

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 4, 2002

1:13 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair

COMMITTEE CALENDAR

CONFIRMATION HEARINGS

Board of Governors of the Alaska Bar

William A. Granger - Anchorage

Violent Crimes Compensation Board

Leslie D. Bogda Wheeler - Wasilla

Commission on Judicial Conduct

Jeffrey M. Feldman - Anchorage

- CONFIRMATIONS ADVANCED

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."

- MOVED CSHB 252(JUD) OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 252

SHORT TITLE:STANDARD OF CARE FOR CINA SERVICES
SPONSOR(S): REPRESENTATIVE(S)COGHILL

Jrn-Date	Jrn-Page		Action
04/23/01	1136	(H)	READ THE FIRST TIME - REFERRALS
04/23/01	1136	(H)	HES
01/17/02		(H)	HES AT 3:00 PM CAPITOL 106
01/17/02		(H)	Heard & Held
01/17/02		(H)	MINUTE(HES)
02/07/02		(H)	HES AT 3:00 PM CAPITOL 106
02/07/02		(H)	<Bill Canceled>
02/12/02		(H)	HES AT 3:00 PM CAPITOL 106
02/12/02		(H)	Heard & Held
02/12/02		(H)	MINUTE(HES)
02/13/02	2257	(H)	COSPONSOR(S): DYSON
02/14/02		(H)	HES AT 3:00 PM CAPITOL 106
02/14/02		(H)	Heard & Held
02/14/02		(H)	MINUTE(HES)
02/21/02		(H)	HES AT 3:00 PM CAPITOL 106
02/21/02		(H)	Moved CSHB 252(HES) Out of Committee
02/21/02		(H)	MINUTE(HES)
02/25/02	2378	(H)	HES RPT CS(HES) NT 1DP 3NR 1AM
02/25/02	2378	(H)	DP: CISSNA; NR: COGHILL, KOHRING,
02/25/02	2378	(H)	JOULE; AM: DYSON
02/25/02	2378	(H)	FN1: (HSS)
02/25/02	2390	(H)	JUD REFERRAL ADDED AFTER HES
02/25/02	2390	(H)	FIN REFERRAL ADDED AFTER JUD
03/04/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

WILLIAM A. GRANGER, Appointee

to the Board of Governors of the Alaska Bar

13810 Jarvi Drive

Anchorage, Alaska 99515

POSITION STATEMENT: Testified as appointee to the Board of
Governors of the Alaska Bar.

LESLIE D. BOGDA WHEELER, Appointee

to the Violent Crimes Compensation Board (VCCB)

PO Box 878885

Wasilla, Alaska 99687

POSITION STATEMENT: Testified as appointee to the Violent Crimes Compensation Board.

JEFFREY M. FELDMAN, Appointee
to the Commission on Judicial Conduct (CJC)
500 L Street, Suite 400
Anchorage, Alaska 99501

POSITION STATEMENT: Testified as appointee to the Commission on Judicial Conduct.

SUSAN COX, Chief Assistant Attorney General
Civil Division (Juneau)
Department of Law (DOL)
PO Box 110300
Juneau, Alaska 99811-0300

POSITION STATEMENT: During discussion of HB 252 responded to questions.

SCOTT CALDER
PO Box 75011
Fairbanks, Alaska 99707

POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 252.

REPRESENTATIVE SHARON CISSNA
Alaska State Legislature
Capitol Building, Room 420
Juneau, Alaska 99801

POSITION STATEMENT: Provided comments during discussion of HB 252.

ACTION NARRATIVE

TAPE 02-27, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:13 p.m. Representatives Rokeberg, Coghill, Meyer, and Berkowitz were present at the call to order. Representatives James and Kookesh arrived as the meeting was in progress.

CONFIRMATION HEARINGS

Board of Governors of the Alaska Bar

Number 0103

CHAIR ROKEBERG announced that the committee would consider William A Granger as appointee to the Board of Governors of the Alaska Bar.

Number 0117

WILLIAM A. GRANGER, Appointee to the Board of Governors of the Alaska Bar ("the Board of Governors"), testified via teleconference. He mentioned that he is a lifelong Alaskan, raised and educated in Alaska; has been a banker all of his adult life, employed most recently by "National Bank of Alaska/Wells Fargo"; is currently in private practice making small consumer and larger commercial loans; has been active for many years in the "Anchorage bar community" in commercial-type transactions and bankruptcy transactions; and has friends and acquaintances who, over the years, have served on the Board of Governors of the Alaska Bar.

MR. GRANGER noted that from these people he has received glowing recommendations regarding the Board of Governors' educational process, and its importance in maintaining the integrity and quality of the bar at large. He recounted that he's always been interested in seeing that "that" be kept to the highest standard possible. He noted that he has been active on the Board of Governors for the last six months since his initial appointment in June 2001; has attended two or three regular meetings; and has been involved in some of the Board of Governors' disciplinary matters, continuing education matters, and "planning meetings" for the Bar Association. He said he has made an effort to become familiar with what the Board of Governors does and how it operates, adding that his enthusiasm for his appointment has not waned at all.

CHAIR ROKEBERG thanked Mr. Granger for volunteering to serve on the Board of Governors. After some discussion regarding the forms provided to the committee, Chair Rokeberg reminded members that signing the reports regarding appointments to boards and commissions in no way reflects individual members' approval or disapproval of the appointees, and that the nominations are merely forwarded to the full legislature for confirmation or rejection.

Violent Crimes Compensation Board

Number 0388

CHAIR ROKEBERG announced that the committee would consider Leslie D. Bogda Wheeler as appointee to the Violent Crimes Compensation Board.

Number 0417

LESLIE D. BOGDA WHEELER, Appointee to the Violent Crimes Compensation Board (VCCB), testified via teleconference. She confirmed that she has served on the VCCB for a partial term and a full term, and is now up for reappointment for a second full term. She relayed that in the past she had worked with the Council on Domestic Violence and Sexual Assault (CDVSA) and some of the programs that it funds, and that she has devoted much of her professional life, for the last 20 years, to victims' services and victims' issues.

MS. BOGDA WHEELER said that serving on the VCCB has been a very rewarding experience for her because the VCCB addresses the needs and issues of victims in many different circumstances. In addition to [issues of] sexual assault, domestic violence, and sexual abuse of children, the VCCB also addresses the entire spectrum of victims' compensation. She noted that she has been fortunate, as a member of the VCCB, to attend a national conference on victims' issues, and this has broadened her knowledge considerably. "With the unfortunate advent of terrorism in our country, I was glad to know that we had already addressed some of the issues involved there, so that we would be prepared, in Alaska, to provide those services; our policies reflect those concerns and that preparation," she added.

MS. BOGDA WHEELER said that the VCCB does quite a bit of work and meets four times a year, and that its staff has done an incredible job of making sure that victims throughout Alaska receive the benefit of compensation for out-of-pocket expenses. She opined that the VCCB is doing a very important job for the people of Alaska, and stated that she is proud to serve on the VCCB and would enjoy continuing that service.

CHAIR ROKEBERG asked for an example of the highest and lowest amounts of compensation that the VCCB has awarded, and for what circumstances those were made.

MS. BOGDA WHEELER said that probably the lowest financial figure - for example, a few hundred dollars - would be for somebody who had some expenses related to going to a hospital, or who had out-of-pocket expenses for a few sessions of crisis counseling. The highest awards would be for cases where somebody has been

tragically injured and their medical bills go far beyond anything that the VCCB has the resources to compensate for. The current high amount for an individual is \$25,000, and for multiple-victim situations, the VCCB can award up to \$40,000 for expenses that may in fact be into the hundreds of thousands of dollars. For a child who has lost his/her parent due to a violent crime, the VCCB would be able to pay \$25,000, total, to that child, which, when considering what it costs to raise a child, is pretty much just a drop in the bucket, she added. "Those are opposite ends of the continuum, if you will, in terms of what we are able to award," she stated.

CHAIR ROKEBERG asked whether, in making awards, the VCCB looks at other factors such as insurance, the victim's net worth, and other family assets.

MS. BOGDA WHEELER said yes; the VCCB is the "payer of last resort," so all other ability-to-pay avenues are exhausted before the VCCB pays anything on any given aspect of a claim.

CHAIR ROKEBERG thanked Ms. Bogda Wheeler for serving on the VCCB.

Commission on Judicial Conduct

Number 0800

CHAIR ROKEBERG announced that the committee would consider Jeffrey M. Feldman as appointee to the Commission on Judicial Conduct.

Number 0837

JEFFREY M. FELDMAN, Appointee to the Commission on Judicial Conduct (CJC), testified via teleconference. After noting that he is up for reappointment to the CJC for a third term, he explained that the CJC is responsible for enforcing the code of judicial ethics and making recommendations to the [Alaska] Supreme Court regarding disciplining judges who have violated that code. He said he has resided in Alaska since 1975 and is a lawyer in private practice - predominately a trial and appeal practice with a mixture of civil cases.

MR. FELDMAN said the CJC fulfills an essential role in the judicial system by ensuring the integrity of the process. He explained that the staff of the CJC receives and reviews a large number of grievances and complaints each year, after which the

CJC also reviews them and then holds hearings where appropriate in order to make findings and recommendations. He offered that during the time that he has served, the CJC has been carrying out its work in a more timely fashion, the caseload is much more current, and the response to concerns and complaints has improved.

MR. FELDMAN noted, however, that there is always tension between rules that keep certain matters at certain stages of the investigation confidential and the desirability of having an open process that is available to the public. He elaborated:

We operate under rules that are established both internally and by statute, and we've attempted to strike that balance - I think reasonably well. And Alaska currently has one of the most open systems of judicial discipline in the country, which I happen to personally think is highly desirable, and if it were up to me personally, I'd probably be happy to make it even more open.

CHAIR ROKEBERG asked for an example of a typical complaint that the CJC receives.

MR. FELDMAN explained that the typical complaint is usually one that does not fall within the jurisdiction of the CJC; a typical complaint often comes [from] a prisoner in jail, or sometimes from a dissatisfied litigant - frequently in a domestic matter - who has a disagreement with a decision that's been made by the judge. Unhappy litigants account for a lot of the complaints that the CJC receives but lacks the authority to review. Of the complaints that the CJC receives that are within its jurisdiction, a significant number fall into the category of judicial demeanor, which is how judges behave and treat people.

Number 1048

MR. FELDMAN noted that the cases that have prompted actual "positions and discipline" have been instances of judges crossing the line and engaging in actions that are beyond the scope of their authority, using judicial power in a way that is found to be improper, and generally conducted themselves in a way that is inconsistent with the canons of judicial ethics. For example, a judge who was found to have bypassed the normal procedures for appointing someone into a coroner position, and a judge who was found to have used the "intent power" in an improper fashion. Demeanor and use of power, he noted, are the

two main categories that complaints fall into, although there are few complaints of judicial misconduct that rise to a serious level; most complaints are simply from unhappy litigants who don't like what happened to them during the judicial process.

CHAIR ROKEBERG asked whether the CJC is responsible for "grading for retention."

MR. FELDMAN explained that the Alaska Judicial Council (AJC) is the body responsible for retention issues and screening applicants for appointment to the bench, not the CJC. The CJC's mission is solely limited to judicial discipline, he added.

CHAIR ROKEBERG asked whether there is any communication between the AJC and the CJC regarding retention.

MR. FELDMAN replied:

There is in the sense that there is a rule that requires that if a judge is up for retention and is currently the subject of a "conduct commission proceeding," certain notification of that proceeding has to be made to the [AJC] so that they can evaluate it and determine whether it bears on the judge's fitness for retention.

CHAIR ROKEBERG thanked Mr. Feldman for his public service.

MR. FELDMAN remarked that he has always considered it an honor to serve on the CJC.

Number 1263

CHAIR ROKEBERG noted that there were no objections to forwarding the reports regarding the appointments of: William A. Granger to the Board of Governors of the Alaska Bar, Leslie D. Bogda Wheeler to the Violent Crimes Compensation Board, and Jeffrey M. Feldman to the Commission on Judicial Conduct. Therefore, the confirmations were advanced.

HB 252 - STANDARD OF CARE FOR CINA SERVICES

Number 1296

CHAIR ROKEBERG announced that the last order of business would be 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." [Before the committee was CSHB 252(HES).] Chair Rokeberg indicated that he would prefer that the testimony focus on the legal issues of HB 252, in particular the civil liability provision - Section 7.

REPRESENTATIVE COGHILL, speaking as the sponsor, said that HB 252 includes recognition of parental rights and encourages greater parental participation with regard to children-in-need-of-aid (CINA) discussions. It establishes a pilot program regarding intensive family services, and, with regard to section 7, HB 252 addresses the issue of the duty and standard of care being exempted from [AS] 47.10. He noted that this exemption is what actually began the whole discussion that resulted in the creation of HB 252. "The reason I brought this whole bill forward was [that] I wanted a little higher degree of accountability in the Department [of Health & Social Services (DHSS)] under [AS] 47.10," he added.

REPRESENTATIVE COGHILL noted that although the [DHSS] actually has "pretty good levels of care," he wanted to tie it to statute. He noted, however, that placing all of the duties and standards of care that the [DHSS] currently follows would create "about a 50-page bill." In addition, although the [DHSS] is under a lot of pressure to perform its duties with fewer resources, Representative Coghill said he would still like to at least provide for departmental accountability and for some form of civil liability. He pointed out that the [DHSS] has been given quasi police and judicial powers, and so should be held accountable for its actions under AS 47.10, much like the requirement of law enforcement to read a person his/her "Miranda rights."

Number 1520

REPRESENTATIVE COGHILL explained that the Department of law suggested the current language in Section 7 of HB 252, but he would rather take that language out and allow for some form liability. He noted, however, that he did not want to impede the [DHSS] in asserting its authority under AS 47.10 in cases where there is danger and harm, but [the DHSS] should still be held accountable for any misuse of that authority. The whole intention of HB 252, he said, is to show respect for parental authority, to encourage families to participate in child-in-need-of-aid [solutions], to provide for a "family preservation service," and to address the issue of civil liability pertaining

to [DHSS] actions. He remarked that he objects to the fact that there is no "standard and duty of care" in statute.

REPRESENTATIVE COGHILL mentioned that he has a couple of amendments to suggest, one of them being merely a technical amendment.

CHAIR ROKEBERG surmised, then, that the goal of HB 252 is to establish in law the fact that the department has a duty to, or a standard of care for, the children in the department's custody, and that Representative Coghill also wishes to retain some type of immunity that exculpates those [department] people from any civil liability.

REPRESENTATIVE COGHILL clarified, rather, that although the language [regarding immunity from civil liability] was suggested by the Department of Law, he would prefer to have that language taken out entirely [so that] if someone felt that there was harm done by the department, he/she could have some kind of civil recourse]. "I don't want to have language in statutes that specifically exempts this department," he added. He recalled that when the [CINA] statutes were first enacted, there were many new provisions and the department was concerned that it would be subjected to lawsuits before all aspects of the [CINA] program could be instituted. This concern resulted in the current statutory language pertaining to immunity from civil liability.

REPRESENTATIVE COGHILL opined that it is time to remove this language now that the [CINA] program is up and running. He relayed his concern that although people in the department sometimes do an excellent job, occasionally they overstep their bounds. Under AS 47.10, families can be held to a very high degree of accountability, so it is important for parents to have some recourse in cases where the department has abused its powers, he opined. And although there are currently a lot of duties and standards in regulation, he said he would rather there was something more specific placed in statute than what is currently there. He remarked that his intention at this point is to at least make sure that the state is not exempting itself from a standard of care, which, he opined, is what the current language [in both the statute and HB 252] does.

REPRESENTATIVE BERKOWITZ asked whether there were any lawsuits at this time, and what was the state's potential liability.

Number 1864

SUSAN COX, Chief Assistant Attorney General, Civil Division (Juneau), Department of Law (DOL), said that she represents the state in personal injury litigation specifically, although she herself does "not do children's' cases." In response to Representative Berkowitz, she said that the state does have cases pending, some related to events that occurred before the "Smart Start legislation" was enacted four years ago, and some related to events that occurred afterwards. She went on to explain that essentially, the standard for liability becomes an issue when the Division of Family and Youth Services (DFYS) has failed to exercise reasonable care in protecting children from harm, whether they are children in foster care who are not protected adequately from foster parents or others in the foster home, or children who are not taken into foster care and protected from their natural parents. Unfortunately, she noted, the DOL has cases of both kinds, which the special litigation attorneys are handling.

MS. COX, turning to Section 7 of HB 252, explained that the language [in question] was initially placed in statute four years ago to preserve the status quo with respect to liability. Thus, this language that says, "nothing in this title creates a duty or standard of care" did not create an immunity for the department. The intention was to keep individual provisions, selectively or collectively, from creating, in and of themselves, new causes of action or new theories for liability. Obviously, she noted, it certainly left open the argument that the [DHSS] or the [DFYS] has failed in, or been negligent in, protecting children from harm. So this [language] was an attempt to keep specific provisions of the CINA laws from becoming, themselves, vehicles for new tort theories - new causes of action.

Number 2001

MS. COX explained that one of the concerns at the time pertained specifically to timelines. The legislation in Title 47 regarding children in need of aid set very specific goals; in fact, she said, Representative Dyson told her that he considers them to be goals and guidelines and that he expects the [DFYS] to exercise some flexibility in moving to terminate parental rights and in making permanent decisions with respect to children. So, both because of the resource questions regarding having enough social workers to handle things in the most beneficial manner, and because the courts can't always do everything in the timelines required, the DOL does not want to

see failure to act within certain timeframes to become, itself, a basis for new tort theories. "Again, we always have the potential for a negligence action claiming that the [DHSS or the DFYS] or a specific social worker has failed to protect children adequately," she said

MS. COX mentioned that at the time, Representative Dyson, one of the architects of the Smart Start legislation, agreed to this language, and so it became part of the overall package and was figured into the fiscal note in 1998. She explained that this language is a term of art, and is certainly not intended to imply to anyone that the DFYS does not need to have standards regarding how it cares for or protects children. In fact, that is certainly not the case, she assured the committee; in reviewing Title 47, one finds that the process and the whole system clarify that the [DFYS], the courts, the guardians ad litem, and the families all have responsibilities in ensuring that the system works for the benefit of the children.

MS. COX pointed out that there is accountability in that process in that parents who are aggrieved have the ability to be represented by counsel, to get court-appointed counsel if they cannot afford it, or to advocate on their own behalves. In addition, guardians ad litem are appointed to represent children's interests, and the [DFYS] has voluminous policies and procedures, as well as administrative complaint processes for parents or others involved in the system who aren't happy with how a situation has turned out. She added that there are many instances in statute that allow someone who is not satisfied to go to the court and ask the judge to review the situation.

Number 2102

MS. COX stated that if AS 47.10.960 - Section 7 of HB 252 - was repealed in its entirety, it begs the question of what the legislature's intent is in doing that. Is it the legislature's desire to open the door for new arguments about liability based on the CINA laws? Is that the intent? Or is it just that the words that are in the statute are offensive or somehow misleading to the public? Unfortunately, as a defense attorney, she said, she can envision new suits, or new theories raised in existing suits, that if this language were repealed, then some provision in the CINA law, if not followed to a "T," would become a new theory of liability, and the attorney general's office would end up arguing whether it was the legislature's intention to create new liabilities. Therefore, since it was the DOL's understanding that the reference to a standard of care

was the problem, the DOL suggested some alternative language that did not speak in terms of standard of care.

MS. COX explained that the new language proposed in Section 7 of HB 252 was just one of the suggestions the DOL made, and it was what the House Health, Education, and Social Services Standing Committee chose to insert in its committee substitute (CS). There are certainly other ways that it could be said, she noted, but if AS 47.10.960 is repealed altogether without some substitute language, she expected a fiscal impact in her office.

REPRESENTATIVE BERKOWITZ wanted clarification on whether, under the existing statute, suits have been initiated and, therefore, people who feel that the [DHSS] has wronged them do have access to the courts.

MS. COX said that is true, but it is primarily for people who believe that children have been harmed, either from being placed in foster care that was not appropriate - not safe - or from not being placed in foster care at all. At this point, she explained, the parents who do not like the way the process has handled things do not necessarily have a right of recourse for themselves; the current lawsuits maintain that the children have been negligently harmed as a result of the [DFYS's or the DHSS's] actions. Therefore, she said, she would not say that the DOL has ongoing litigation involving parent's allegations that they have somehow been aggrieved; the current cases pertain to failing to protect children.

Number 2251

MS. COX, in response to a question regarding the standard prior to the enactment of HB 375 [by a previous legislature], explained that before that time, the laws in Title 47 relating to child protection were not as mandatory or as extensive, and so did not impose as many statutory obligations upon the [DHSS].

REPRESENTATIVE COGHILL remarked that parents don't have a lot of latitude on timelines [imposed by the DHSS/DFYS]; parents are held civilly liable if they don't make a court date, they are held civilly liable if they don't follow through with even suggestions made by the [DHSS/DFYS], and they are held civilly liable if they sign something that they don't necessarily understand and can't comply with because they have not been properly instructed. Not only are parents held civilly liable, they may have their children taken away from them. Parents are

held civilly liable by many entities, including the court system, the DFYS, and a variety of different [agencies].

REPRESENTATIVE COGHILL opined that with all of the extra authority, knowledge, and other advantages that [the DHSS] has over parents, [the DHSS] should at least be liable for not following "those timelines." He pointed out that pursuing litigation is very difficult for a parent who is under investigation [by the DHSS]. He said that his intent is "to bring that liability at least to some equity." He asked for an example of a [new theory of] liability that might result from repealing Section 7.

MS. COX clarified that in the world of litigation, saying that someone is civilly liable means that he/she is subject to a judgment for damages, and this is what Section 7 [precludes]. To say that a parent is held accountable in many instances in the DFYS and CINA systems is not the same thing as saying that he/she is civilly liable.

REPRESENTATIVE COGHILL offered, however, that those parents are subject to a civil action.

MS. COX acknowledged that a CINA case is a civil action; it's a children's action, which is a special kind of civil action that the courts designate differently. Notwithstanding this, she added, there is a difference between saying civil liability for purposes of damages and saying that someone is responsible for following certain processes in the law. To say that parents are statutorily required to comply with various court and DFYS requirements - if the CINA statutes are invoked and a process is initiated - is different than saying parents are civilly liable.

Number 2392

REPRESENTATIVE COGHILL argued, however, that the effect of this kind of civil action is still significant. And while he understands the concept of civil liability as it relates to a monetary judgment, he said, what he is referring to is still considered a civil action.

MS. COX agreed. She then remarked that the responsibilities of the [DHSS] are spelled out in the same statutes that speak to the responsibilities of parents, with the court overseeing the process; hence, recourse for parents is there, currently, via the courts. Regarding the question of what a new [theory of] liability might be, she said:

By removing this language [in Section 7] that has, up to this point, meant that the CINA statutes, in and of themselves, do not create new causes of action - or at least [eliminate] that argument - ... it opens the door to the argument that, in fact, each provision of Title 47 or 47.10, in itself, if it's not followed, could create a statutory cause of action for damages. Now, that's not necessarily going to be the conclusion reached by the court, but it's certainly going to be the argument made, and begs the question: What is the legislature's intent in removing that language? Was it to open the door to additional types of liability? So, virtually any provision in [Title] 47.10, if it wasn't followed to a parent's or a guardian ad litem's satisfaction, would be arguably the basis for a civil suit for damages, apart from the interplay that we already expect under the CINA laws in the court process in the CINA case itself.

REPRESENTATIVE COGHILL respectfully submitted, then, that perhaps [similar language] should be inserted at the conclusion of almost every set of laws adopted.

CHAIR ROKEBERG recognized the presence of Representative Sharon Cissna, and asked her to join members at the committee table.

TAPE 02-27, SIDE B
Number 2497

REPRESENTATIVE COGHILL, referring to language in current statute that says "nothing in this title creates a duty or standard of care for services to children and their families being served under AS 47.10", said he finds this statement offensive. He noted that what the legislature is trying to do via these statutes is protect children, but at the same time, he opined, the statute is specifically saying that nothing is created that guarantees responsibility on the part of the [DHSS]. He asked Ms. Cox to explain to him why this [or similar] language should remain in statute.

MS. COX, in response, reiterated that the term "does not create a duty or standard of care" is a term of art [pertaining to] civil liability, and that the intention was to maintain the status quo. Liability is still possible. This [language] does not create an immunity, and it was part of the whole package

that was enacted four years ago during a comprehensive revision of the statutes.

REPRESENTATIVE MEYER asked Representative Coghill if he feels that by allowing for civil liability, it's going to "change anything that's currently going on." He offered that it may just add more expense [to the state].

REPRESENTATIVE COGHILL posited that if the language is removed, "then all's we're doing is creating 'what if' questions; we're really not creating a greater liability." However, if the current statutory language is retained, he added, "then there's a lot of 'what if' taken away from parents, because we're saying that there's nothing in this title that creates a duty or standard of care for services to children or their families."

CHAIR ROKEBERG mentioned that sometimes the use of terms of art can create confusion regarding the common meaning of words.

REPRESENTATIVE BERKOWITZ proffered that what Representative Coghill is saying is that he wants some affirmative statement that a duty or standard of care exists, and that what the DOL is saying is that they would prefer that it arise under some different provision of law than AS 47.10. Is that accurate? Or, that it [already] does arise under some different [provision]?

Number 2366

MS. COX said that the DOL would be perfectly content - not happy, but perfectly satisfied - to have liability remain a question of the common law breach of reasonable care - the standard negligence test - and not be a question of statutory causes of action or, arguably, statutorily created causes of action.

REPRESENTATIVE COGHILL indicated agreement with Representative Berkowitz's assessment. "That's where I'm heading; I want to try to get something that'll help us bridge this very gap," he added.

REPRESENTATIVE BERKOWITZ asked whether language such as "the duty or standard of care for services to children and their families being served does not arise under AS 47.10" or "the duty or standard of care for services to children and their families being served arises from the common law" would alleviate Representative Coghill's concern and bridge the gap.

CHAIR ROKEBERG asked Representative Coghill whether he had considered just omitting [Section 7].

REPRESENTATIVE COGHILL said yes. He posited that omitting Section 7 would lead to the same effect as Representative Berkowitz's proposed language because "it would be assumed anyway."

REPRESENTATIVE BERKOWITZ, in colloquy, said:

But you wanted a statement that there is an affirmative duty or standard of care. And if you assert that there is a duty or standard of care, ... at the same time acknowledging that it does arise out of the common law, but instead of saying it arises out of the common law, just say it doesn't arise under [AS] 47.10 ...

CHAIR ROKEBERG asked Ms. Cox to explain the difference between a common law cause of action for civil liability and a statutory cause of action.

MS. COX explained that for the common law test for negligence, the elements are the existence of a duty, the breach of a duty - typically the duty is to act with reasonable care, and so there is the duty of reasonable care - failure to exercise reasonable care, and causation - it causes damages to the injured person. So the question becomes whether there has been negligence in either the action toward a child, or the failure to act to protect a child from harm. That is the law in Alaska, she said, "but it is not a creature of a statute."

Number 2246

MS. COX then explained that the courts can imply a statutory cause of action if they view the legislature's intent is to create a cause of action for damages flowing directly from a statute. So the argument becomes: Did the legislature's enactment of a particular law create a specific duty that substitutes for the general test for negligence? Is that the legislature's intention, to create specific liabilities flowing from the statute itself; or rather is it to create a statutory scheme to accomplish certain things? She noted that ordinarily, the kind of language in AS 47.10.960 does not need to be said because it is not presumed that the legislature, in regulating

all manner of legal situations in this state, intends to create liabilities.

MS. COX said that with HB 375, this language was included because of the concern that the legislation was getting so specific and thus the argument could be raised that the legislature was intending to create mandatory duties, the breach of which would, in and of itself, create new liabilities. So this specific sentence currently in AS 47.10.960 was included to prevent that argument from being raised. The problem that the DOL has with repealing that language altogether, she said, relates to the question of construction by the courts subsequently, because now that it is on the books, the repeal of it begs the question: What is the legislature's intent? Did the legislature presume to create new liabilities with its specific mandates in AS 47.10?

MS. COX mentioned that had the language never been inserted, perhaps there would not be any need for the current discussion; however, since the language is part of current statute, repeal of that language raises the question of legislative intent. She noted that the proposed substitute language found in Section 7 is an attempt to maintain the status quo while removing the language that Representative Coghill finds so offensive.

REPRESENTATIVE BERKOWITZ said: So, in essence, the duty or standard of care that exists currently derives from the common law. Is that correct?

MS. COX said yes.

REPRESENTATIVE BERKOWITZ asked: Why don't we just say that? Would that be okay?

REPRESENTATIVE COGHILL said he thought that by repealing the language altogether, the legislature would be saying that.

REPRESENTATIVE BERKOWITZ suggested stating that specifically: "The duty or standard of care for services to children and their families being served derives from the common law."

Number 2110

MS. COX said that would certainly be fine with her. Since "we've" already said that it doesn't create a duty, it would be helpful to say that it derives from the common law, and doing so would maintain the status quo.

CHAIR ROKEBERG indicated agreement. He also expressed concern with the use of the words "Failure to comply with a provision of this title...." He asked why all of AS 47 is referenced in the proposed substitute language for Section 7.

MS. COX suggested that perhaps it is because HB 375 made changes throughout AS 47 and not just to AS 47.10. She noted, however, that if the language offered by Representative Berkowitz were adopted, she would not anticipate having problems elsewhere in AS 47 because of that change.

CHAIR ROKEBERG reiterated that it troubles him to have that reference there.

REPRESENTATIVE BERKOWITZ suggested that "under AS 47.10" could be added to the language he previously suggested.

CHAIR ROKEBERG asked whether the reference to common law would apply to both the [DHSS} and anybody else who was statutorily deemed to have responsibility [over children] - such as a foster parent.

MS. COX surmised that it would apply to anybody who is affected by AS 47.10 in terms of his/her responsibilities within the statutes.

REPRESENTATIVE COGHILL asked what would be changed by stating that the duty or standard of care derives from common law if, currently, individuals have recourse under common law on issues of liability.

MS. COX said it changes nothing except for removing the potential argument that the legislature intended to create new liabilities.

CHAIR ROKEBERG mentioned that the heading for AS 47.10.960 would need to be changed [if Representative Berkowitz's suggested language is adopted].

REPRESENTATIVE BERKOWITZ suggested "Duty and standard of care."

Number 1840

REPRESENTATIVE COGHILL made a motion to adopt Representative Berkowitz's suggested language as Amendment 1. That section of statute would then read: "**Sec. 47.10.960. Duty and standard of**

care. The duty or standard of care for services to children and their families being served under AS 47.10 is derived from common law."

Number 1810

CHAIR ROKEBERG objected for the purpose of discussion. He asked Ms. Cox whether the entire title, or just the CINA chapter, should be referenced.

MS. COX opined that the language is adequate as suggested. She acknowledged that presumably common law would apply to the remainder of Title 47 as well. She posited that the discussion thus far does clarify that the legislature is not intending to create new liabilities anywhere in Title 47.

REPRESENTATIVE COGHILL requested assurance that Amendment 1 would not enable the [DHSS] to exempt itself from liability.

MS. COX assured Representative Coghill that Amendment 1 neither creates any new liability nor creates any exemption from liability; it will merely maintain the status quo.

REPRESENTATIVE COGHILL remarked that the CINA laws are very complex and difficult to understand, so going to plain English whenever possible is a much better way to go.

Number 1561

CHAIR ROKEBERG withdrew his objection. There being no further objection, Amendment 1 was adopted.

Number 1549

SCOTT CALDER testified via teleconference and said that Representative Coghill has already given voice to many of Mr. Calder's concerns. Notwithstanding this, he noted that he still wants to comment on other aspects of HB 252. He began:

First of all, I'd like to debunk the notion that parents whose children have been harmed by the [DHSS] have some type of existing recourse or method of resolution. The existing specifications of recourse or method of resolution are additional modes of torture for parents ...; the assumption that there's possible recourse is a myth. So a lot of the discussion has focused on kind of an assumption of a

steady state of things being okay or that [there are] possibilities for resolution, and this is a distinct falsehood in my opinion and I think that that can be objectively shown if we ever have a situation in a venue where these grievances can be aired, which we do not now.

... The notion that parents have effective counsel is false. The notion that the child's best interests are guarded by the court officers is false. The notion that there is an administrative complaint process, which deserves that name or description, is false. And the idea that a person can, in practical terms, ... go to court to resolve difficulties or be represented in court - or, I might add, in many cases, not all cases, be represented in the legislature - is false.

There [were] several statements made by Ms. Cox regarding maintaining the status quo, leaving the playing field as we had it, on assuming no change in state practices in regards to the expected fiscal notes, and things like this. And, Mr. Chairman, I have to tell you, from personal experience, as a witness to human rights crimes perpetrated under the color of law by this agency, that we should change the way things are right now. It's not just a little fix or a little problem in one little paragraph.

Number 1395

MR. CALDER continued:

Nothing has been said about the family preservation efforts contained in the remainder of the bill, and I can understand that a person might miss some of the language contained in those sections, and that a person might not understand the consequences for families. ... We could go through line by line - I have a lot of notes here, and so I'd be happy to answer your questions about specific suggestions - but let me just say generally that the problem here, again, is that placing the idea of family preservation services, or eligibility for family preservation services, or really what amounts to mercy by an oppressor, ... within the discretion of the [DHSS] is a continuation of the problem.

Now, I think this family preservation services could maybe be a good thing, but oftentimes the thing that needs to be done to preserve a family is to remove the state from the life of the children and the family members who would become ensnared. And simply assuming that "oh, they could go to court or they could complain or do something else," this just adds additional injury to ... already occurring injuries and insults. So it's very difficult to break through this problem conceptually, I can understand that. But I think ... we have to realize that in this society, and as a state, ... we have a serious problem here that needs to be addressed, that it can't just be made to go away by some polite conversation about the technicalities of one particularly difficult section such as Section 7, which was discussed.

Number 1305

We have gone from, as Representative Coghill indicated, a simple idea of rebalancing things somewhat, so that parents at least would have some right or standing as an authoritative individual in the life of a child, ... to creating a burdensome presumption that parents are essentially irrelevant unless the [DHSS] comes along and wants to process them, based on some kind of state grant or license or permission, to be preserved as a family. And this is absolutely ridiculous, but it's also typical of the thinking that goes into these legislative items, as near as I've been able to tell.

MR. CALDER continued:

I think that it's only appropriate to have the parental rights language contained in the construction section, for example, rather than [in the] intent section. Now, I'm not an attorney, [so] maybe somebody could explain why it's better in the intent section, but it says ... "LEGISLATIVE INTENT. By the amendment of AS 47.10.005 in sec. 2 of this Act, the legislature intends to express its recognition that parents possess inherent individual rights", et cetera.

Well sir, all it says in that [AS] 47.10.005 is that ... the [DHSS], apparently, can liberally construe the provisions of this chapter so that [the child coming within the jurisdiction] may receive the care, guidance, treatment that will promote the child's welfare and the parents participation in the child's upbringing. Mr. Chairman, we need to do something to correct the problem where the parents' authority to be responsible and to direct and control the education and upbringing of their own children is what we have in law, not simply that the [DHSS] as at liberty to involve or decide what participation is or make any other of these types of judgments, based on whatever the prerogatives of the [DHSS] are.

Now, there are many of us who understand that the activities of the [DHSS] are motivated by a progressive, understanding, ... realization that children do need to be protected, and that there are very important social issues there. But what is consistently missed is the fact that while we say that, what we're doing is, we're stripping parents of authority and stripping children of their parents and their families. The very support network that we say is important to children is consistently eroded by these laws that we have.

Number 1132

MR. CALDER concluded:

I guess just to kind of sum up, I'm not satisfied with the amendment process of this bill. Now, I would defer [to] Representative Coghill's judgment on it, but I would think that we would be dangerously close, here, to creating a worse problem than we already have. So I would hope that there would be some questions, because I can certainly answer them.

CHAIR ROKEBERG asked Mr. Calder if he supported HB 252 or was against it.

MR. CALDER responded:

That is such a close call ... I absolutely supported the bill when it was first introduced. I think that creating additional things for the [DHSS] to do and to

say that it's doing, which are not binding upon it in any meaningful way, is pointless. It's a verbal exercise, apparently, to create some visibility for the claim that maybe something is being done about this problem. What we have is an institution that's involved in human-rights crimes against the citizens, and I would hope that the legislature, at least, would recognize the standing of citizens with complaints - citizens of this state - to ... a higher degree than it does the attorneys of the state. This seems to be an attorneys' document, not a document for humanity. Not knowing what common law is, or how to address that, I don't know if anything has been done with Section 7 today, other than ... maybe shuffling some words around.

CHAIR ROKEBERG offered that Amendment 1 has enhanced Mr. Calder's position.

MR. CALDER said that he does see that that particular amendment may have improved that particular section, but he is unable to determine whether that outweighs the damage that's contained in the remainder of the amendment to the original HB 252.

CHAIR ROKEBERG explained that the House Judiciary Standing Committee would not be focusing on those other issues today, and suggested that Mr. Calder take up any remaining concerns with Representative Coghill, the sponsor. Chair Rokeberg thanked Mr. Calder for his testimony, and expressed appreciation for Mr. Calder's work on these issues.

MR. CALDER remarked that the family preservation [section of the bill] has the parents guilty until proven innocent. That is a judicial issue, and that is the problem with the other statutes that are in place, he said. He requested that the committee consider this issue further.

Number 0879

REPRESENTATIVE COGHILL made a motion to adopt Amendment 2 [as amended] which read [original punctuation provided]:

Page 5, line 25:

Delete "the"

Page 5, line 27:

Delete "should"

Insert "shall"

Page 5, line 29:

Delete "should"

Insert "shall"

Number 0859

CHAIR ROKEBERG asked whether there were any objections to Amendment 2 [as amended]. There being no objection, Amendment 2 [as amended] was adopted.

REPRESENTATIVE BERKOWITZ, directing members' attention to page 2, line 1, noted that the term "child's welfare" is used, although elsewhere in HB 252 the term "best interests of the child" is used. He suggested that it would be preferable to have page 2, line 1 say "promote the best interests of the child".

CHAIR ROKEBERG, noting that this section is to be liberally construed, asked whether the term "welfare" would be part of "best interests".

REPRESENTATIVE BERKOWITZ said that according to his recollection of HB 375, one of main things that occurred was a shift to "the best interests of the child"; so if the main goal is to assist children, "we need to be consistent with the use of that phrase." He observed that the best interests of the child may not be the same thing as the child's welfare.

REPRESENTATIVE COGHILL indicated that such a change would be appropriate. He mentioned that page 2, line 1 also includes the addition of the term "and the parents' participation in the child's upbringing".

REPRESENTATIVE BERKOWITZ noted that by having "welfare" and "parents' participation" the courts are being told to do two things. Therefore, he suggested, the language should be changed to say "best interests [of the child], including the parents' participation in the child's upbringing". Thus, he opined, the court would know that it should focus first on the best

interests of the child and that then parental participation should figure prominently.

REPRESENTATIVE COGHILL surmised, then, that Representative Berkowitz is suggesting replacing "and" with ", including".

REPRESENTATIVE BERKOWITZ said yes; if "and" is used, the courts are being told to do two things, as opposed to having a hierarchy of responsibilities, as would be the case if using ", including". In this way, the courts would have discretion with regard to whether including the parents' participation is in the child's best interest, which would be the priority.

Number 0625

REPRESENTATIVE SHARON CISSNA, Alaska State Legislature, commented that sometimes it is desirable to include the parent in a child's life, but from a distance. Currently, however, the trend is to exclude the parent completely. She mentioned that other states are including the parent in the child's life even after the child is no longer in the parent's custody.

CHAIR ROKEBERG commented that sometimes children are better off with their foster parents than with their biological parents.

REPRESENTATIVE CISSNA said that although that is true, [Representative Berkowitz's suggested language change] would not affect those situations.

Number 0467

REPRESENTATIVE BERKOWITZ restated his suggested language change: page 2, line 1, delete "child's welfare and" and insert "best interest of the child, including".

Number 0387

CHAIR ROKEBERG, calling the aforementioned proposed change Amendment 3, asked whether there were any objections to adopting it. There being no objection, Amendment 3 was adopted.

Number 0362

REPRESENTATIVE COGHILL moved to report CSHB 252(HES), as amended, out of committee with individual recommendations and the accompanying fiscal note. There being no objection, CSHB

252(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 0321

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:43 p.m.