LEGISLATIVE RESEARCH SERVICES

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(907) 465-3991 phone
(907) 465-3908 fax
research@akleg.gov

Parental Rights for Children Conceived through Rape

Patricia Young, Legislative Analyst

You wished to know about current laws in Alaska that deal with parental rights for women with children conceived through rape. Specifically, you asked if any provision in current law protects such women and children from custody being awarded to the biological fathers. You also asked for information on the status of legislation in Congress that would provide grants to states with such laws under certain conditions.

Alaska Statute § 25.23.180(c)(3) provides for the involuntary termination of parental rights on the grounds that the biological parent conceived the child through an act of sexual assault or through sexual abuse of a minor and that termination of such rights is in the best interests of the child. Language specific to a private action for termination on those grounds resides specifically in AS § 25.23.180(e), which reads follows (with emphasis added):

> (e) A petition for termination of the relationship of parent and child made in connection with an adoption proceeding **or in an independent proceeding** for the termination of parental rights on grounds set out in (c)(3) of this section may be made by
>
> (1) either parent if termination of the relationship is sought with respect to the other parent. . .

The catalyst for the legislation was a particular child custody case wherein a biological father's parental rights had been terminated on public policy grounds because the child had been conceived through his sexual abuse of his stepdaughter. On appeal, the Supreme Court affirmed the custody decision but overturned the termination because sexual abuse had not been claimed and because termination was not available in a custody case outside of an adoption or a child in need of aid (CINA) proceeding. Noting the problem, the Court in its decision encouraged the legislature to address the problem.

The legislative history of the measure clearly indicates that the intent was to provide a statutory mechanism for private individuals to accomplish the involuntary termination of parental rights outside of a criminal case, and without the government involvement required for an adoption or a CINA proceeding. Streamlining of the language during the 1987 passage of the bill resulted in the current situation, which is that the essential nugget for a private termination action—although tied to AS § 25.23.180(c)(3)—hinges on language in AS § 25.23.180(e). While the law is succinct, it has at times been subject to misinterpretation outside of the Alaska courts.

Catalyst for Legislation

Alaska's statutory provision originated from 1987 legislation designed to address a particular situation about which the Alaska Supreme Court had just issued a decision.[1] In that case, the lower court had granted custody to the mother and terminated the parental rights of the biological father (the woman's stepfather) on public policy grounds for conceiving the child as a result of a criminal relationship (begun when the woman herself was an eight year old child). The father appealed. The

[1] *S.J. v. L.T.* 727 P.2d 789 (1986).

Supreme Court, while affirming the award of custody to the mother, overturned the termination of the father's parental rights on points of law and remanded the case to the superior court for further proceedings.

The majority concluded that because no accusations of child sexual abuse had been brought, the evidence presented had failed to support the lower court's finding that the child had been conceived as a result of a criminal relationship. Further, Alaska law at that time allowed for the involuntary termination of parental rights only in the context of adoption or child in need of aid (CINA) proceedings. Since neither of those statutory mechanisms had been invoked, the Court ruled that the termination was improper.

The Justices were not unsympathetic to the woman's plight, however, and while discussing some troubling possibilities for using a "criminal relationship" as the basis for termination of parental rights, they made the following point:

> We take this opportunity to urge the legislature to consider issues such as those raised in this case in order to provide courts with necessary guidance in resolving sensitive questions.

Justice Burke, disagreeing with the majority in regard to the termination, highlighted the dynamics of sexual relationships between children and adult authority figures. He argued that by its very nature, the relationship in the case could not have been consensual, and the court should "deny the existence of *any* parental rights where the offspring resulted from abuse by the stepfather of a child in his care for eight years."

In a separate opinion concurring with the majority, Chief Justice Rabinowitz concluded as follows:

> I think it of critical importance to emphasize that on remand it remains open to [the mother and the child's guardian ad litem] to demonstrate to the superior court that no parental rights ever attached to [the biological father]. In this regard I am of the view that the theory advanced by Justice Burke in his dissent has considerable merit. I also think it important that the courts of Alaska neither recognize nor enforce parental rights in the circumstance where they have been obtained in an egregious manner.

Evolution of the Legislative Fix

The Supreme Court issued its decision in the case in November of 1986. Shortly thereafter, the first session of the Fifteenth Legislature (1987 – 1988) convened and took up consideration of the pre-filed Senate Bill 30, "An Act relating to termination of parental rights of perpetrators of certain sexual offenses." Myra Munson, then-commissioner of the Department of Health and Social Services (DHSS), urged speedy passage of the bill noting,

> [This bill] was written to address one specific case in which there is wide spread agreement about the answer. When a child is conceived through sexual abuse, it is clear why a mother and the child would want the parental rights of the father terminated. . . [The bill] needs to be passed this session before a judgment is made in that case.[2]

As introduced, the bill would have added new sections to AS § 47.17, the laws addressing child protection. The proposed article included a Purpose section as well as a section on Who May File Petition—a list that began with the mother, personal

[2] Commissioner Munson refers to a prospective judgment in the superior court on the termination issue on remand from the Supreme Court. House Health, Education and Social Services Committee, May 17, 1987.

representative, or guardian of the child.[3] Another section mandated that if, by clear and convincing evidence, the court found that a child had been conceived by an act constituting sexual abuse of a minor or incest and that termination was in the best interests of the child, the court would terminate the parental rights of the biological parent.

Before the bill had advanced beyond its first committee, DHSS recommended moving the language to the section of law relating to adoptions (AS § 25.23). In so doing, DHSS was responding to suggestions from Andy Harrington, the attorney with Alaska Legal Services Corporation who had represented the woman in the appeal before the Supreme Court.[4] In communication with the DHSS, Mr. Harrington noted the efficiency of amending existing adoption statutes that already contained several provisions regarding termination of parental rights, rather than creating a new set of laws:

> Inserting the . . . private cause of action into AS 25.23.180 will make it possible for a private individual to terminate parental rights based on the child sexual abuse/incest ground; it will enable a private individual to terminate another's parental rights if that private individual can make the same showings the State makes in terminating parental rights in child-in-need cases.[5]

Having dealt first hand with the issue, the attorney proposed that AS § 25.23.180(c) read as follows:

> The relationship of parent [and] child may be terminated by a court order issued in connection with an adoption proceeding under this chapter, **an independent proceeding under this section**, or a proceeding under AS 47.10 [CINA] **on any of the following grounds**. . . .

Additionally, he recommended adding the phrase *non-adoptive termination of parental rights* in several strategic places.

The committee substitute did not incorporate the phrase *non-adoptive termination of parental rights* anywhere, but instead did the following:

- moved the provisions to the chapter on adoption;
- added the phrase *an independent proceeding under this section*, but placed it in AS § 25.23.180(e), a subsection that already identified those entitled to bring such actions, including "either parent"; and
- broadened the language of AS § 25.23.180(c) from "an adoption proceeding" to "a proceeding under this chapter."

Aside from the addition of sexual assault to the conditions for termination, subsequent changes were largely stylistic and did not alter the essential provision. The bill was enacted as Chapter 50 SLA 1987, and it appears that the specific language outside of an adoption situation has not been before the Alaska Supreme Court since the originating case. The enacted language—still current—is succinct, but some have found it rather too subtle to be unerringly parsed.[6]

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[3] Senate Bill 30 as introduced included the following language: Sec. 47.17.180. PURPOSE. In order to protect the child conceived as a result of sexual abuse of a minor or of incest, the court may terminate the parental rights of the perpetrator to the child when the termination is in the best interests of the child.

[4] Andy Harrington began working with Alaska Legal Services Corporation in 1982. He became that entity's Fairbanks supervisor in 1996 and served as the organization's executive director from 2002 until 2010.

[5] Andy Harrington, Alaska Legal Services attorney, to Randall Burns, special assistant, DHSS, March 11, 1987. Under court rules, the showing (standard of evidence) needed for terminating parental rights in either adoption or CINA cases is clear and convincing evidence.

[6] For example, according to the Rape, Abuse & Incest National Network (RAINN)—the nation's largest anti-sexual violence organization and the source typically cited as definitive on the issue—Alaska Statute 25.23.180(c)(3) "only applies where the child has first been identified as a 'child in need of aid'"; *http://apps.rainn.org/policy-state-laws-db/index2.cfm?state=Alaska&group=1*.

Federal Legislation

The Rape Survivor Child Custody Act was signed into law on May 29, 2015, as Title IV of the Justice for Victims of Trafficking Act (Public Law 114-22). This title (Section 401-409, attached) directs the Department of Justice to increase certain grant funding to states with laws in place that allow the mother of any child conceived through rape to petition the court for termination of the parental rights of the biological father with regard to that child and that authorize the court to grant such termination upon clear and convincing evidence of rape. The increase in funding would be no more than ten percent of the average of the total amount provided to the state under two formula grant programs during the three most recent awards. The increase would be allocated such that 25 percent would be provided under the STOP Violence Against Women Formula Grant Program, and 75 percent would be provided under the Sexual Assault Services Program.[7] The increase would be for a two-year period, and could be provided four times. The Act authorized $5 million to be appropriated for each of fiscal years 2015 through 2019 to cover the incentive.

Eligibility for Federal Incentive—Adding Clarity to Alaska Law

Alaska law authorizes a mother to petition and the court to terminate the parental rights of a biological father if it finds that his child's conception resulted from an act of sexual assault or from sexual abuse of a minor and that termination is in the child's best interests. Although not explicit, no criminal conviction is required as a prerequisite to a finding of conception by rape or sexual assault. Although neither the law nor court rule specifies the burden of proof required in such actions, Alaska courts—like those in all states—are bound by a U.S. Supreme Court decision holding that in actions to terminate parental rights, due process requires that allegations are proven at least by clear and convincing evidence.[8] It appears in this regard, that Alaska law would meet the requirements as envisioned in the federal legislation.

We note, however, the following statement among the findings (Section 403) of the new law:

> (7) Currently only 10 States have statutes allowing rape survivors to petition for the termination of parental rights of the rapist based on clear and convincing evidence that the child was conceived through rape.

The source of this assessment is not cited, but may be the Rape, Abuse & Incest National Network (RAINN), the nation's largest anti-sexual abuse organization, and one of the pivotal supporters of the original bill in Congress. The organization appears to have misinterpreted Alaska's law as applying only in CINA cases.

From both the statutory language and the intent that is paramount throughout the legislative history, the Alaska courts would without doubt apply the law correctly; nevertheless, the language could be more transparent. Referencing independent proceedings within the language of AS § 25.23.180(c) would diminish the possibility of misinterpretation by the public or by other entities. Making explicit both that a criminal conviction is not a prerequisite to termination and that the proof required for a finding of conception by sexual assault or by sexual abuse of a minor is clear and convincing evidence would likewise increase clarity.

You may wish to consult with the attorneys at Legislative Legal Services on these issues. We hope this is helpful. If you have questions or need additional information, please let us know.

[7] The STOP Violence Against Women Formula Grant Program is part T of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg, et seq.); the Sexual Assault Services Program is section 41601 of the Violence Against Women Act of 1994 (42 U.S.C. 14043g).

[8] *Santosky v. Kramer*, 455 U.S. 745 (1982). Alaska court rules pertinent to adoption and CINA cases also both specify that termination of parental rights must be based on clear and convincing evidence.

do so, shall be fined under this title or imprisoned not more than 10 years, or both.

"(b) REQUESTS TO PROSECUTE VIOLATIONS BY STATE ATTORNEYS GENERAL.—

"(1) IN GENERAL.—The Attorney General shall grant a request by a State attorney general that a State or local attorney be cross designated to prosecute a violation of this section unless the Attorney General determines that granting the request would undermine the administration of justice.

Deadline.

"(2) REASON FOR DENIAL.—If the Attorney General denies a request under paragraph (1), the Attorney General shall submit to the State attorney general a detailed reason for the denial not later than 60 days after the date on which a request is received.".

Rape Survivor Child Custody Act.

TITLE IV—RAPE SURVIVOR CHILD CUSTODY

42 USC 13701 note.

SEC. 401. SHORT TITLE.

This title may be cited as the "Rape Survivor Child Custody Act".

42 USC 14043h.

SEC. 402. DEFINITIONS.

In this title:

(1) COVERED FORMULA GRANT.—The term "covered formula grant" means a grant under—

(A) part T of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg et seq.) (commonly referred to as the "STOP Violence Against Women Formula Grant Program"); or

(B) section 41601 of the Violence Against Women Act of 1994 (42 U.S.C. 14043g) (commonly referred to as the "Sexual Assault Services Program").

(2) TERMINATION.—

(A) IN GENERAL.—The term "termination" means, when used with respect to parental rights, a complete and final termination of the parent's right to custody of, guardianship of, visitation with, access to, and inheritance from a child.

(B) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to require a State, in order to receive an increase in the amount provided to the State under the covered formula grants under this title, to have in place a law that terminates any obligation of a person who fathered a child through rape to support the child.

42 USC 14043h–1.

SEC. 403. FINDINGS.

Congress finds the following:

(1) Men who father children through rape should be prohibited from visiting or having custody of those children.

(2) Thousands of rape-related pregnancies occur annually in the United States.

(3) A substantial number of women choose to raise their child conceived through rape and, as a result, may face custody battles with their rapists.

(4) Rape is one of the most under-prosecuted serious crimes, with estimates of criminal conviction occurring in less than 5 percent of rapes.

(5) The clear and convincing evidence standard is the most common standard for termination of parental rights among the 50 States, territories, and the District of Columbia.

(6) The Supreme Court established that the clear and convincing evidence standard satisfies due process for allegations to terminate or restrict parental rights in Santosky v. Kramer (455 U.S. 745 (1982)).

(7) Currently only 10 States have statutes allowing rape survivors to petition for the termination of parental rights of the rapist based on clear and convincing evidence that the child was conceived through rape.

(8) A rapist pursuing parental or custody rights causes the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, and can make it more difficult for her to recover.

(9) These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child.

(10) Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.

SEC. 404. INCREASED FUNDING FOR FORMULA GRANTS AUTHORIZED.

42 USC 14043h–2.

The Attorney General shall increase the amount provided to a State under the covered formula grants in accordance with this title if the State has in place a law that allows the mother of any child that was conceived through rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape.

SEC. 405. APPLICATION.

42 USC 14043h–3.

A State seeking an increase in the amount provided to the State under the covered formula grants shall include in the application of the State for each covered formula grant such information as the Attorney General may reasonably require, including information about the law described in section 404.

SEC. 406. GRANT INCREASE.

42 USC 14043h–4.

The amount of the increase provided to a State under the covered formula grants under this title shall be equal to not more than 10 percent of the average of the total amount of funding provided to the State under the covered formula grants under the 3 most recent awards to the State.

SEC. 407. PERIOD OF INCREASE.

42 USC 14043h–5.

(a) IN GENERAL.—The Attorney General shall provide an increase in the amount provided to a State under the covered formula grants under this title for a 2-year period.

(b) LIMIT.—The Attorney General may not provide an increase in the amount provided to a State under the covered formula grants under this title more than 4 times.

42 USC 14043h–6.

SEC. 408. ALLOCATION OF INCREASED FORMULA GRANT FUNDS.

The Attorney General shall allocate an increase in the amount provided to a State under the covered formula grants under this title such that—

(1) 25 percent the amount of the increase is provided under the program described in section 402(1)(A); and

(2) 75 percent the amount of the increase is provided under the program described in section 402(1)(B).

42 USC 14043h–7.

SEC. 409. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out this title $5,000,000 for each of fiscal years 2015 through 2019.

Military Sex Offender Reporting Act of 2015.

TITLE V—MILITARY SEX OFFENDER REPORTING

42 USC 16901 note.

SEC. 501. SHORT TITLE.

This title may be cited as the "Military Sex Offender Reporting Act of 2015".

SEC. 502. REGISTRATION OF SEX OFFENDERS RELEASED FROM MILITARY CORRECTIONS FACILITIES OR UPON CONVICTION.

(a) IN GENERAL.—The Sex Offender Registration and Notification Act is amended by inserting after section 128 (42 U.S.C. 16928) the following:

42 USC 16928a.

"SEC. 128A. REGISTRATION OF SEX OFFENDERS RELEASED FROM MILITARY CORRECTIONS FACILITIES OR UPON CONVICTION.

"The Secretary of Defense shall provide to the Attorney General the information described in section 114 to be included in the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Website regarding persons—

"(1)(A) released from military corrections facilities; or

"(B) convicted if the sentences adjudged by courts-martial under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), do not include confinement; and

"(2) required to register under this title.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of contents of the Adam Walsh Child Protection and Safety Act is amended by inserting after the item relating to section 128 the following:

"Sec. 128A. Registration of sex offenders released from military corrections facilities or upon conviction.".

TITLE VI—STOPPING EXPLOITATION THROUGH TRAFFICKING

SEC. 601. SAFE HARBOR INCENTIVES.

Part Q of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd et seq.) is amended—

42 USC 3796dd.

(1) in section 1701(c), by striking "where feasible" and all that follows, and inserting the following: "where feasible, to an application—