

HOUSE FINANCE COMMITTEE
April 04, 2002
1:55 P.M.

TAPE HFC 02 - 75, Side A
TAPE HFC 02 - 75, Side B

CALL TO ORDER

Co-Chair Williams called the House Finance Committee meeting to order at 1:55 P.M.

MEMBERS PRESENT

Representative Bill Williams, Co-Chair
Representative Eldon Mulder, Co-Chair
Representative Con Bunde, Vice-Chair
Representative Eric Croft
Representative John Davies
Representative Richard Foster
Representative John Harris
Representative Bill Hudson
Representative Ken Lancaster
Representative Carl Moses
Representative Jim Whitaker

MEMBERS ABSENT

None

ALSO PRESENT

Representative John Coghill; Theresa Tanoury, Family Services Administrator, Division of Family and Youth Services, Department of Health and Social Services; Susan Cox, Chief, Assistant Attorney General, Civil Division, Department of Law; Nate Mohatt, Staff, Representative Sharon Cissna

PRESENT VIA TELECONFERENCE

Brant McGee, Public Advocate, Office of Public Advocacy, Juneau

SUMMARY

HB 252 An Act relating to the construction of certain statutes relating to children; relating to the scope of duty and standard of care for persons who provide services to certain children and families; and providing for an effective date.

HB 252 was HEARD and HELD in Committee for further consideration.

#HB252

HOUSE BILL NO. 252

An Act relating to the construction of certain statutes relating to children; relating to the scope of duty and standard of care for persons who provide services to certain children and families; and providing for an effective date.

REPRESENTATIVE JOHN COGHILL stated that the two most important goals of HB 252 would be to create a standard of care for services offered by the Division of Family and Youth Services (DFYS) and to keep families together. He noted that it is important to continue the work of balancing child protection with family preservation during government intervention. Parents are held to a standard of care by the State with the threat of losing parental rights if they fail in meeting those standards.

Representative Coghill explained that failing to properly care for children is not just a parental issue. DFYS is made up of humans that from time to time may fail in a standard of caring. HB 252 requires that a standard of care be instituted within Alaska so that each department employee is held to at least the same standard of care required of parents.

Currently, under AS 47.10.960, there is no duty or standard of care imposed on Department employees. The lack of a standard of care obscures the fiduciary duty of the State to the parents and children for which they are making decisions.

Representative Coghill stated that HB 252 was introduced with the purpose of recognizing parents in their given role to raise their children as they see fit. The bill recognizes that parents fail in varying degrees and that DFYS is called upon to protect the children while trying to preserve the family structure. Therefore, the parent's participation in the event of a child coming under court jurisdiction was added. The legislation directs DFYS to offer intensive family preservation services to families who are able and want to learn the skills necessary to remain together and to change the conditions that would mandate the placement of their children. Those services would be provided at the family's option and would consist of an intensive short-term intervention to help the family work through the crisis and stabilize. He concluded that by remaining intact and safe, families can grow strong and

overcome their problems together.

Additionally, the bill requests for a study to determine a plan for providing statewide services. That study would include recommendations on solicitation of federal funds and redirection of State funds in order to provide services and realize cost-savings.

Co-Chair Mulder MOVED to adopt the work draft version #22-LS0454\B, Lauterbach, 4/2/02, as the document before the Committee. Representative Croft inquired if it was the Committee's intent to go back to the version before the House Judiciary version.

Representative Coghill explained the only difference in those two versions would be the repealing section. There being NO further OBJECTION, the "B" version was adopted.

Representative Coghill outlined the changes made to that version of the bill:

Section 1. Expresses the legislative intent behind Sec. 2 of the legislation.

Section 2. Changes the standard for construction of statutes in AS 47.10, from a standard promoting "the child's welfare" to a standard promoting "the best interests of the child, including the parents' participation in the child's upbringing".

Section 3-6. These sections direct the Department of Health and Social Services to offer, through contract providers, intensive family preservation services to families under certain circumstances. The services would be funded with funding already appropriated for the specific purpose of "intensive family preservation services" (IFPS).

Section 7. Defines "intensive family preservation services".

Section 8. Provides that before an agency can seek to terminate parental rights, intensive family preservation services must be offered to the parents.

Section 9. Repeals AS 47.10.960, which states: "Sec. 47.10.960. Duty and standard of care not created. Nothing in the title creates a duty or standard of care for services to children and their families being served under AS 47.10." AS 47.10 is the Children a\In Need of Aid (CINA) Title.

Section 10. Directs the Department of Health & Social

Services to conduct a study in at least one region of the State to develop projections for the need and cost of IFPS, would develop a long-range plan, and would complete a report on the study by November 30, 2004.

Section 11. Makes Sections 1 and 2 of the legislation effective immediately.

Section 12. Makes Section 3-6 and 8-10 requiring the IFPS of legislation effective July 1, 2002. Section 7 would become effective 90 days after the bill becomes law.

Representative Davies asked if there was an updated fiscal note, which would indicate costs associated with the repeal of Section 9 and the intensive care concerns.

Representative Coghill replied that he did not have one. He recommended that Theresa Tanoury from the Division of Family and Youth Services speak to that.

Representative Hudson inquired the costs of the attached fiscal note and what it would provide for the coming fiscal year.

Representative Coghill understood that the note would provide for the basic program to be administered and the pilot project would begin this year. He noted that the Department had provided the fiscal note, and that the effective date would be 2004.

Representative Lancaster voiced his concern with how the bill had grown and the intent changed.

Representative Coghill explained that the intent of the bill was to get "family preservation" installed and that it was his intent to hold the Department accountable. The bill will determine how to design that program while raising the standard for family and youth care. In the House HESS Committee, family services were included and at that point, the legislation changed. At present time, the intent is how to design that program.

Representative Coghill advised that his reason for the bill was to improve the family unit. He believed that in many cases, the children were being protected to the exclusion of the "family". Before any child is removed, there needs to be intensive family service to determine if there is more that could be done to preserve that family unit. He claimed that many times, the intent to protect the child has been to the detriment of the family even if that family is not as functional as one might prefer. He added that before the parental right is taken away, family services should be used to intervene to protect the family. He admitted that some

families are "broken" and that separating and protecting the child can be dangerous, yet important. He emphasized that the Department must be held accountable and that misuse of their power could be devastating.

Representative Lancaster asked if the legislation was related to foster care in any way.

Representative Coghill advised that it was the intent to work "along side" foster care.

Vice-Chair Bunde agreed that Division of Family and Youth Services (DFYS) should be held accountable and held to the proposed standard because in some situations, DFYS has been too aggressive. Vice-Chair Bunde voiced concern that there are some families, which are very dysfunctional. He asked if the intensive family preservation services would become an unfunded mandate for the Department, and would they be coming back for a fiscal note.

Representative Coghill agreed that resources are generally an issue. The intent of the family preservation services would be an attempt to try a different venue. He acknowledged that it would cost the Division something. He requested that Theresa Tanoury explain how they would address those costs. Representative Coghill added that the intent is that everything be directed at "family wholeness". He acknowledged that the duty to the child is paramount, however, the pendulum has swung a little to far away from the unit of the family staying together. He reiterated that a high degree of accountability should be imperative.

Representative Hudson noted that he was cautious of new ideas regarding intensive family counseling and services. He asked what the upgraded requirement or higher standard would be. He noted that he preferred the original bill to the version before the Committee.

Representative Coghill thought that the language of the bill could suggest concerns that should be examined more closely by the Division. He asked that staff from Representative Cissna's office be consulted regarding the changes from the original version.

Vice-Chair Bunde inquired why Representative Coghill had voted a "no recommendation" on his own bill.

Representative Coghill explained that the bill had been changed in each Committee and that those changes had highlighted different areas than the original intent of the bill. The original intent was to raise the standard and duty of care. It was not to go in the direction of family preservation services. He agreed that there was a need and

benefit for that concern; however, he expected that the Department would already have that in place.

Representative Croft asked if the Committee should address the concerns listed in Section 9.

Co-Chair Williams recommended that the bill be placed in subcommittee to discuss that concern.

THERESA TANOURY, FAMILY SERVICES ADMINISTRATOR, DIVISION OF FAMILY AND YOUTH SERVICES, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, advised that the Division of Family and Youth Services has had long discussions with both Representative Coghill and Representative Cissna on different sections of the bill. Ms. Tanoury indicated that the Department supports the House Judiciary version of the legislation.

Ms. Tanoury agreed with Representative Coghill that parents need to know up front on first contact, what their rights are. She understood that can be an intimidating process. The Division has developed a handbook for parents, which is now given to all parents at the first contact. Many of the legislative offices have helped with the development of that pamphlet.

In response to Vice-Chair Bunde, Ms. Tanoury reiterated that the handout is given to the parent at the initial point of contact.

Vice-Chair Bunde imagined that the initial contact would be a difficult time for the parent. He asked if the parent would understand their rights.

Ms. Tanoury replied that before the handbook was available, there were other types of brochures given out. In the time of a crisis, it is often difficult to absorb all the information. When the child is removed, that is a crisis point. The Division wanted to go the "extra" step and knew that parents "wanted to know". Thus, the pamphlet was developed.

Vice-Chair Bunde suggested that the first contact with the family was not the time that the child was taken away. He asked if there were any intervening steps before the child was removed.

Ms. Tanoury explained that there are procedures laid out. When a report of harm is received, a fact-finding investigation is begun, many times includes talking to parents. There is an obligation to tell the parents about the report in order to hear their side of the story before action is taken. Those procedures are all pre-established.

Once a decision has been made to remove the child, and there is a legal action taken, then there is an obligation to tell the parents everything there is to know and what to expect during the process and their rights. At that time, they are given an opportunity to remedy the situation or make the situation "whole". It is clear that during those crisis periods, some of the information is getting lost. That is why it was important to create the user-friendly pamphlet.

Ms. Tanoury noted that the Division does oppose Section 9. The Department of Corrections does have a fiscal note associated with the repeal of that Section. She indicated that DFYS workers are held to a national standard. Ms. Tanoury added that there is also an ethical standard and a code of ethics. Personnel actions are taken when workers have violated that criterion. The Division is not against standards. She noted that there currently is an intensive family preservation component included in the budget. She pointed out that Representative Cissna was concerned with the intensity of the level of services provided during the grant program. None of the grantees are non-profit and they have been around for a long time. The Division is totally dependent on those services. Ms. Tanoury indicated that it Representative Cissna does not want the Division to change the grant agreement relationship in any way. The intent is to find more money to grant applications to fund the program. Representative Cissna has a specific model in mind.

Representative Hudson asked how much money was needed and how many cases would fit into that category.

Ms. Tanoury replied that the family preservation component was almost \$3 million general and federal fund dollars. She noted that there are several programs within family preservation services:

- Time limited verification, which is for families in which the child has already been removed. The grantee is asked to come in and provide a time-limited family verification effort with federal money. In the grant programs, there are approximately 2,000 kids statewide;
- There are at-risk kids who come from a referral source. The situation has not gotten to the place of taking custody. The grantee is asked to provide services to that program. The Division receives about 16,000 reports per year, with 11,000 kids that are unduplicated.

SUSAN COX, CHIEF, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF LAW, spoke to Section 9, which would repeal AS 47.10.590. The statute clarifies that a duty or standard of care is not created in Title 47. She noted that the reason was that language was placed in the Smart Start package in 1998 to insure that the comprehensive overhaul of the child in need of aid (CINA) statutes do not in and of it create liabilities. The language was intended to preserve the status quo with regard to civil liabilities. The intent was not to create immunity to protect the government. The insertion of that language was included in the package to avoid the argument that any provision within the Smart Start package would create a special statutory liability. It was the drafter's intention to not upset the balance when it came to liability concerns. For that reason, there were no fiscal impacts identified with that legislation for new liability concerns. There were concerns that many of the goals included the package would not be reached in all cases because of lack of resources.

Ms. Cox pointed out that the sponsor has sought to repeal AS 47.10.960. She understood that it was because that standard did not create a duty or standard of care for services for children or family, and that it sends the wrong message to families effected by actions taken by DFYS. The language that is there is a term-of-art for liability purposes. The impression is that DFYS is not accountable or not held to standards when it comes to taking care of children. The fact of accountability is built into the entire Title 47 process as well as the DFYS procedures. The foreseen problem is an outright repeal of the language that is there. It raises the question of what the legislature's intent is. If the language is removed, it is presumed that the Legislature is doing it for a reason. Without the language, the Department would expect to face litigation challenges and a fiscal impact to defend against those arguments.

Ms. Cox advised that the Department had proposed alternative language to an outright repeal that was adopted in the House HESS Committee. In the House Judiciary Committee that language was removed. The proposed House Finance Committee version proposes to remove the language. If it is removed, she anticipated that the Department of Law would have to add a fiscal not. Ms. Cox offered to answer questions of the Committee.

Representative Croft thought that there was a distinction between the general, negligent actions and a cause of action for failure to meet any particular time lines. He understood that the State would be liable for the general failure to care for a child.

Ms. Cox acknowledged that was correct. The State has defended lawsuits before the Legislature, and will continue

to, regarding allegations made that the Division has failed to adequately care for children in their care.

Representative Croft commented that the concern becomes what should the liability of the Department be for failure to meet the statutory mandates. He asked if there could be compromises and if there was anyway to retain the ability to enforce procedural, technical, and timeline requirements without the full penalty of legal rights.

Ms. Cox stated that there is a way. She added that the entire process envisioned in Title 47 for protecting children in need of aid is already judicially overseen. When custody is taken, the Court is involved in overseeing decisions made in that regard. There are many steps in the process under Title 47 where the Court could be directly appealed to. The Department of Law is attempting to address the initiation of separate litigation. At anytime during the Court CINA case, the parents, guardians, or social workers, all have the ability to give input. If a parent wants a hearing, they can request it. The Department is attempting to avoid "spin-off" litigation that sets up separate remedies and basically creates a separate liability.

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Representative Croft asked what the consequence to the Department would be for not following their own statutes.

Ms. Cox replied that the court is free to order that certain things happen and to mitigate those consequences if they are adverse to the family. The main concern is to address the best interest of the child.

Representative Croft noted that there is nothing indicated regarding repeated failure. He asked if there was any consequence to the family, besides the judicial order, which would indicate what they should have done before.

Ms. Cox replied that she could not imagine it but there is the possibility of contempt. She did not know of any other order that a court could make. At this point, separate litigation is not anticipated. That would all be addressed in the CINA case, after conferring with the judge regarding that oversight.

Representative Croft commented that the heart of the matter is how to amend AS 960; he noted he was worried that there is no remedy for a continued violation. He added that the job of the Legislature is to establish the structure so that it functions properly. He believed that when there a family

that is repeatedly faced with violations and failure to meet timeline requirements, and if they are not able to rise to the occasion of specific harm to the child, that family would at some point would experience "harm" through those small neglects. He recommended "limiting" would be appropriate.

Ms. Cox replied that in the HESS Committee language, there was a statute that did mention a duty or standard of care, speaking spoke to civil liability. The language would make it clear that failure to follow consequences would be pursued by the Division's own complaint section separate from a court action.

Representative Croft thought that failure to comply with particular requirements could be used as evidence of a general neglect.

Vice-Chair Bunde questioned the post statute verbiage and asked if it would be possible for the Department to create a citable offense to the parent. He asked if the Department was held to a different standard than the parent would be.

Ms. Cox cautioned about thinking in terms or liability, as that speaks to actions happening for money damages. She commented that it would be more appropriate to ask if there would be consequences. If a child is removed and placed in the Department's custody, under statute, every effort must be made to help the child return to the family in a safe environment. There are a number of obligations placed on the Division to work with the family to provide services. There is a court oversight of that project. If the parent does not meet all of the objectives, there would be continual oversight and evaluation of whether that child should be returned to the family or not. At some point, the Legislature directed the Department to make long-term decisions regarding the child and to determine if termination of the parents rights were in order.

Vice-Chair Bunde asked if the requirement of the State was as stringent as the requirement placed on the parents. He questioned if there would be consequences placed on the State.

Ms. Cox advised that if the State sought to terminate a parent's rights and found that they had improperly applied the law, they would intervene. She acknowledged that there are consequences and that the Division does not always get its way. The parents have the ability throughout the case to bring matters to the court's attention. There are rights build into the system under AS 47.10. If harm befalls the child while they are in the State's custody, there would be consequences to the State for that.

BRANT MCGEE, (TESTIFIED VIA TELECONFERENCE), PUBLIC ADVOCATE, OFFICE OF PUBLIC ADVOCACY, ANCHORAGE, pointed out that he did not represent the DFYS or the Administration except to represent the best interest of abused and neglected children in the context of the CINA cases.

Mr. McGee noted that he supported Representative Coghill's intention with the bill but did support the repeal of Section 9. He stipulated that there is one primary issue involved in the controversy, and that is one of accountability. There are those that seek to evade and avoid accountability and those that seek to impose it. The Division of Family and Youth Services has more power over Alaskans than any agency of government. Children and their parents can have their lives destroyed by tragically inadequate services by DFYS. Children, families and parents should have the greatest possible legal protection from government misconduct, negligence and failure to fulfill statutory duty. Those protections include suits for negligence for money damages and violations of statutory duties. He stated that more important are the remedies available to children and families in actions of equity and constitutional claim.

Equitable remedies allow children to ask the court to stop the State from doing "something" and to order the State to adhere to a duty. These actions are rarely used, but no less critical. Chapter 10 governs CINA procedures once the child is taken into custody. Sections specifically impose a mandatory duty upon the State to provide a child with food, shelter, education and medical care, and to protect, train and nurture the child. That is the job of any custodian of any child. When the State fails to do so, ad leim guardians from the Office of Public Advocacy advocate for the best interest of that child. The Office almost always wins because the job of protecting the child's interest is in accord with the judge's job to give the highest priority to the best interest of children.

Mr. McGee added that the Office of Public Advocacy is limited in their ability to litigate only in the context of the CINA cases. He stated that they cannot bring independent actions on behalf of children. That is why it is necessary that children have the ability to seek legal regress based on statutory duties and constitutional claims based upon those duties. He stressed that sub-Section 960 makes no sense because it deals with Chapter 10. Chapter 10 creates duties for DFYS. Sub-Section 960 says nothing in the title that creates a duty or standard of care for services to children and their families served under AS 47.10. In other words, some statutes oppose that duty; however, this statute renders those statutes empty and meaningless. Those duties, enacted by the Legislature, make

promises to children in custody and elimination of that statute would break that promise.

Other chapters in Title 47 have no language like sub-Section 960. He claimed that arguments submitted by Representative Coghill's bill to delete that section would be subject to further litigation. Those arguments are groundless. The enactment of Section 960 does not and has not barred actions for negligence. He added that a court has never interpreted that section. Mr. McGee asked what had changed since its enactment in 1988, noting that it has not precluded any legal action against the State. The State is concerned that violations of the procedural rule could form the basis of a civil negligence. If that is true, the State should carefully craft a new Section 960 that does not allow forming the basis of such action.

Mr. McGee suggested the following verbiage:

AS 47.10.960 - "Violations of procedural timelines in AS 47.60 do not form the basis for civil liability."

Co-Chair Williams requested that Representative Coghill prepare a committee substitute including the language proposed by Mr. McGee.

HB 252 was HELD in Committee for further consideration.
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ADJOURNMENT

The meeting was adjourned at 3:02 P.M.