigator also reviewed the Alaska Judicial Council’s 1996 report “Improving the Court Process for Alaska’s Children in Need of Aid” and attended a November 1997 Alaska Bar Association Continuing Legal Education seminar on investigating child sexual abuse allegations.

DFYS case files are confidential by law and, as per AS 24.55.090 and AS 24.55.160, the Ombudsman cannot reveal any information deemed confidential by law. Therefore, the Ombudsman is not able to reveal any specific information obtained from DFYS files that the Ombudsman reviewed in connection with this investigation.

Beginning in 1990 DFYS received several complaints that Kelly was neglecting or abusing Oliver. The Ombudsman investigator reviewed the case files and record of contact notes that applied to each case to determine what information was provided to DFYS, what collateral contacts social workers made to verify the reports and whether the workers contacted Oliver and Kelly and visited the home. The Ombudsman investigation indicated the following:

- Except for the final report of harm in 1995, the other reports were remarkably similar. Early reports focused on neglect of the

child and alleged drug abuse by the parent.

- With the exception of the final report of harm in 1995, all others were closed as unconfirmed and closed with no protective action deemed necessary or taken after the investigation.
- One of the reports was filed by an anonymous source. The source of several of the other complaints was either the same person, or persons encouraged to file reports of harm by another.
- In each case during investigation of the report of harm, social workers conducted the required visits to the family home so they could personally witness the home environment and interview Oliver and Kelly. These visits usually were accomplished within the required timeframes.
- Social workers interviewed collateral contacts such as physicians, neighbors, school teachers and nurses, friends, and associates as appropriate given the nature of each individual report. These interviews took place in a variety of settings.
- Social workers assessed each report using the DFYS risk assessment tool as required.
- In the reports of harm where sexual abuse was alleged, DFYS social workers reported the allegations to area law enforcement authorities for criminal investigation and participated in the interviews. In all three cases, police detectives trained to investigate abuse of minors conducted lengthy interviews of Oliver and concluded that he was consistent and convincing in his denials that sexual abuse or other improprieties occurred.

- In the police interviews the child admitted that Kelly had spanked him but generally spoke favorably about Kelly and their home life.
- In the most serious report of harm the social worker conducted several interviews of collateral witnesses who had knowledge of the child's circumstances.
- DFYS offered Kelly social service referrals upon closing each report but until the last report-of-harm investigation, Kelly declined to accept them.
- DFYS supervisors reviewed and approved the decision to close investigations of each report of harm.
- Most of the agency action taken in Oliver's case after his relatives obtained the restraining order and after DFYS filed a Child in Need of Aid petition to take custody, was on the advice of therapists or the attorney general.
- DFYS relied heavily on assessments of psychotherapists who examined Oliver and were seeing him regularly when they made recommendations regarding visitation between Oliver and Kelly.
- Much of the action taken in this case after the restraining order and CINA petition were granted was approved by court order issued after the relatives' attorney litigated the issue in court.
- Kelly complied with the rudimentary requirements set by Oliver's therapist in terms of attending substance abuse counseling but Kelly's efforts were often deemed insincere and

inadequate by counselors.

- Oliver's therapist initially recommended limited supervised telephone visitation between Oliver and Kelly but changed that recommendation after two visits because Oliver exhibited signs of extreme distress following the visits and when discussing the visitations.
- The attorney general moved in court that DFYS be allowed to close the CINA case based on his legal assessment that Oliver was not in danger because he was living with Harold and Nancy. This motion was consistent with legal precedent on CINA cases.

ANALYSIS AND FINDING OF RECORD

Limitations on Ombudsman review

This case was difficult to review for several reasons associated with the Ombudsman statute. The Ombudsman is governed by AS 24.55 and 21 AAC 20 which limit the matters the Ombudsman can review. The Ombudsman cannot investigate actions that have been ruled upon by a judge, that occurred more than one year prior to the complaint to the Ombudsman's office.

Additionally, the Ombudsman has limitations on reviewing the actions of attorneys exercising their professional judgment. The Alaska Attorney General, and through him, his assistant attorneys general and the district attorneys, have broad professional discretion to decide how litigation involving the state will be handled. They derive their authority from Alaska Statute 44.23.020 and an Alaska Supreme Court decision, *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975).

The Ombudsman will not substitute her judgment for that of the state's attorneys. Basically, this means that just disagreeing with a prosecutor's decision is not enough to challenge it. People often disagree in good faith on the conclusions to be drawn when laws are applied to evidence. The Ombudsman will only review such decisions if there is evidence of impropriety, serious flaws in the decision-making process or evidence that the decision is completely insupportable. There was no such

evidence in this case.

Allegations discontinued because of statutory limitation

Applying the limitations on the Ombudsman jurisdiction to this case, the following portions of the allegations must be removed from consideration:

Allegation: DFYS staff unreasonably did not move to terminate Kelly's parental rights when they were informed of Kelly's neglect and abuse of Oliver and after social workers stated that they would do so.

The record indicates that as part of its case plan in the summer of 1996, DFYS at one point considered terminating Kelly's parental rights. The Dells were aware of this possibility. However, Assistant Attorney General Killip strongly recommended against termination on the grounds that Oliver was no longer a child in need of aid and DFYS eventually agreed. Mr. Killip based his professional recommendation on the following: 1) Oliver was adequately protected in his relatives' home and, therefore, not at risk of harm; 2) Oliver was not CINA because he had relatives willing to provide for his care; 3) The circumstances that led to Oliver being taken into state custody were not severe enough to declare him a child in need of aid.

AAG Killip moved to dismiss the case. The Dells and their attorney contested that motion in court. Judge Michalski, granted the motion to dismiss, accepting the argument that Oliver was not legally a child in need of aid. Under AS 47.10.080, and case law, *In re T.W.R.*, 887 P.2d 941, the state cannot terminate a parent's rights to a child unless the child is adjudicated CINA. This office has no authority to overrule the court's decision and, therefore, must discontinue review of this portion of the complaint.

However, while not issuing an official finding in this portion of the allegation, our review of this case leads us to believe that DFYS acted in accordance with federal law, state statute, DFYS policy and case law.

Ombudsman investigation has not uncovered any evidence of impropriety, serious flaws in the Attorney General's decision-making process or evidence that the decision is insupportable. The court agreed with Mr. Killip. The Ombudsman has found nothing to support disagreement with the court or Mr. Killip.

Allegation: DFYS placed an unreasonable priority on Kelly's needs for visitation and reunification with Oliver. DFYS did not establish any concise guidelines for Kelly to follow in order to have visitation

with Oliver.

Federal law, Alaska Statute and DFYS policy all mandate that the agency take steps to reunify a parent with a child who has been removed from the home. The priority in most cases is the attempt to heal what has torn the family apart, be it substance abuse, anger management problems, or mental illness. The agency is required to try to “fix” the problem parent. It has no choice. DFYS policy also recognizes that the sorts of problems leading to abuse or neglect do not mend in a few days. Thus, the Division has more than a year to provide services to the family in order to help the family become a positive entity for the child.

Additionally, AS 47.10.084 mandates that parents of CINA children have the right to reasonable visitation with their children, absent a showing that such visitation will be detrimental to the child. Case law extends that right to require that before disallowing parental visitation, the state must prove through “clear and convincing evidence” that visitation will not be in the best interests of the child in custody.

The record shows in this case that DFYS relied heavily on the advice of Oliver’s private therapist. The Dells chose the therapist who initially recommended visitation, then recommended against it. DFYS agreed and complied. The therapist established the guidelines and timeframes for the telephonic visits between Kelly and Oliver and supervised the visits. DFYS complied. Later the therapist stated Oliver was ready for some form of in-person visitation but only if he could immediately receive a session of therapy after the visits. Further, the CASA and GAL who are appointed to represent the child’s best interest, agreed that Oliver should only visit Kelly under therapeutic care. The GAL also recommended substance abuse treatment courses for Kelly *before* Kelly was ever considered to be a placement option. DFYS agreed. Judge Michalski, by court order, required DFYS to prepare a visitation plan which he approved by court order in the summer of 1996. As it turned out, Kelly did not comply with the requirements and has not seen Oliver for more than two years as of this writing.

In this case, because the visitation plan was required and approved by the court, this office is required by statute to discontinue our review and issue no finding. However, our review of this case indicates that DFYS’s visitation requirements complied with statute, regulation, policy and case law and the advice of a professional therapist.

Allegation: DFYS staff unreasonably refused to analyze physical evidence that the Dells gave to the agency when Nancy Dell contacted DFYS in March 1994 after picking him up from his parent’s home.

This incident occurred in 1994, nearly four years ago. The length of time from the report of the substance in Oliver's hair to the filing of this complaint make this issue fall under the timeliness provisions of AS 24.55 and the Ombudsman therefore discontinued and will not issue a formal finding on this portion of the allegation.

However, review indicated the following: Ms. Dell visited a DFYS regional office where a social worker *and* a police officer said the evidence presented would be inconclusive as to how it was obtained. However, DFYS staff did not dismiss this report. Social workers and police detectives interviewed Oliver. DFYS workers also interviewed Kelly. This report of harm was investigated in depth despite questions about the nature of the evidence. When interviewed, Oliver was convincing and consistent in his denial that he had been abused.

DFYS took action on this report. DFYS did not reach the conclusion that the Dells wanted and believed to be correct, however, DFYS did investigate their allegation.

FINDING OF RECORD

The Ombudsman was able to issue findings in the following portions of this allegation.

Allegation: The DFYS permanency planning social worker unreasonably did not come to see Oliver during the time she supervised the case. She lied, saying she did not receive faxes or telephone calls from the Dells.

The social worker is no longer with the agency. She recalls that DFYS policy implemented in 1995 requires one home visit by the social worker per month. Actually, that number varies depending on the severity of the assessment rating. Oliver was rated high in the assessment, therefore, he should have been seen more often. The social worker stated that she may have met Oliver once at the therapist's office but her record of contact notes do not reflect that. In this case there is no question of fact. She never met the boy. The review then extends to whether the reason for not conducting the required home visits with Oliver and the Dells was reasonable.

Again, relying on her memory, the social worker states she had a high caseload and there were problems coordinating with the CASA and GAL for a visit.

The social worker defended her failure to meet with Oliver by saying that she had more than 50 cases under her supervision and she was unable to coordinate the visits with the Dells, the GAL and the CASA worker. The CASA visited Oliver to the point that Harold Dell complained to the Ombudsman that she was intruding in his life.

Audits of the DFYS South-central office, prior to Oliver's case and subsequent to Oliver's case, indicate that the office has a historical problem of conducting home visits as required by policy and procedure. However, through the resources of the Dells, Oliver was being seen by a qualified therapist on a regular basis and DFYS was following the therapist's recommendations to the letter. Additionally, the CASA and the GAL were focusing on Oliver's needs by visiting him regularly.

So the question then becomes one of whether the non-DFYS safety net of the CASA, GAL and therapist compensated for the failure of the social worker to visit Oliver. Technically the complaint is correct. The social worker didn't do what she was supposed to. The Ombudsman standard requires that the action must be "inconsistent with agency policy and thereby place the complainant at a disadvantage to all others."

The action was inconsistent with agency policy but because of circumstances it did not place Oliver at a disadvantage to others. Oliver was seeing the therapist regularly. The therapist was talking to and essentially guiding DFYS social workers who followed her lead. Additionally, the CASA and GAL were in contact with the child and relative and made their recommendations to DFYS. Arguably, the social worker was "seeing" Oliver through the therapist, CASA and the relatives.

Therefore, the Ombudsman cannot find that *in this one case*, Oliver was harmed by the failure of the social worker to have face to face contact with him. Had he not been seeing the therapist and CASA and GAL, this finding would be different. But *in this case*, I propose to find this allegation to be unsupported by the facts. As for the Dells' accusation that the social worker lied about phone calls, she said she does not recall a specific issue about missed faxes or phone calls but said that it would not surprise her at all because of problems with faxes at DFYS. Ms. Dell provided one copy of one fax that she re-sent to the social worker.

Given these circumstances and the scant facts, it is impossible to prove that the social worker did not get faxed messages or that she did not get phone messages. This portion of the allegation cannot be proven one way or the other. Therefore, I propose to find this portion of the

allegation to be undetermined.

When the Ombudsman issues a finding on different portions of an allegation and the findings are not consistent, the Ombudsman issues a joint ruling on the combined facets of the allegation. In this case, I find this portion of the complaint to be unsupported.

Allegation: DFYS personnel unreasonably did not act in Oliver's best interest when they reviewed charges that his parent neglected and abused him. DFYS Social Worker Jason Allen had all necessary information about Kelly's sexual abuse of Oliver but unreasonably did not reach the proper conclusion that the abuse occurred.

DFYS received eight reports of harm and neglect involving Oliver and Kelly from 1990 to 1995, all of which were unconfirmed.

The evidence to support the allegation that Kelly sexually abused Oliver was regarded as tenuous at best by the DFYS social workers interviewed. The investigating social worker included the allegations in the non-emergency petition to assume custody of Oliver, but he stated that the evidence was inconclusive. DFYS sought custody because of Kelly's substance abuse which led to Kelly's inability to care for Oliver. DFYS records and reports of police interviews indicate that Oliver "consistently and convincingly" denied any impropriety by Kelly or anyone. His therapist described him early on as a child who did not present the behaviors associated with sexual abuse.

Additionally, the medical evidence was conflicting. One doctor said he had an anal scar "possibly consistent with a tear caused by sexual abuse." Another pediatrician said he saw no such scar.

Two witnesses said Kelly admitted sexually abusing Oliver while under the influence of drugs and/or alcohol. This alleged statement was made within days of a police interview of Oliver on an earlier allegation that Kelly had abused him. One detective chose not to re-interview Oliver, saying the statement was hearsay. Another officer did interview him extensively and Oliver again denied abuse. The motives of the primary witnesses to this statement have been questioned. The parent has never admitted abuse occurred

And, last, but certainly not least, Oliver did not at the time nor has he to this day disclosed any sexual abuse. Experts on sexual abuse of children and the investigating social worker say that child sex abuse victims often do not disclose their abuse. They cover it up for years. They rarely disclose in the first interview or even other early interviews. Some never

disclose.

Such cases highlight the difficulty of investigating child abuse allegations. There were a lot of troubling signs in this case, enough to cause repeated reports and investigations. However, the troubling signs, once investigated, did not prove the presence of sexual abuse in a clear and convincing manner. This office cannot find that DFYS came to an unreasonable conclusion to the question of whether Kelly sexually abused Oliver. Therefore, I find this portion of this allegation unsupported.

The facts uncovered by this review do not find that the staff of DFYS acted unreasonably or inappropriately in this case.

Having reviewed all the portions of this allegation, I find this allegation to be unsupported by the facts. I understand that the Dells will disagree. I must stress that this does not mean that we doubt that Oliver suffered some abuse or neglect while in Kelly's care. This simply means that, given the federal and state regulations, statutes, policies and procedures as well as court opinions, we have not found that DFYS acted improperly.

This case clearly demonstrates the heart-wrenching problems facing concerned relatives of at-risk children and those charged with protecting them. We surely cannot say that Kelly Dell was a good parent. We cannot even say Kelly was barely acceptable. All we can say from our review of this case is that Kelly Dell was not a bad enough parent to have parental rights terminated. We recognize and we ask the Dells to recognize that we did not spend the days and weeks with Oliver or Kelly that they did and, therefore, we did not see the nuances in Oliver's behavior that led them to believe he was abused.

The DFYS social workers spent a phenomenal amount of time on this case and could only come to the conclusion that Kelly's behavior was bad enough to warrant legally removing Oliver from Kelly's home while Kelly sought to overcome drug addiction. Had the investigating social worker spent the same amount of day-in, day-out time with Oliver that his relatives did, he might have seen the nuances that led them to believe Oliver was a sexually abused little boy. But that was impossible. The social worker spent a great deal of time investigating the reports but neither he nor other health professionals are convinced that Oliver was sexually abused.

We did not find fault in the social worker's investigation of these allegations, nor, given the existing laws, could we find fault in the decision to not terminate Kelly's rights. The history of child protection

in this country is fraught with instances of social workers removing children from loving and caring families for little more than limited income. Such abuses prompted society to direct their elected representatives to protect the poor from perceived abuse by social service agencies. That legislative mandate resulted in a sea change in child protection to protecting the rights of parents. They are afforded attorneys and therapists. They have an opportunity to change themselves. Often it doesn't work but society has mandated that the child protection agencies of this country try.

Now, with drug addiction and the splitting of the nuclear family, children face more serious problems and we see more and more serious abuse. With this change in abuse patterns, the pendulum has begun to swing to the other direction. As more instances of abused children are featured in the news pages, people are starting to ask for faster judgments of and fewer second chances for suspected abusers. That is a call that will have to be answered by the legislatures of the land.
