HB
194

HB194

February 9, 1977

The Honorable Hugh Malone
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker:

Under authority of art. III, sec. 18 of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill relating to the definition of "delinquent minor". The bill was requested by the Department of Health and Social Services in response to the recent Alaska Supreme Court opinion, In the Matter of L.A.M., 547 P.2d 827 (Alaska 1976). The L.A.M. decision permits a "child in need of supervision" to be classified and institutionalized as a "delinquent" if the child is found to be in contempt of court. The attached bill reverses the effect of that decision for future cases.

Under AS 47.10.010(1) and 47.10.290(2), delinquent children are those who violate laws. Under AS 47.10.-010(2), (3) and (6), and 47.10.290(7) children in need of supervision are those whose behavior would not constitute a criminal offense if they were adults, e.g., runaways, truants, children beyond the control of their parents or guardians. The runaway child in the L.A.M. case violated a court order which prohibited her from leaving a foster home without contacting a responsible adult, i.e., she ran away again. The child was adjudicated a delinquent because her failure to abide by the court order would be characterized as the "crime" of contempt under AS 09.50.010(5) were she an adult.

The Department of Health and Social Services is strongly opposed to the effect of the L.A.M. decision because it believes that children in need of supervision, including those who have violated a court order to cease the behavior which has resulted in such a

classification, are in a different category from children who have violated a criminal statute and should receive different treatment. The classification and institutionalization as delinquents of children whose conduct would not be a crime were they adults is viewed by the department as a serious step backwards in providing meaningful treatment for these children.

This bill does not undertake the "legislative overhaul" in the child-in-need-of-supervision area requested by the state Supreme Court in the L.A.M. decision, 547 P.2d at 836, because such an overhaul has been made by the Children's Law Revision Task Force in the legislation which it plans to introduce during this legislative session. The present bill addresses the single issue of classifying a child as a delinquent on the ground of a finding of contempt of court, an issue not clearly covered by current statutes or the Task Force's proposed legislation.

Sincerely,

Jay S. Hammond
Governor

Alaska State Legislature
House of Representatives

POUCH V
JUNEAU, ALASKA 99811

My file HB194

MEMORANDUM

TO: Rep. Terry Gardiner
Rep. Bill Miles
Rep. Fred Brown
Rep. Lisa Rudd
Rep. Ed Dankworth
Rep. Dick Eliason
Rep. Keith Specking

FROM: Rep. Hugh Malone HM

DATE: 15 March 1977

I would appreciate your reviewing the attached material and considering Judge Hanson's opinion before taking action on HB 194.

Thank you.

MAR 1 1 1977

Superior Court

State of Alaska

Chambers of
JAMES A. HANSON, Judge

BOX 3891
KENAI, ALASKA
99611

303 K STREET
ANCHORAGE, ALASKA
99501

March 8, 1977

Hugh Malone
State Representative
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Hugh:

Fully realizing that you do not have time now to read the enclosed material I am simply asking that you do what you can to hold HB 194 over to next year so that its ramifications can be studied. This bill is designed to overcome the Supreme Court's opinion in LAM vs State, 547 P2d 827 (Alaska 1976) a copy of which is enclosed. Also enclosed is a copy of the Superior Court decision which led to the Supreme Court opinion.

About a year ago I had a Kenai girl very similar to LAM. I'm satisfied that she'd now be either dead or better off dead if I had no legal tool with which to control her I don't like locking up kids. Sometimes it is necessary.

On another subject the Department of Health and Social Services has been totally mute regarding the local jail situation. No reply to the city or the court system. They return neither letters or phone calls.

Very truly yours,

JAMES A. HANSON, Judge

JAH: rf
Enclosures

In the Matter of L. A. M., Appellant,
v.
STATE of Alaska, Appellee.
No. 2221.

Supreme Court of Alaska.
March 15, 1976.

The Superior Court, Third Judicial District, Anchorage, James K. Singleton, J., entered order declaring minor a delinquent child for her willful failure to comply with certain court orders made after prior adjudication that she was child in need of supervision, and she appealed. The Supreme Court, Erwin, J., held that evidence supported conclusion that minor, who was chronic runaway, would not be distinguishable in sophistication or exposure to criminal activity from average child in population at state youth center, and thus, placement of such minor in state youth center was not precluded; that superior court had authority to enforce order entered against child in need of supervision, which order provided that child was not to remain away from children's home in which she had been placed without permission of appropriate adult authorities of the home; and that failure of minor to abide by court orders regarding her supervision constituted willful criminal contempt of court's authority, and she was, therefore, properly declared delinquent and subject to those sanctions available for correction of delinquent minor's behavior.

Affirmed.

Boochever, J., concurred and filed opinion in which Rabinowitz, C. J., joined.

Rabinowitz, C. J., concurred and filed opinion.

1. Contempt ⇐20

Before party may be held in criminal or civil contempt for failure to abide by court order, certain elements must be established: existence of valid order directing alleged contemnor to do or refrain from doing something and court's jurisdiction to enter that order; contemnor's notice of order within sufficient time to comply with it; and in most cases, contemnor's ability to comply with order; and contemnor's willful failure to comply with order.

2. Contempt ⇐2

Distinction between criminal and civil contempt is generally phrased in terms of whether character and purpose of contempt is "remedial" or "punitive."

3. Contempt ⇐3, 4

Where contempt power is invoked to punish alleged contemnor for "past, willful, flouting of the court's authority," contempt is criminal, but where contempt proceeding is instituted to "coerce future conduct," contempt is civil. AS 09.50.010(5), 09.50.050.

4. Contempt ⇐3

Contempt order issued against minor for minor's willful failure to comply with certain court orders made after adjudication that minor was child in need of supervision constituted criminal contempt. AS 09.50.010(5).

5. Infants ⇐16.5

Proceedings against children alleged to be in need of supervision are in substance and effect custody disputes where contestants are parent and child, and parent appeals to court to vindicate and enforce his custody rights in child against that child.

6. Adoption ⇐7.2(1)
Names ⇐9
Parent and Child ⇐2(1), 4, 5(1), 8

The following are "parental rights" protected to varying degrees by constitution: physical possession of child, which, in case of custodial parent, includes day-to-day care and companionship of child; right to discipline child, which includes right to inculcate in child parent's moral and ethical standards; right to control and manage minor child's earnings; right to control and manage minor child's property; right to be supported by adult child; right

to have child bear parent's name; and right to prevent adoption of child without parents' consent.

See publication Words and Phrases for other judicial constructions and definitions.

7. Adoption ⇐7.2(1)
Names ⇐9
Parent and Child ⇐2(17)

Of the so-called residual parental rights, those that remain after custody is placed in another include right to consent to adoption and to withhold consent to prevent adoption, right to visitation and right to have child bear parents' name.

8. Parent and Child ⇐2(1)

Like all legal rights, parent's right to custody of his child is not absolute and may be lost through divorce, by conduct depriving child of necessities of life, by abandonment, by child's emancipation, or, subject to constitutional limitations, where welfare of child requires limitation or termination of parental rights. AS 09.55.205, 25.20.010, 47.10.010(a)(4, 5), 47.10.080(c), 47.10.290(3).

9. Infants ⇐13

State has legitimate interest in protecting children from venereal disease, from exposure to use of dangerous and illicit drugs, from attempted rape, and from physical injury.

10. Infants ⇐16.1

Purpose of statute creating classification of child in need of supervision is reintegration of child into her family and resumption of parental custody, including parental control. AS 47.10.010(a)(2), 47.10.-290.

11. Infants ⇐16.8

Evidence in delinquency hearings supported conclusion that minor, who was chronic runaway, would not be distinguishable in sophistication or exposure to criminal activity from average child in population at state youth center, and thus, placement of such minor in state youth center was not precluded.

12. Infants ⇐16.4

Whether child is characterized as delinquent child, child in need of supervision, dependent child, or merely child whose custody is disputed in domestic relations proceeding, court has authority, upon extending all procedural safeguards, to make orders affecting her custody. Const. art. 4, § 1.

13. Contempt ⇐33

While court may have limitations on its power to act, there are only due process limitations on its authority to compel enforcement of its orders.

14. Infants ⇐16.12

Superior court had authority to enforce order entered against child in need of supervision, which order provided that child was not to remain away from children's home in which he had been placed without permission of appropriate adult authorities of the home.

15. Infants ⇐16.2

Failure of minor to abide by court orders regarding her supervision, following adjudication that such minor was child in need of supervision, constituted willful criminal contempt of court's authority, and she was, therefore, properly declared delinquent and subject to those sanctions available for correction of delinquent minor's behavior. AS 09.50.010, 47.10.010(a) (2, 3, 6), 47.10.080(j), 47.10.290.

Herbert D. Soll, Public Defender, Phillip P. Weidner, Asst. Public Defender, and R. Collin Middleton Anchorage, Alaska, for appellant.

Avrum M. Gross, Atty. Gen., Juneau and Larry R. Weeks, Asst. Atty. Gen., Anchorage, for appellee.

Before RABINOWITZ, Chief Justice, and CONNOR, ERWIN, BOOCHEVER and BURKE, Justices.

OPINION

ERWIN, Justice.

L.A.M. seeks review of the superior court's order dated July 26, 1973, declaring her a delinquent[1] child for violation of AS 09.50.010,[2] i.e., willful failure to comply with certain court orders made after a prior adjudication that she was a child in need of supervision.[3]

In order to understand L.A.M.'s arguments and place her situation in context, it will be necessary to set out her history at some length.

L.A.M. was born in Canada in 1958 and was adopted by the M's shortly thereafter. The M.'s soon were divorced and Mrs. M. moved with L.A.M. to Alaska. In 1971 Mrs. M. married Mr. C. and retired from work, intending to spend more time with L.A.M. Difficulties arose almost immediately with L.A.M. neglecting to return home after staying with friends.

L.A.M. began a consistent pattern of running away in the Spring and Summer of 1972. During this period two petitions were filed seeking to have her declared a child in need of supervision, but in both cases the petitions were dismissed on stipulation and the matter handled informally.[4] On November 2, 1972, a new petition was filed. At the hearing L.A.M. admitted the allegations of the petition and was declared a child in need of supervision. She was ordered detained at the McLaughlin Youth Center pending adjudication.

On December 12, 1972, the disposition hearing was continued and L.A.M. was released to her parents. One week later the court was informed that she had run away. A pick-up order was issued and the minor was brought back to court on December 27, 1972, at which time she was detained pending disposition. The disposition hearing was finally held on January 11, 1973. Upon listening to testimony, the Master for the Family Court filed his recommendation that the minor be "released to her parents." A superior court judge adopted the finding and executed a release.

On March 19, 1973, L.A.M. was brought back to court by an intake officer who in-

1. AS 47.10.010(a)(1) provides in relevant part:
   (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor (1) violates a law of the state, or an ordinance or regulation of a political subdivision of the state . . ..

2. AS 09.50.010 provides in relevant part:
   Acts or omissions constituting contempt. The following acts or omissions in respect to a court of justice or court proceedings are contempts of the authority of the court:
   . . . . .
   (5) disobedience of a lawful judgment, order, or process of the court . . ..

3. AS 47.10.290 provides in relevant part:
   In this chapter, unless the context otherwise requires,
   . . . . .
   (7) "child in need of supervision" is a minor whom the court determines is within the provisions of (AS 47.10.010(a)(2), (3), (4), and (6)). [Matter in parentheses supplied.]

   AS 47.10.010(a)(2), (3) and (6) respectively provide:
   [B]y reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian;
   [I]s habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others;
   . . . . .
   [A]ssociates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others . . ..

4. Children's Rule 4(d) provides:
   Informal Disposition. If the intake officer, after investigation, believes that in the best interest of the child the matter should be handled on an informal basis, he may thereafter refrain from filing a petition and shall thereafter on behalf of the court, counsel with the child and parents, guardian or custodian, and with their consent and cooperation establish such informal supervision or disposition of the child matter as the circumstances may require.

formed the court that she had "been a runaway almost constantly since the time the court released her." The intake officer then filed a petition with the court alleging that the minor was a "child in need of supervision" by virtue of having been truant from school in violation of AS 47.10.-010(a)(3) and AS 14.30.010 (truancy).[5] At the hearing the court was informed that Mrs. C. had obtained a child psychiatrist who had met with the child and her mother, and together they had worked out some program of counseling. The parties agreed that L.A.M. would be placed in a foster home during a period of counseling and the judge accepted a stipulation to that effect. Having previously explained to L. A.M. that if she violated a court order she could be held in contempt of court and incarcerated, the judge informed the child that she was not to leave the foster home without contacting her psychiatrist, her social worker, or her mother. She agreed. The minor was released from McLaughlin on March 31, 1973, and placed in a foster home. She ran away on April 2, without notification, and was not apprehended until May 4.

A hearing was held on May 14, 1973, at which time L.A.M. was charged with contempt of court by the intake officer. Because of the uncertainty in this area, the trial court appointed the public defender to represent her. On May 17, 1973, the hearing resumed. The state argued that a child in need of supervision could not thereby be held in contempt of court and incarcerated, but that a child guilty of "criminal contempt" could on that basis be adjudicated a "delinquent child" and thereafter institutionalized. The State, therefore, moved to dismiss the petitions, alleging contempt of court and substituting a petition of alleged delinquency. The court denied the motion but permitted the State to file an amended petition alleging as a separate count an act of delinquency predicated upon "criminal contempt."

A petition alleging delinquency was filed on May 23, 1973, at which time a hearing was held. In responding to the petition L. A.M. denied the allegations and requested a trial. Pending trial, she was placed at the Alaska Children's Services receiving home. A written order was entered on June 8, 1973, specifically setting out the conditions under which L.A.M. would reside at the receiving home pending her adjudication hearing. Specifically, it provided that "[T]he child is not to remain away from the Anchorage Children's Christian Home overnight without the permission of the appropriate adult authorities of the home."

On July 26, 1973, an intake officer filed a petition for revocation of conditions of release pending L.A.M.'s adjudication hearing. In part, the petition stated that she had left the receiving home without permission on July 3, 1973, and remained away until July 24, 1973. A detention hearing was held on July 26th, and at the hearing L.A.M., through her counsel, admitted the allegations of the petition of alleged delinquency based on violation of a court order filed on May 23, 1973. L.A. M.'s counsel made it clear that the minor was only admitting the facts and reserving the right to litigate the legal consequences of those facts.

The court then proceeded to a consideration of the petition for revocation of conditions of release pending adjudication hearing filed on July 26, 1973. Upon admitting the allegations of this petition as well L.A.M. requested through her attorney that a disposition hearing be scheduled within thirty days.

5. AS 14.30.010 provides in relevant part: *When attendance compulsory.* (a) Every child between seven and 16 years of age shall attend school at the public school in the district in which the child resides during each school term. Every parent, guardian or other person having the responsibility for or control of a child between seven and 16 years of age shall insure that the child is not absent from attendance.

At the disposition hearing held on August 28, 1973, and on August 31, 1973, two experts testified on behalf of the minor and two testified on behalf of the State. The expert testimony pointed up the substantial differences of opinion both as to principle and policy that exists regarding runaways and their treatment. After considering all of the evidence, the court accepted the recommendation of the Division of Corrections and ordered the minor institutionalized, but deferred execution of the order for a period of sixty days to give L. A.M. one more opportunity to establish that she could be rehabilitated within the community. During the deferred period L.A.M. was assigned to Sheila Lankford of the Division of Corrections Probation Department.

On November 2, 1973, the superior court, on the request of Ms. Lankford, vacated the deferred order of institutionalization and placed the child on regular probation, having been advised that L.A.M. was functioning effectively within the community while living at home. On November 5, 1973, the minor ran away but returned of her own accord on November 7. Two days later she ran away again and remained away until December 5, 1973, when she was apprehended by the police. On December 6, 1973, Ms. Lankford petitioned to revoke the minor's probation. At the hearing on this matter held on December 18, the superior court granted the petition to revoke probation but reinstated it on new conditions in light of a request by Ms. Lankford that the minor not be institutionalized. It was agreed that the child would reside in the Alaska Children's Services Receiving Home.

On March 18, 1974, Ms. Lankford filed a further petition seeking revocation of probation. In it she alleged that on February 20, 1974, the minor ran away from the receiving home and remained away until March 16, 1974, when she was apprehended by the police. At the hearing on the petition, held on March 22, 1974, the court found the minor had violated the conditions of her probation and had run away from the receiving home. The court considered the minor's objections presented by her attorney and, after considering the evidence and the argument of the parties, directed that the minor be institutionalized.

L.A.M. seeks to have her adjudication of delinquency set aside on two grounds. She contends that both as a matter of statutory interpretation and constitutional law, a child in need of supervision may not be prosecuted for criminal contempt; or, in the alternative, if such a prosecution is allowable, such prosecution cannot result in incarceration. Upon discussing the nature of contempt in this case, each of these grounds will be dealt with in order.

[1] Before a party may be held in criminal or civil contempt for failure to abide by a court order, certain elements must be established: (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order within sufficient time to comply with it; and in most cases, (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order.

[2] The distinction between criminal and civil contempt is generally phrased in terms of whether the character and purpose of the contempt is "remedial" or "punitive."

[3] In *Johansen v. State*[6] we used a balancing test in determining that the failure to pay child support was criminal rather than civil contempt. We did so because incarceration was imposed for a fixed period under AS 09.50.020[7] to punish a completed act rather than to coerce future con-

6. 491 P.2d 759 (Alaska 1971).

7. See n. 2, *supra*.

duct pursuant to AS 09.50.050.[8] Specifically, the court held that where the contempt power was invoked to punish the alleged contemnor for "past, willful, flouting of the court's authority" pursuant to AS 09.50.010(5) (cf. AS 09.50.020), contempt was criminal, but where the contempt proceeding was instituted to "coerce future conduct" pursuant to AS 09.50.050, the contempt is civil.

[4] Applying that distinction here, the contempt order issued by the court would obviously be classified as "criminal." Were L.A.M. an adult, her failure to abide by court orders would be characterized as a "crime" under AS 09.50.010(5). Hence, L.A.M. could properly be declared a delinquent under AS 47.10.010(a)(1) after a proceeding in the Children's Court.

L.A.M. grounds her constitutional argument in *Breese v. Smith*,[9] where this court ruled that the right to liberty set out in Art. I, Sec. 1, of the Alaska State Constitution[10] guarantees every Alaskan regardless of age ". . . total personal immunity from governmental control: the right to be let alone . . . ," which L.A.M. contends the supreme court qualified only to the extent that it ". . . must yield when [it] intrudes upon the freedom of others. . . ." Therefore, she continues, a citizen's right to liberty as enunciated in *Breese, supra*, (bolstered by the more recently enacted "right to privacy")[11] cannot be infringed by preventing her from doing anything that does not injure a specific definable victim. Consequently, L.A.M. concludes since her conduct, i.e. running away from home and foster home placement, did not injure anyone (except perhaps herself, which she contends has not been proved), it necessarily follows that it cannot constitutionally be interfered with by the State because there is no compelling state interest to justify such an interference.

L.A.M. assumes that the only interest to be protected by legislation in this area is that of the children. This is simply not the case. The parents' interest as well as the State's must be considered.[12]

[5–7] Proceedings against children alleged to be in need of supervision are in substance and effect custody disputes where the contestants are parent and child, and the parent appeals to the court to vindicate and enforce his custody rights in the child against that child.[13] Viewed in

8. AS 09.50.050 states in relevant part:
When the contempt consists of the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he has performed it.

9. 501 P.2d 159, 168–170 (Alaska 1972).

10. Art. I of the declaration of rights of the Alaska Constitution, § 1, provides:
Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

11. Alaska Constitution, Art. I, § 22, provides:
Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

12. The U. S. Supreme Court has on a number of occasions held that a parent's "right" to the custody and control of his child was constitutionally protected. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1932).

13. While there is much discussion of parental rights in reported cases, few cases attempt to define those rights making discussion difficult. A careful review of the literature, including case law, treatise and law review, indicates that the following have

this light, the statutes creating the status "child in need of supervision" provide a judicial remedy and discourage resort to self-help and the attendant risk of violence.[14]

[8] Thus, before L.A.M. can sustain her case that the child in need of supervision procedure, including the invocation of the court's contempt power to enforce orders made pursuant to it, is an unconstitutional invasion of her liberty and privacy, she must first establish that her mother has no legally enforceable right to her custody and the State thus has no right to enforce such an order. We note at the outset, however, that there is more to the parent-child relationship than simple custody. It is love and trust and a responsibility toward each other which cannot be defined legally. It is impossible to discuss severing this relationship without considering the heartache and anguish of the parents who must ultimately live with themselves and the decision after the child reaches adulthood. Further, the consideration of such an issue must accept the limitations of the State to be a parent; good intentions are not adequate substitutes for the day-to-day relationship which we have come to accept as necessary to the growth of children into responsible adults. True, like all legal rights, a parent's right to the custody of his child is not absolute and may be lost through divorce,[15] by conduct depriving the child of the necessities of life,[16] by abandonment,[17] by the child's emancipation,[18] or, subject to constitutional limitations, where the welfare of the child requires a limitation or termination of parental rights.[19]

been listed as "parental rights" protected to varying degrees by the Constitution:

(1) Physical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. In the case of a non-custodial parent, possession is tantamount to the right to visitation.

(2) The right to discipline the child, which includes the right to inculcate in the child the parent's moral and ethical standards.

(3) The right to control and manage a minor child's earnings.

(4) The right to control and manage a minor child's property.

(5) The right to be supported by an adult child.

(6) The right to have the child bear the parent's name.

(7) The right to prevent an adoption of the child without the parents' consent.

Of these so called residual parental rights, those that remain after custody is placed in another include the right to consent to an adoption and to withhold consent to prevent an adoption, the right to visitation and the right to have the child bear the parents' name. See the discussion in Burt, Forcing Protection on Children and Their Parents, 69 Michigan 1259 (1971); Dobson, The Juvenile Court and Parental Rights, 4 Family Law Quarterly 393 (1970); Young, The Problem of Neglect: The Legal Aspects, 43 Journal of Family Law 29 (1964); Note, Child Neglect: Due Process for the Parent, 70 Col.L.Rev. 465 (1970).

14. By withdrawing court assistance (and police assistance) from embattled parents, the state is not inducing compromise but may encourage violence, since parents have the right under Alaska law to physically control their children. See AS 11.15.110(1) as interpreted in *State v. England*, 220 Or. 395, 349 P.2d 668 (1960), and compare the civil liability of parents for disciplining their children which is discussed in *Hebel v. Hebel*, 435 P.2d 8, 14-15 (Alaska 1967).

15. AS 09.55.205 gives a court in a divorce action the right to provide for the custody of the children.

16. See AS 47.10.010(a)(5) which, when read in conjunction with AS 47.10.080(c) and AS 47.10.290(3), permits the state to take custody of a child who "lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian."

17. See AS 47.10.010(a)(4), which authorizes the state to take custody of a child who has been abandoned.

18. A child is emancipated as a matter of law when he or she reaches the age of majority which in Alaska is 19 years of age; AS 25.20.010. *See R.L.R. v. State*, 487 P.2d 27 (Alaska 1971).

19. *Turner v. Pannick*, 540 P.2d 1051, (Op. No. 1119, 1975); *In the Matter of the Adoption of K. S.*, 543 P.2d 1191, (Op.No.1219, 1975).

L.A.M. was given an opportunity to show any of the foregoing as a defense to a finding that she was a "child in need of supervision" or, subsequent thereto, to a finding that she had committed criminal contempt of court and was therefore delinquent by violating orders regarding her placement; but she failed to do so.

Runaway children of L.A.M.'s age are generally incapable of providing for or protecting themselves. As a result, police spend a substantial amount of time protecting these youths from those who would prey upon them, as well as protecting the community from those who are ultimately driven to criminal activity to provide themselves with the necessities of life.

Various other social agencies also expend considerable efforts attempting to protect and shelter runaways in an effort to provide both an alternative to criminal activities and counseling in lieu of that they received from their parents. Without question these children's matters are of broad public interest and concern. They go to all aspects of the physical and mental well being of such children.[20]

The family, school, social agency and police resources allocated to aid the runaway are enormous. In this case, the child had continuing aid and support of (1) her mother and step-father, (2) a private psychiatrist hired by her mother, (3) counseling with social workers in Division of Family and Children's Services, (4) probation officers in Division of Corrections, (5) school counselors, (6) psychologists and psychiatrists from Langdon Clinic, (7) Alaska Youth Advocates, (8) group home counselors, (9) her court-appointed attorney, and (10) the court. To assert that the State has no interest in this child is to deny that the function of government is to protect its citizens. All of this presupposes the heartache and anguish of the parents, who in the first instance have been unable to deal with this problem but who must also live with the solution.

This court has previously found that there is sufficient State interest to justify restrictive measures on much less substantial grounds.[21] Further, this court has noted that distinct government interests with reference to children may justify legislation that could not properly be applied to adults.[22]

[9] The State has a legitimate interest in protecting children from venereal disease, from exposure to the use of dangerous and illicit drugs, from attempted rape, and from physical injury, all of which occurred in this case. Doubtless the State will never be entirely successful in its efforts. It does, however, have the right and obligation to *try* to protect its young people from such conditions.[23] The test set out by this court in *Ravin v. State*,[24] is whether the means chosen by the State are closely and substantially related to an appropriate government interest. Clearly they are here.

[10] While it may be argued that the necessary "supervision" contemplated by the statute is simply the furnishing of food, clothing, shelter and schooling in lieu of that which would otherwise have been provided by a parent, this argument begs the question, for the purpose of the supervision or treatment contemplated by the creation of the child in need of supervision and its predecessor non-criminal delinquency was reintegration of the child into her family and resumption of parental custody including parental control (cf. AS 47.10.-

20. *In Re G.M.B.*, 483 P.2d 1006 (Alaska 1971); *Waystaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975).

21. *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972).

22. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

23. In the analogous equal protection argument concerning ". . . economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491.

24. 537 P.2d 494 (Alaska 1975).

280). Thus, the State's efforts regarding the child are not directed solely at providing an alternate living situation (as they are in a true case of dependency) but at putting the child back in her own home. The reestablishment of her mother's custody and supervision over her and any foster placement is merely a means to that end, not an end in itself. Thus, by rejecting these efforts L.A.M. defeats, or at least slows, this reintegration process and thereby prejudices her mother's right to her custody and control, subjecting herself to the more severe sanction contemplated by AS 09.50.020.

We note that L.A.M.'s primary argument in this case is that as a child in need of supervision whose conduct from the inception of the case to the present has not changed, she may not be placed in a closed setting, i. e. one where the doors may be locked. However, the cases upon which L.A.M. relies proceed to a different point, namely that the child should not be placed in a state training school. In Colorado, California, Illinois and New York,[25] children in need of supervision can at the first instance be placed in juvenile halls or youth centers, i.e. places with locked doors, but cannot be placed at the state training school, i.e. maximum security institutions. The McLaughlin Youth Center in Anchorage is more the equivalent of a juvenile hall than it is a state training school. It should be noted that Alaska has contracts with Colorado and California to place Alaska delinquents who are too sophisticated for McLaughlin in the state institutions in those states. Thus L.A.M. is not to be placed at either the California or Colorado training schools; she is threatened with placement at the McLaughlin Youth Center.

[11] Substantial evidence was introduced during the many hearings of this case regarding the population at the McLaughlin Youth Center. Based upon that evidence, it is clear that the kind of children who are extremely agressive, and extremely hardened in delinquency, are not treated at McLaughlin Youth Center but are sent outside for placement at schools in Colorado and California under contract with the State of Alaska. While the population at McLaughlin is made up at the present time exclusively of "delinquents," the evidence introduced at trial convinces us that while delinquency in some form is a prerequisite to gaining admission to McLaughlin, it is not the real reason that the child is at McLaughlin. The overwhelming majority of delinquents with strong family ties are treated in the community. Those delinquents who end up at McLaughlin are by and large there for the same reason that L.A.M. may be there, namely an unwillingness to remain at home or a home substitute and heed parental or a custodian's regulations. Based upon the evidence, it appears that L.A.M. and other chronic runaways would not be distinguishable in sophistication, exposure to criminal activity, etc., from the average child in the population at McLaughlin and that therefore the reasoning of the cases cited by L.A.M. should not apply to Alaska.

[12–14] Whether we characterize L.A.M. as a delinquent child, a child in need of supervision, a dependent child, or merely a child whose custody is disputed in a domestic relations proceeding, the court has authority, upon extending all procedural safeguards, to make orders affecting her custody. It is argued, however, that this is a situation where the court has no power to enforce its order, and thus the court must release L.A.M. This view is contrary to the inherent power of the court to enforce its orders or decrees.[26] While the court

25. *In re Presley*, 47 Ill.2d 50, 264 N.E.2d 177 (1970); *Matter of Tomasita N.*, 30 N.Y.2d 927, 335 N.Y.S.2d 683, 287 N.E.2d 377 (1972); *C. v. Redlich*, 32 N.Y.2d 588, 300 N.E.2d 424 (1973); Cal.Welf. and Inst. Code, §§ 601, 730, 777 (West 1972).

26. Alaska Const. Art. IV, § 1, provides in part:
The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature.
See also *Ex Parte Robinson*, 86 U.S. (19

may have limitations on its power to act, there are only due process limitations on its authority to compel enforcement of its orders. Hence, we reject the argument that the superior court lacked the authority to enforce specific orders against L.A.M. in this case.

[15] The lower court determined that L.A.M. would not abide by any orders it entered regarding her supervision under AS 47.10.080(j). This behavior constitutes willful criminal contempt of the court's authority; were she an adult, her actions would be characterized as a "crime" under Alaska statutes. She was, therefore, properly declared a delinquent and subject to those sanctions available for the correction of a delinquent minor's behavior. Certainly, conciliation should precede coercion; and if coercion is necessary, mild sanctions should first be tried before more severe sanctions are imposed. However, where mild sanctions fail, the court's orders must be enforced and severe sanctions should be imposed if necessary. In the instant case, all available sanctions, save institutionalization, were tried and found unsuccessful. Thus, the lower court determined that it had no choice but to order L.A.M. institutionalized.

In affirming this decision, we note that the trial judge was most innovative in fashioning a necessary remedy for a situation not covered by statute.[27] The very nature of the problem, however, calls for legislative overhaul of the statutes in this area, for the trial court's remedy is not easily modified to cover other situations where there is no statutory guidance.

BOOCHEVER, Justice, with whom RABINOWITZ, Chief Justice, joins, concurring.

I concur in the court's opinion based on the last three paragraphs thereof. I would not reach the other issues discussed in the opinion. Protection of parental rights to care, custody and supervision do not seem to me to be an appropriate rationale for placing a child in an institution. In my opinion, the court's efforts were devoted primarily to furthering the welfare of the child, a subject in which the state does have an interest.[1] There was ample testimony to indicate that L.A.M.'s conduct was harmful to her.[2]

Wall) 505, 510, 22 L.Ed. 205, 207 (1874); *In re Shortridge*, 99 Cal. 526, 528, 34 P. 227, 229 (1893); Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts —A Study in Separation of Powers, 37 Harv. L.Rev. 1010, 1017–1022 (1924); Goldfarb, *The Contempt Power*, 37–40 (Columbia University Press 1963).

27. The trial judge was a model of patience and fairness in this extremely difficult case. Further, we are indebted to him for his scholarly memorandum opinion which aided in the preparation of this opinion.

1. The state's power to act in support of the welfare of children is exemplified by such statutory enactments as compulsory education (AS 14.30.010 et seq.); financial assistance for dependent children (AS 47.25.-310 et seq.); protective laws as to the employment of children (AS 23.10.325 et seq.); minimum age of consent for marriage (AS 25.05.171); prohibition of the use of alcohol and tobacco by minors and of the sale of either substance to minors (AS 04.15.-050 et seq. and AS 11.60.080); punishment for statutory rape (AS 11.15.120); contributing to the delinquency of a minor (AS 11.40.130); and for lewd or lascivious acts toward children (AS 11.15.134).
In *Anderson v. State*, 384 P.2d 669, 671 (Alaska 1963), this court stated that the purpose of the statute punishing acts which contribute to the delinquency of a minor is "to protect all children under the age of 18". In *Hanby v. State*, 479 P.2d 486, 498 (Alaska 1970), the court held that the state can enact statutes to protect the juveniles—to prevent as well as punish delinquency. In *Hanby*, the court found that material which was not so obscene as to be proscribed for the general population could be forbidden to minors. Children who were judged to be in a harmful environment were removed from their home in *In re [illegible] N.*, 533 P.2d 13 (Alaska 1975). The court determines child custody in divorce proceedings according to the welfare and best interest of the child. *Horton v. Horton*, 519 P.2d 1131, 1132 (Alaska 1974); *Nichols v. Nichols*, 516 P.2d 732, 734 (Alaska 1973); *Carle v. Carle*, 503 P.2d 1050, 1052 (Alaska 1972).

2. While a runaway, L.A.M. was truant from school; was allegedly the victim of a

On the basis of the record, I do not believe that we can conclude that police spend countless hours protecting the community from anti-social conduct of runaway children. Recent studies indicate that status offenders (such as runaways) are not a source of general harm to others as contrasted with children who have committed offenses which, if perpetrated by adults, would be crimes.[3] I concur in the opinion since I believe that the state has an interest in the welfare of children justifying the entry of appropriate orders. In cases involving status offenders, only after all else fails, should placement in a closed setting be justified. But under the facts of this case, the trial judge had no alternative.

RABINOWITZ, Justice (concurring).

Although I am in agreement with the court's disposition of this appeal, I think it appropriate to answer appellant's contention that our prior decisions precluded the superior court from institutionalizing L.A.M. This contention is grounded upon *In re E.M.D.*, 490 P.2d 658 (Alaska 1971), where we rejected the argument that under Alaska's statutes a minor who has been adjudicated a child in need of supervision may be institutionalized by the state. Upon analysis of the relevant statutes, we concluded that ". . . the legislature has authorized institutionalization only when the child is found to be a delinquent minor." [1] Thus, if the superior court in the case at bar had institutionalized L.A.M. because she had been adjudicated a child in need of supervision, such action would have been erroneous under *E.M.D.*

But here L.A.M.'s status was not merely that of a child in need of supervision; the scope of her future conduct had been limited by the superior court's order. By virtue of this order L.A.M. was, as the state argues, essentially on probation.[2] The majority notes that the superior court found that L.A.M. had violated the conditions of her probation by running away. The majority then observes that

> Were L.A.M. an adult, her failure to abide by court orders would be characterized as a 'crime' under AS 09.50.-010(5). Hence, L.A.M. could properly be declared a delinquent under AS 47.-10.010(1) after a proceeding in the Children's Court.

I thus conclude that what essentially transpired below was that the trial court found a violation of the conditions of probation which it imposed pursuant to its determination that L.A.M. was a child in need of supervision, and ordered L.A.M. incarcerated.[3] In my view, *E.M.D.* did not prohibit the superior court from ordering the institutionalization of L.A.M. in the circumstances of this case.

rape as reported in a call to the police; contracted gonorrhea; suffered an injured jaw and broken teeth from a fall, which injuries had not received medical attention.

3. Clarke, Stevens H., "Some Implications for North Carolina of Recent Research in Juvenile Delinquency," Journal of Research in Crime and Delinquency, January 1975.

1. *In re E.M.D.*, 490 P.2d 658, 659 (Alaska 1971). In E.M.D., after finding the minor to be a child in need of supervision, the trial court committed E.M.D. to the custody of the Department of Health and Welfare and directed the Department to place her in a correctional or detention facility.

2. AS 47.10.080(j) provides in part:
> If the court finds the minor is a child in need of supervision it shall make any of the following orders of disposition for his supervision, care and rehabilitation:
>
> . . . . .
>
> (2) order the minor placed on probation under those conditions and limitations that the court may prescribe.

3. *See* AS 47.10.080(b)(1).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

FAMILY COURT DIVISION

In the Matter of L.A.M.,)
)
A Minor Under the Age)
of Eighteen Years.)
)
)
)

CP No. 2992

ORDER DENYING MOTION TO
VACATE FINDING OF DELINQUENCY

L.M. seeks review[1] of this court's order dated July 26, 1973, declaring her a delinquent[2] child for violation of AS 09.50.010,[3] i.e. wilful failure to comply with certain court orders made after a prior adjudication that she was a child in need of supervision.[4] L.M. contends that both as a matter of statutory interpretation

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1. Children's Rule 28(b) provides:

> Review upon application. For good cause shown the juvenile, his parents, guardian or custodian are entitled to review at any time upon application therefor.

2. AS Sec. 47.10.010(1) provides in relevant part:

> (a) Proceedings relating to a minor under eighteen years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor . . . (1) violates a law of the state, or an ordinance or regulation of a political subdivision of the state; . . .

3. AS Sec. 09.50.010 provides in relevant part:

> Acts or omissions constituting contempt. The following acts or omissions in respect to a court of justice or court proceeding are contempts of the authority of the court:
>
> . . . (5) Disobedience of a lawful judgment, order or process of the court; . . .

and constitutional law, a child in need of supervision may not be prosecuted for criminal contempt; or, in the alternative, if such a prosecution is allowable, such prosecution cannot result in a declaration of delinquency.

In order to understand L.M.'s arguments and place her situation in context, it will be necessary to set out a brief resume of her history.

L.M. was born in Alberta, Calgary, in Canada in 1958. The M.'s adopted her shortly after her birth. Mr. and Mrs. M. separated shortly thereafter, eventually divorcing. L.M. remained in Mrs. M.'s custody. Mrs. M. brought L.M. to Alaska and generally cared for her alone during the first twelve years of L.M.'s life. Until she was in the fifth grade, L.M. was left with babysitters

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3. (Cont'd)

AS Sec. 09.50.020 provides in relevant part:

> Penalty. A person who is guilty of contempt is punishable by a fine of not more than $300.00 or by imprisonment for not more than six months. However, when the contempt is one mentioned in (Sec. 10(5)) of this chapter, or in an action before a magistrate, the person is punishable by a fine of not more than $100.00 unless it appears that a right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt, in which case the penalty shall be as prescribed for contempts described in Secs. 10(1) and (2) of this chapter. (Matter in parentheses supplied.)

4. AS Sec. 47.10.290 provides in relevant part:

> In this chapter, unless the context otherwise requires, . . . (7) "child in need of supervision" is a minor whom the court determines is within the provisions of (AS Sec. 47.10.010(a)(2), (3), (4), and (6)). (Matter in parentheses supplied.)

AS Sec. 47.10.010(a)(2) provides:

> "by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; . . .

while her mother worked. Thereafter, L.M. was permitted to be on her own. Mrs. M married Mr. C. in 1971 (over L.M.'s objection) and retired from work intending to spend more time with L.M. Difficulties arose almost immediately with L.M. neglecting to return home after staying with friends. L.M. began a consistent pattern of running away in the spring and summer of 1972. The first time the minor ran, she was located by her parents without police intervention and returned home. This was in May of 1972. She ran away again on June 19, 1972, at which time her parents again found her, this time with court and police assistance, and took her to the mental health clinic for counseling. L.M. rejected counseling and ran away again on July 3, 1972, at which time her parents sought the assistance of the Langdon Psychiatric Clinic. L.M. rejected any assistance from Langdon's Clinic, missing a number of appointments. Petitions were filed seeking to have L.M. declared a child in need of supervision on June 22, 1972, and July 3, 1972; but in each case, the petitions were dismissed on stipulation and the matter handled informally. 5/

Informal adjustment having been found unsuccessful, a further petition was filed on October 31, 1972, and amended on November 2, 1972. A hearing was held on November 2, 1972, at which time L.M. admitted the allegations of the petition and, upon the master's recommendation, was declared a child in need of supervision. She was ordered detained at the McLaughlin Youth Center pending adjudication. A

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4. (Cont'd)

Sec. 10(a)(3) provides:

> "is habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others; . . ."

Sec. 10(a)(6) provides:

> "associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others; . . ."

background survey and analysis was prepared by probation officer Karl Ellis which, after setting out the minor's history, culminated in the following evaluation:

> The impression given by this minor is that she is not going to listen to any adult and is going to have her own way regardless. If she does not like what is being said, she tends to ignore the person saying it. It is likely that she has had her own way until her mother remarried and now does not want to be told what she has to do. No doubt, L.M. is well aware of the difficulty anyone will encounter in trying to do anything about her running away. The first time she encounters opposition to her wishes she will no doubt run again. It is not known whether she has used drugs but with her group of friends it may just be a matter of time. Continued resistance to counseling or seeing a psychiatrist can be expected. The mother's way of handling the problem has been ineffective. To tell this girl that she cannot run around with certain people will produce more rebellion and running away. It would be advisable for L.M. and her mother to attend counseling or to understand how to relate to one another. However, L.M. will not willingly attend any counseling session. Having this minor on probation may not produce any appreciable results. It is not likely that anything can be done about L.M.'s running away until she has violated a law and is declared delinquent.

On December 12, 1972, the disposition hearing was continued to obtain psychiatric and psychological evaluations that had been made of L.M. but not filed with the court. L.M. was released from detention to her parents pending the disposition. One week later, on November 19, 1972, the court was informed by Mr. Ellis that L.M. had the preceding Saturday ran away, then been picked up, and ran away again on Monday and was still missing. A pick-up order was issued. [6/] Dr. Wreggitt filed his report on December 18, 1972, in which he stated in part:

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5. Children's Rule 4 provides in relevant part:

> (d) Informal disposition. If the intake officer, after investigation, believes that in the best interest of the child the matter should be handled on an informal basis, he may thereafter refrain from filing a petition and shall thereafter on behalf of the court, counsel with the child and parents, guardian or custodian, and with their consent and cooperation establish such informal supervision or disposition of the child matter as the circumstances may require.

> L.M. was seen in psychiatric evaluation on July 17, 1972, at which time a diagnosis of depression reaction characterized negativism, apathy, hostility and runaways. Also of note, was a serious internal stress within the family in the form of severe impasse between L.M. and her mother.

Dr. Wreggitt went on to point out that family counseling had been suggested but rejected.

The minor was brought back to court on December 27, 1972, at which time she was detained pending dispositon. She had been picked up on December 26, 1972, by the police. A further report was filed by Dr. Wreggitt on January 10, 1973, at which time he repeated the material from his prior report, and added the following:

> In my repeat examination of L.M., she appeared equally as depressed as she had in July except that her hopelessness is markedly increased. In the period I spoke with her, I found no way to break through her hopelessness and no way to enlist her cooperation in a treatment effort. She stated that she wished to return home, although, she was still ambivalent about the problem's extent, and that she would run away from a foster or group home placement. She felt that she might consider the possibility of medication for her depression should this be offered, but felt rather hopeless about this. She denied suicidal ideation.
>
> There have been numerous contacts with both L.M. and her parents since the inception of our contact with them in July. . . . On the basis of those ongoing interviews and on the basis of the present examination, it would not appear that psychotherapy with the intact family at this time would be very productive.
>
> Although I have no direction from the court in this matter, whatsoever, it would appear that there are three alternatives possible for this child. The first of these is to continue with the home. Should she return to the home, the runaways are likely to continue to occur as there have been no significant structural change that I have been able to detect. If anything, there has been a worsening in L.M.'s condition and a hardening

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6. The Family Court has interpreted AS 47.10.030(c) to authorize the court to order the police to pick up runaways; cf. AS 47.10.140(e) and Children's Rule 5.

> of her defenses. The significant will struggle between the mother and child, which goes back for many years and has been exacerbated by the mother's recent marriage, still appears to be present. I am not sure of all the factors which enter into this will struggle.
>
> The second possibility would appear to be a placement in a group home. It is not clear whether there is either parental desire for such a placement or whether the girl would indeed stay in such a placement. Some possibilities would include, if age requirements are met, the Booth Memorial Home or the Jesse Lee Home.
>
> A third possibility would appear to be foster placement, but in view of Mr. Ellis' concern about the availability of an adequate placement here and the girl's serious problems, I would see this as having about the same chance of success as placement in the parental home. . . .

The disposition hearing was finally held on January 11, 1973, before the Honorable Wayne Ross, Master for the Family Court.

At the hearing Mr. Ellis testified under oath. He repeated most of the material in his written report and added that as a result of her continual running away from home, L.M. had missed a substantial part of her school year. Master Ross filed his recommendation that the minor be "released to her parents" with the Superior Court and Judge Butcher executed a release on January 11, 1973. No specific disposition pursuant to AS Sec. 47.10.080 was ever made. [7/]

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7. AS Sec. 47.10.080 provides in relevant part:

> (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not a delinquent, or a child in need of supervision, or dependent minor.
>
> . . .
>
> (j) If the court finds that the minor is a child in need of supervision, it shall make any of the following orders of disposition for his supervision, care and rehabilitation:
>
> (1) any order which is authorized under (c) of this section; or
> (2) order the minor placed on probation under those conditions and limitations that the court may prescribe.

On March 19, 1973, L.M. was brought back to court by Mr. Fredericks, the intake officer. He represented to the court that L.M. had "been a runaway almost

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7. (Cont'd)

AS Sec. 47.10.080(c) provides:

> (c) If the court finds that the minor is dependent, it shall:
>
> (1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment;
>
> (2) order the minor released to his parents, guardian, or some other suitable person; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor; the department's supervision may not extend past the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment; or
>
> (3) by order, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, if one of the following conditions exists:
>
> (A) Each parent, or the surviving parent, or one parent if the other has been deprived of custody and visitation rights wishes to relinquish the child to the department or to a legally appointed guardian of the person of the child for adoptive purposes, and the relinquishment is in writing, signed and acknowledged before the court or duly authorized representative of the department and filed with the court;
>
> (B) the child has been abandoned for a period of not less than six months by
>
> (i) both parents, or
>
> (ii) the surviving parent, or
>
> (iii) one parent if the other has been deprived of custody and visitation rights;
>
> (C) each parent, the surviving parent, or one parent if the other has been deprived of custody and visitation rights has been judicially determined to be of unsound mind and the disability has not been removed and the parent has been hospitalized for reasons of mental illness diagnosed as permanent or of long duration; or

constantly since the time the court released her." Further, he indicated that he had been contacted by Central Junior High School and informed that L.M. was constantly truant from school. He further indicated that Mrs. "C", L.M.'s mother, had contacted a new psychiatrist who had agreed to work with L.M. He therefore requested that L.M. be detained at McLaughlin Youth Center until the psychiatrist could meet with her. During the colloquy that followed, it appeared that Mr. Ross was under the impression that L.M. was on probation though, in fact, she was not. In any event, he ordered her detained for two days to permit a "further investigation."

On March 21, 1973, the intake officer filed a petition with the court alleging that the minor was a "child in need of supervision" by virtue of having been truant from school in violation of AS Sec. 47.10.010(3) and AS Sec. 14.30.010 (Truancy). 8/

On March 21, 1973, a further hearing was held before the Honorable Wayne Ross, Master of the Family Court. At that time, Mr. Ross disqualified himself from further participation in the case and directed that the matter be brought to the attention of a Superior Court judge. The matter was then assigned to me and I held a hearing on March 21, 1973.

At that hearing Mr. Fredericks informed the court that L.M. was presently in detention having run away from home, and having been the subject of a petition

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7. (Cont'd)

> (D) each parent, or the surviving parent, or one parent if the other has been judicially deprived of custody and visitation rights, has demonstrated by his conduct, proven by clear and convincing proof amounting to more than a preponderance of the evidence that he is unfit to continue to exercise his parental rights and responsibilities.

8. AS Sec. 47.10.010(3) provides:

> (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor . . .

alleging frequent truancy from school. He further stated that Mrs. "C" had obtained a child psychiatrist, Dr. Barbare Ure, who had met with the child and her mother, and

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8. (Cont'd)

> (3) is habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others; . . .

AS Sec. 14.30.010 provides in relevant part:

> When attendance compulsory. (a) Every child between seven and sixteen years of age shall attend school at the public school in the district in which the child resides during each school term. Every parent, guardian or other person having the responsibility for or control of a child between seven and sixteen years of age shall insure that the child is not absent from attendance.

AS Sec. 14.30.020 provides:

> Violation. A person violating Sec. 10 of this chapter is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $50 nor more than $200, plus the cost of prosecution, and may be imprisoned until the fine and costs are paid or until he has served one day for every $2 of the fine and costs, at which time the fine and cost are automatically discharged. Each unlawful absence is a violation and if an absence is extensive there is a new violation each time five consecutive days of the absence elapse. The court may suspend sentence, stay or postpone enforcement of execution, or release from custody a person found guilty upon the conditions which are in the best interests of the child. In any event, at the expiration of the school year, the person shall be released and discharged from all penalties provided by this section.

While arguably a child's violation of this section would bring him within Sec. 47.10.010(a)(1), i.e. a minor who violates a law of the state . . ., the Family Court takes the position that the specific governs the general and that Sec. 47.10.010(3) which speaks specifically to truancy as a condition for being determined in "need of supervision" prevents a finding of delinquency predicated on "truancy" i.e. violation of AS 14.30.010.-.020, supra.

together they had worked out some program of counseling. He further stated that the parties had agreed that L.M. would be placed in a foster home during a period of counseling. Mr. Fredericks further informed the court that L.M.'s present status was uncertain as a previous petition alleging that she was a child in need of supervision had been sustained but that in lieu of disposition the Master, being convinced that the minor required a close setting and believing that under current statutory and case law he could not place the minor in a close setting, concluded that there was nothing the law could do and, therefore, dismissed the matter and directed that no further child in need of supervision petitions be presented since in the Master's opinion, such would be a waste of the parties' time and money.[9/] After explaining L.M.'s legal rights to her and convincing myself that she understood them at least to the extent that a fourteen year old could, I accepted the parties' stipulation that L.M. be placed in a foster home. Having previously explained to her that if she violated a court order she could be held in contempt of court and incarcerated, I explained to her that she was not to leave the foster home without contacting her psychiatrist, her social worker, or her mother. She agreed. The minor was released from McLaughlin on March 31, 1973, and placed in a foster home. She ran away on April 2, 1973, without giving the required notification, and was out of contact with her psychiatrist, her social worker and her mother for approximately one month, until apprehended on May 4, 1973. A detention hearing was held before Master Rhoads on May 4, 1973, and L.M. was detained

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9. The Master apparently met off the record with the intake officer at or about the time of the most recent petition. There is nothing on the record indicating a "dismissal of the petition." The results of the "disposition hearing" are discussed above.

pending further proceedings. In the meantime, L.M. was rushed to a hospital for medical care, resulting in further continuances until May 14, 1973.

A further hearing was held on May 14, 1973, before me, at which time L.M. was charged with contempt of court by the intake officer. The intake officer requested that if L.M. admitted the allegations of the petition, she be sentenced to the McLaughlin Youth Center for thirty days as a sanction for contempt of court. Because of the uncertainty of the law in this area, and the possibility of further incarceration of L.M., I appointed the Public Defender to represent her.[10/] To enable the Public

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10. Children's Rule 14 provides in relevant part:

> (a) Right to counsel. Where a juvenile matter has not been closed by informal adjustment or disposition, the juvenile, his parents, guardian, or custodian, upon the filing of a petition for adjudication, be informed of their respective rights to be represented by counsel in all subsequent stages of the proceedings. The court shall advise the juvenile, his parents, guardian, or custodian on the record, of the right to court-appointed counsel provided their circumstances qualify them under the provisions of Rule 15.
>
> (b) Waiver of right to counsel. If the right to counsel is waived and the court is satisfied that the waiver was intelligently and understandingly made, it shall be accepted. If the court is not satisfied that the waiver was intelligently and understandingly made and the interests of justice appear to so require, it shall appoint counsel unless specifically requested not to do so by the party concerned.

Children's Rule 15(a)(4):

> When the court shall appoint counsel. The court shall appoint counsel to represent the juvenile . . . (4) for the juvenile . . . in any situation where, in the opinion of the court, the interests of justice and the nature of the case warrant providing the assistance of counsel at the taxpayer's expense.

Consideration should also be given to Rule 11(a) permitting the court to appoint a guardian ad litem for the juvenile when her welfare requires it. Cf.

and L.M. continued in detention until that time. On May 15, 1973, a further hearing was held. Mr. Van Winkle, of the staff of the Public Defender Agency, appeared as counsel for L.M. He requested a two-day continuance to respond to the allegation that L.M. was in contempt of court. This was granted. However, with L.M.'s permission, Dr. Barbare Ure was permitted to testify regarding her contacts with L.M. in the interim and a proposed plan for L.M.'s rehabilitation.

Dr. Ure testified that the minor would not stay in a foster home, would not stay in her own home, had missed the better part of the school year, and required placement in a secure setting until such time as she could "reintegrate herself" since this was the only way to insure that L.M. would remain around for "treatment." Dr. Ure further testified that the circumstances of L.M.'s hospitalization indicated that her freedom in the community was hazardous to her health. Dr. Ure recommended institutionalization at McLuaghlin Youth Center.

I asked Dr. Ure for what period of time she felt L.M. would require institutionalization.

She responded that the current children's rights movement had substantially complicated the answer to my question. She continued:

> I have found in my experience of working with these young people that frequently they've got to be in a setting where they know that it's not up to them and

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10. (Cont'd)

AS Sec. 47.10.050 and AS Sec. 47.10.110. It is the policy of the family court to appoint attorneys for alleged children in need of supervision (usually the Public Defender) but only upon request. L.M. had refused counsel in the past. While I would agree that a child involved in a dependency or delinquency proceeding could theoretically waive the right to an attorney if some adult, i.e. the state in the former and a parent in the latter case, were present to protect the child's interest, I do not believe an alleged child in need of supervision can effectively waive counsel unless a guardian ad litem is appointed since in such a proceeding almost by definition there is a conflict of interest between parent and child (see n. 24, infra, and accompanying text). I have carefully reviewed the record and concluded beyond reasonable doubt that L.M. was not prejudiced by the court's failure to appoint an attorney before I appointed the Public Defender.

> . . . in the control system of the impulses . . . if the child has to control himself and it's up to the child, many children cannot really take the responsibility until they know that it's not really up to them, that it's inevitable, that control is a necessity. In other words, my experience has been that as long as there's an opening, a way out of having to face the problem, they don't face it. They will -- they will continue to -- to avoid facing the real conflicts, the real problems, the real pain'ul struggles that hurt just as long as they possibly can and only when they've reached the end of the road . . . only then can they begin to pull themselves together and decide what kind of a person they're going to be, how they're going to live their life and what's important. Consequently, . . . I can't really say for sure how long it would take L.M. to reintegrate or in other words pull herself together and say it's the (sic) inevitable.

The court then, at Mr. Van Winkle's request, recessed the hearing for two days.

The hearing resumed on May 17, 1973. The state, represented by Mr. Tim Middleton, argued that a child in need of supervision could not be held in contempt of court and incarcerated, but that a child guilty of "criminal contempt" could on that basis be adjudicated a "delinquent child and thereafter institutionalized. The state, therefore, moved to dismiss the petitions alleging contempt of court and substitute a petition of alleged delinquency. The court denied the motion but permitted the state to file an amended petition alleging as a separate count an act of delinquency predicated upon "criminal contem L.M. through counsel moved to dismiss the existing petitions on the ground that the court had no jurisdiction to enter an order requiring her to stay in a foster home, and, therefore, could not hold her in contempt for violating the order. This motion was denied without prejudice to its renewal supported by authorities. The court granted the parties a one-week continuance to prepare a response to the existing petitions. The court continued L.M. in detention pending that hearing but authorized her placement at the ACS receiving home if an opening was found and if the Division of Family and Children's Services could guarantee her appearance at further hearings. A petition alleging delinquency was filed on May 23, 1973, at which time a hearing was held. The court reviewed

L.M.'s legal rights with her and asked her to respond to [illegible]

of counsel, she denied the allegations and requested a trial. A date for the trial was set.[11/] Pending trial, L.M. was released from McLaughlin Youth Center for placement at the Alaska Children's Services receiving home. She agreed that she would remain on the premises of the receiving home twenty-four hours a day and would not leave except in the company of an employee of the home.

A further hearing was held on June 7, 1973, at which time the adjudication hearing was further continued until July 20, 1973 to permit the court to participate in the Trial Judges' College held at the University of Nevada. At the request of L.M. and with the concurrence of the Department of Family and Children's Services and the District Attorney's Office, L.M. was extended the general privileges of the receiving home during the intervening period.

A written order was entered on June 8, 1973, specifically setting out the conditions under which L.M. would reside at the receiving home pending her adjudication hearing. Specifically, it provided:

> (1) The child is to inform the authorities of the Anchorage Children's Christian Home of her whereabouts at all times when she is not on the premises of the home.
> (2) The child is not to remain away from the Anchorage Children's Christian Home overnight without the permission of the appropriate adult authorities of the home.
> (3) The child will obey the house rules that are set by the authorities at the Anchorage Children's Christian Home.

The order specifically set out an acknowledgement for L.M.'s signature. The acknowledgement provided:

> I acknowledge having received a copy of this order, having read it and completely understand what is expected of me. I recognize that any violation of this order on my part will

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11. A brief pretrial conference was held in chambers. Present were Mr. Rice and Mr. Middleton representing the state, and Mr Van Winkle representing L.M. At the conference L.M. requested and was granted a jury trial on the allegations of delinquency. All parties agreed that all safeguards available to adult criminal defendants except bail would thereafter be extended to L.M.

> constitute contempt of court and may [illegible]
> to be filed against me. I agree to abide by the conditions of this order.

The writing bears L.M.'s signature as well as her attorney's, Mr. Van Winkle, and Mr. Frederick's, the in-take officer, signatures as witnesses.

On July 26, 1973, Mr. Jay Warner, Intake Officer for the Family Court, filed a petition for revocation of conditions of release pending adjudication hearing. The petition stated in relevant part:

> . . . On or about July 2, 1973, at an unknown hour, at or near Anchorage, in the Third Judicial District, State of Alaska, L.M., a minor child, without permission and without informing the authorities of the said Anchorage Children's Christian Home left said children's home and remained away until July 3, 1973, when she returned. And that on or about July 3, 1973, at approximately 4:00 p.m., at or near Anchorage, in the Third Judicial District, State of Alaska, L.M., a minor child, without permission and without informing the authorities of the said Anchorage Children's Christian Home, left said children's home and remained away until July 24, 1973.

A detention hearing was held on July 26, 1973. At that hearing Mr. Frank Koziol, Assistant Public Defender, substituted for Mr. John Van Winkle as attorney for L.M. At that time Mr. Koziol indicated to the court that he had thoroughly discussed the facts of the case with L.M. and Mr. Van Winkle, and that the three of them had determined that it would be in the best interest of L.M. that she admit the allegations of the petition of alleged delinquency filed on May 23, 1973. Mr. Koziol made it clear that the minor was only admitting the facts and reserving the right to litigate the legal consequences of those facts.

I therefore discussed the factual content of the petition with L.M. I pointed out to her that a charge of contempt of court based upon violation of a court order has four elements: first, a person must be ordered to do something by the court; second, he or she must know that they have been ordered to do it; third, they must have the ability to comply with the order; and, fourth, they must willfully and knowingly violate that order. I told L.M. that unless all of these factors were present, she should not admit the petition. I pointed out to L.M. that if she was at all confused

about the order, its meaning or her responsibilities, she should not admit the petition. Further, I pointed out that if the conduct of any other person compelled her to violate the court order, she should not admit the petition; and, finally, I pointed out that if she had any doubts about the matter at all, she should not admit the petition. L.M. then admitted the facts of the petition in the presence of her attorney, Mr. Koziol.

We then proceeded to a consideration of the petition for revocation of conditions of release pending adjudication hearing filed on July 26, 1973. This petition was read to L.M. and in the presence of her attorney, after being advised of her legal rights, she admitted those allegations as well. L.M. then requested through her attorney that a disposition hearing be scheduled within thirty days and stipulated that she remain at the McLaughlin Youth Center in the interim.

A disposition hearing was then set for August 21, 1973, and ultimately held in two sessions: the first, on August 28, 1973, and the second, on August 31, 1973.

Dr. Joseph Bloom, a psychiatrist associated with the Langdon Clinic, and Kord Rosen-runge, testified as experts on behalf of the minor. Dr. Barbare Ure, a child psychiatrist in private practice in this area, and Susan Roguzka, a probation officer employed by the Division of Corrections of the State Department of Health and Social Services, testified on behalf of the State. Neither the minor nor her parents testified. The expert testimony pointed up the substantial differences of opinion both as to principle and policy that exists regarding runaways and their treatment. Generally, Mr. Rosen-runge and Dr. Bloom testified in support of a system that would permit minors who did not get along with their parents to obtain conciliation services and, if unsuccessful, separate maintenance or, in extreme cases, a divorce from those parents. In no event would these witnesses advocate court

support court intervention and institutionalization in the case of chronic or habitual runaways who could not otherwise be treated in the community. All of the witnesses opposed institutionalization as a treatment modality for the average child in need of supervision. Probation officer Roguzka indicated that detention had definitely been used in the past too frequently with children in need of supervision, and that while

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12. A number of recent law review articles support the position taken by Mr. Rosen-runge and Dr. Bloom. See, e.g., Novak, The Incorrigible Child under the New Penn. Juvenile Act: An Unsound Unsupportable and Unfortunate Policy Choice, 35 Univ. of Pittsburg L. Rev. 73 (1973); McNutty, The Right to be Left Alone, 12 Journal of Family Law 228 (1972-73); Chused, The Juvenile Court Process: A Study of Three New Jersey Counties, 26 Rutgers L. Rev. 488, 531-33 (1973); Comment, Non-Delinquent Children in New York: The Need for Alternatives to Institutional Treatment, 8 Columbia Journal of Law and Social Problems 251 (1972); Comment, Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality, 19 U.C.L.A. L. Rev. 313 (1971); Green and Essesstyn, The Beyond Control Girl, 23 Juvenile Justice 13 (Nov. 1972); Comment, Juvenile Law: A Potential for Calif. Change, 2 Pacific L.J. 737 (1971). These writers advocate a community conciliation system for parents and children who don't get along in lieu of the present children's court. While conciliation proceeded the state would provide an alternate living situation for the child. Should the child not wish to reconcile with his parents, or the parents fail to make needed concessions, the alternate living situation would become permanent. In no event would any pressure be applied to the child to conform to parental wishes.

Implicit in this model for dispute resolution is an assumption that the relationship between state, parent and child is one of trust wherein the state is trustor, the parent trustee, and the child both the corpus of the trust and its beneficiary. Viewed in this way, the state and the parent have reciprocal rights and duties as do the child and the state, but as between the parent (the trustee) and the child (the beneficiary), the parent has only duties, e.g., to feed, clothe and house the child; and the child has only rights, e.g., to be fed, clothed and housed. Thus, if it is determined that a parent has a legal right to the custody of his child enforceable against the child, the trust analogy fails and the argument outlined above collapses.

I express no opinion as to which model, i.e. children's rights or parental rights, is the more appropriate or will win posterity's approval. Such questions are for the legislature, not the judiciary. My sole concern must be what do the statutes currently require.

some such children would only benefit from treatment in an institution, there was a substantial risk that institutionalization would be used too often in "frustrating" situations. Dr. Bloom also testified that while a "closed setting" might be theoretically defensible, he feared giving to a possibly vindictive court system imbued with a punitive philosophy the power to authorize it.

After considering all of the evidence, the court accepted the recommendation of the Division of Corrections and ordered the minor institutionalized, but deferred execution of the order for a period of sixty days to give L.M. one more opportunity to establish that she could be rehabilitated within the community. During the sixty-day deferred period, L.M. was assigned to the intensive care unit of the Division of Corrections Probation Department under the supervision of Sheila Lankford, it being understood that Ms. Lankford would carry a small caseload and, therefore, be able to spend a substantial amount of time with L.M.

On September 25, 1973, Ms. Lankford filed a petition with the court alleging that L.M. had violated the conditions of her probation in that she had run away from home on September 23, 1973, and stayed away until September 25, 1973, at which time she returned voluntarily. Ms. Lankford indicated that the child and family were in counseling and had regularly attended counseling sessions, and that the minor's behavior with the exception of the two-day absence without leave had been exceptional. Consequently, Ms. Lankford asked that the deferred order be continued and that the minor remain on probation. I accepted this proposal.

On November 2, 1973, this court, on the request of Ms. Lankford, vacated the deferred order of institutionalization and placed the child on regular probation having been advised that L.M. was functioning effectively within the community. In her report to the court, Ms. Lankford indicated that the minor and her parents had continued to participate in regularly scheduled family counseling with Dr. Ure, Melissa Middleton (of the Alaska Youth Advocates) and herself; that the parents had attended a class in

transactional analysis and family systems offered by the Corrections Department; and that the minor and her parents had mutually agreed upon a written contract setting out each's expectations of the other. She concluded that while L.M. had to a minor degree violated the conditions of her probation by going A.W.O.L. the week-end of September 25, 1973, and on other occasions missing her curfew, these problems were being worked out within the family and did not justify further court intervention.

On November 5, 1973, the minor ran away but returned of her own accord on November 7, 1973. On November 9, 1973, the minor ran away again and remained away until December 5, 1973, when she was apprehended by the police department. On December 6, 1973, Ms. Lankford petitioned to revoke the minor's probation. A hearing was held on December 6, 1973, at which time the minor denied the allegations of the petition and the matter was set for hearing on December 11, 1973.

The December 11, 1973, hearing was held, the court heard the testimony of Sheila Lankford, probation officer; Dr. Ure, child psychiatrist; L.M.; and her mother, L.C.; and a child care worker from Alaska Children's Services, Patricia Brown. Ms. Lankford testified that L.M. was now amenable to treatment and requested that L.M. not be institutionalized. The court detained L.M. for an additional week and took the matter under advisement. On December 18, 1973, I granted the petition to revoke probation but reinstated it on new conditions. I continued the minor in the custody of the Division of Health and Social Services under Ms. Lankford's supervision, and directed that she be placed in an appropriate home setting; and as a further condition of probation, directed that she be detained at McLaughlin Youth Center for a period of thirty days but allowed credit for any time spent since December 5, 1973. At the request of Ms. Lankford the minor was transferred upon leaving McLaughlin from her own home to the Alaska Children's Services Receiving Home.

On March 18, 1974, Ms. Lankford filed a further petition seeking revocation of probation. In it she alleged that on February 20, 1974, the minor ran away from the receiving home and remained away until March 16, 1974, when she was apprehended by the police.

In a hearing on March 19, 1974, the minor represented by Mr. Herb Soll of the Public Defender's Office denied the allegations of the petition and requested a hearing. The hearing was held on March 22, 1974, at which time after hearing all of the evidence the court found the minor had violated the conditions of her probation and had run away from the receiving home. The court heard further from Ms. Lankford who testified that she had exhausted community resources available to L.M. and recommended that the minor be institutionalized at the McLaughlin Youth Center. The court considered the minor's objections presented by her attorney and, after considering the evidence and the argument of the parties, directed that the minor be institutionalized. The judgment is dated March 28, 1974.

DISCUSSION

As previously indicated L.M. seeks to have her adjudication of delinquency set aside on a number of grounds. These grounds will be dealt with in order.

Before a party may be held in criminal or civil contempt for failure to abide by a court order, four elements must be established: (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order within sufficient time to comply with it; (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order. Where the requested sanction is a period of incarceration, the party seeking citation for contempt must in addition prove that his rights or those of another party to the action have been materially prejudiced by the allege contempt.

L.M. challenges the validity of the subject order on two grounds: first she contends that while the statute providing for disposition in cases of children in need of sup vision does use the phrase "probation" as an alternate disposition, in fact a reading of the entire statute establishes the impropriety of "probation" for children in need of supervisio and requires a finding that the legislature intended dispositions of children in need of

supervision to be identical to dispositions of children found to be dependent. L.M. relies upon a reading of the entire statute as impliedly interpreted by Children's Rule 12 in support of this position.[13] Consequently, she concludes, the court had no jurisdiction to place her on probation and cannot hold her in contempt for violating the terms of such an invalid probation.

A review of the file establishes, however, that L.M. was never placed on probation prior to her adjudication as a delinquent child. Her earliest petitions were all dismissed prior to adjudication or disposition on the recommendation of the intake officer in order to pave the way for informal disposition. The only adjudication for child in need of supervision which proceeded to the disposition stage resulted in a recommendation by the master, confirmed by Judge Rutcher, releasing the minor to her parents without disposition. Her subsequent readjudication as child in need of supervision for truancy resulted in an informal disposition by stipulation of the parties where the minor remained under the supervision of the Division of Family and Children's Services, the agency supervising dependent children, rather than the Division of Corrections with a proposed placement in a foster home and counseling by Dr. Ure. Thus, that disposition and resulting order was one consistent with treating the minor as a "dependent" rendering L.M.'s argument about "probation" irrelevant.

In her trial brief L.M. contends that she was denied procedural due process in that the court did not give her adequate notice of her obligations and what she was required to do under the March 21 order. While L.M. is correct that as a matter of con-

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13. Children's Rule 12 provides in relevant part:

> 12(b) . . .
> A minor under the age of 18 years who (1) is habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others; or (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian may be designated as a child in need of supervision and the procedure provided under these rules for the determination and disposition of dependency shall apply to him.

stitutional law she cannot be held in contempt for violating an order of which she had no notice, she cannot be held in contempt for violating an order of which she had no notice ...nder the common law without reference to the constitution. However, notice is a question of fact. L.M. was entitled to have a jury determine on all the evidence whether she did or did not have adequate notice of the order in question. After initially requesting a jury trial on this issue, L.M. withdrew that request and admitted the allegations of the petition. If this was error, L.M.'s remedy is to move to set aside her admission rather than challenging the adjudication predicated upon it.

While the Children's Rules make no express provision for withdrawal of an admission to the allegations of the petition, the Criminal Rules which to this extent at least are in pari materia do make specific provision (see Criminal Rule 32(d)).[14/]

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14. Criminal Rule 32(d) provides in relevant part:

> (d) Plea withdrawal. (1) The court shall allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct manifest injustice.
>
> (i) A motion for withdrawal is timely and is not barred because made subsequent to judgment or sentence if it is made with due dilligence.
> (ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant demonstrates that:
> (aa) He was denied the effective assistance of counsel guaranteed to him by constitution, statute or rule, or
> (bb) The plea was not entered or ratified by the defendant or a person authorized to so act in his behalf, or
> (cc) The plea was involuntary, or was entered without knowledge of the charge or whether the sentence actually imposed could be imposed, or
> (dd) He did not receive the charge or sentence concessions contemplated by the plea agreement, and
> (A) The prosecuting attorney failed to seek or opposed the concessions promised in the plea agreement, or
> (B) After being advised that the court no longer co curred and after being called upon to affirm or withdraw his plea, he dic not affirm his plea.

It is clear from the reported cases that the alleged contemnor need have notice only of the order itself. I have found no case that requires as a precondition for holding someone in contempt of court for failing to heed a court order that the alleged contemnor had prior knowledge of the existence of the contempt power and the sanctions that could be imposed when it is invoked. 15/

L.M. has conceded that she had the ability to comply with these orders and willfully violated them. Therefore, there is a factual base for holding her in contempt of court.

L.M. contends that she cannot be held in contempt of court because of the exclusive remedy provisions of AS 47.10.010(1) 16/ and AS 47.10.080(g). 17/ The majority rule holds that comparable provisions do not prevent holding a minor in contempt of court at least where "civil contempt" is involved, i.e. a proceeding to force

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14. (Cont'd)

> (iii) The defendant may move for withdrawal of his plea without alleging he is innocent of the charge to which the plea has been entered.
>
> (2) Once the plea has been accepted by the court and absent a showing that withdrawal is necessary to correct a manifest in justice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right. Before sentence, the court may in its discretion allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.
>
> (3) A plea of guilty or nolo contendere which is not accepted or has been withdrawn shall not be received against the defendant in a criminal proceeding.

I assume that this procedure is available to L.M.

15. As a practical matter in this case L.M. was told that if any orders were made involving her, and she violated them, she could be held in contempt of court and incarcerated. I do not consider this notification necessary to an invocation of the contempt power.

16. See footnote 2, supra.

a child to do something in the future, e.g., testify in court (see e.g. Young v. Knight, 329 S.2d 195 (Ky. 1959); Application of Balucan, 353 P.2d 631 (Hawaii 1960); Accord, Bryant v. State, 271 N.E.2d 127, 129-30 (Ind. 1971)).

One case, In Re Williams, 306 F. Supp. 617 (D. C.D. 1969) has applied this rule to "criminal contempt of court." There certain minors were held in criminal contempt of court for violation of an injunction but the court held that the minors if convicted were to be housed in the juvenile facility rather than the jail.

The state agrees in part with L.M., at least to the extent that "criminal contempt" is involved. The state contends that "criminal contempt" by a minor is a violation of statute and thus is governed by AS 47.10.010(1)(a)(1) and AS 47.10.080(g). See Annotation, Court's Power to Punish for Contempt a Child within the Age Group Subject to Jurisdiction of Juvenile Court, 77 A.L.R.2d 1004 (1961).[17a]

The governing statutes support the state's position that any criminal activity by a child must be prosecuted in the Children's Court in a delinquency proceeding. The question then is, under Alaska law, was L.M.'s willful failure to abide by certain court orders involving her placement pending dispositon as a child in need of supervision, a crime. There is substantial dispute in the authorities as to whether failure to abide by a court order can ever be a criminal contempt (see, e.g., Goldfarb, The Contempt Power (New York & London: Columbia Univ. Press 1963), passim, esp. pp. 49-67.

Goldfarb states:

> As a result, one is left with but few and vague guides. A wrongdoer may never know, at the time of his wrong-

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17. AS 47.10.080(g) provides in relevant part:

> . . . nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter . . .

> ful act, whether he has committed a civil or criminal contempt or what the form of his sanction will be. Courts appear to survey all concomitants of a case and decide on the basis of the special characteristics of the act, the remedies sought, the nature of the action, and the aim of the remedy, whether the act looks like what has been vaguely considered civil or criminal contempt in the past. To this end the key issues considered by courts have been: Who will primarily gain from exercise of the contempt powers; is exercise of the power to punish a completed act or to coerce a future one; will the contempt proceeding constitute a separate action or will it be part of the execution of the original one; and what standard indicia of civil or criminal proceedings appear to attach to the processing of the power in the instant case . . . (id. at 66)

Goldfarb goes on to point out that disobedience to court orders, judgments and decrees is generally handled as "civil contempt" but he concludes:

> . . . A thorough consideration of the cases leaves a distinct impression that courts supply an ad hoc kind of accounting to contempt situations and arrive at conclusions which, no matter how just in the immediate case, compose only the most casual and intellectually unsatisfying link with any body of law or legal principle (id. at 67).

The Alaska Supreme Court in Johansen v. State, 491 P.2d 759 (Alaska 1971) has, however, determined that a violation of a court order is criminal rather than civil contempt where incarceration is imposed for a fixed period under AS 09.50.020[17b/] to punish a completed act rather than to coerce future conduct pursuant to AS 09.50.050.[18/] Thus, the court has adopted the "nature of the punishment" test. Specifically, the co..t

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17a. Cf. AS 47.10.060 (Waiver of Jurisdiction) which requires inter alia a finding that the minor is "not amenable" to treatment as a minor before jurisdiction can be waived. In light of Dr. Ure's testimony, L.M. is clearly amenable. See Davenport v. McGinnis, ____ P.2d ____ (Alaska 1974, Op. No. 1049); R.J.C. v. State, ____ P.2d ____ (Alaska 1974); and P.H. v. State, 504 P.2d 837 (Alaska 1972).

17b. See n. 3, supra.

18. AS 09.50.050 states in relevant part:

> When the contempt consists of the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he has performed it.

held that where the contempt power was invoked to punish the alleged contemnor for "past, willful, flouting of the court's authority" pursuant to AS 09.50.010(5) (cf. AS 09.50.020), contempt was criminal and the defendant was entitled to all substantive and procedural criminal safeguards; but where the contempt proceeding was instituted to "coerce future conduct" pursuant to AS 09.50.050, the contempt is civil but the defendant is entitled to a jury trial on the issue of his ability to comply with the order. Applying that distinction here, L.M no longer has the power to comply with the orders she has previously violated, though she certainly has the power to comply with similar orders in the future. Thus, if the state proceeds against her to sanction past conduct, as they are doing, it must be for a "crime", i.e., violation of AS 09.50.010(5), and such proceeding is limited by AS 47.10.010(1)(a)(1) and AS 47.10.080(g) to a delinquency proceeding in the Children's Court. Cf. State v. Browder, 486 P.2d 925 (Alaska 1971) which supports the state's contention that any contempt which does not meet the test of AS 09.50.050 is a crime by an adult and, therefore, an act of delinquency by a child.

In Johansen, supra, the Supreme Court noted certain inadequacies in this procedure stating at 491 P.2d 764, n. 22:

> There are two disadvantages to the character-of-the punishment test which affect primarily the trial courts and to which we call attention here. The first is that punishment is not determined until the end of the proceeding, whereas the need for classification exists from the beginning. Trial courts may overcome this in most instances by announcing at the outset the goal of the contempt action, specifying whether the action is designed primarily to vindicate the court's authority or to coerce compliance with one of its orders for the benefit of a third party. The second is that the alleged contemnor, at the time of his wrongful act, has no way of knowing whether he has committed a civil or criminal contempt, or what his sanction will be. . . . We deem this disadvantage outweighed by the benefits of an otherwise workable classicatory scheme and mitigated, for purposes of due process notice requirements, by the trial court's announcement, at the beginning of the proceedings, of the purpose of any punishment imposed.

L.M. does not deny that she knew from the inception of the contempt proceedings the state's intent, nor that she was afforded all the procedural safeguards mandated by Johansen, supra, and Browder, supra, but she contends that this procedure is unfair

as applied to her. She reasons that Johansen could only be found guilty of civil contempt to the extent that he had the immediate ability to comply with the order, and only under those circumstances could he be imprisoned and then only until he complied with the order. Should the state have proceeded against Johansen for "criminal contempt", then the maximum penalty that could be imposed would be imprisonment for a period of six months. In her case, however, if her violation of court order is deemed a crime, and therefore an act of delinquency, she can be imprisoned until her nineteenth birthday for a period of five years. This problem arises because the legislature did not distinguish between felonies and misdemeanors in making violation of a statute or ordinance, i.e., crimes, acts of delinquency while they did distinguish between felonies and misdemeanors for purposes of setting periods of imprisonment for adults. Thus, L.M.'s argument is really directed to permitting misdemeanors to be a basis for a finding of delinquency.[19/] The counter-argument usually made is that while the minor's exposure is to a greater period of incarceration, in fact the overwhelming majority of alleged delinquents are handled informally without even a court appearance and of the remainder, the majority are placed on probation. Of the institutionalized, the actual period of time spent in an institution is usually less than six months to a year. Witnesses testified that the minor, if institutionalized, would probably have to spend approximately four months at the McLaughlin Youth Center, but could during that period and thereafter earn her release by modifying her behavior. They testified further that it was unlikely that anyone would spend more than nine months in the institution (though on cross-examination by Mr. Van Winkle Ms. Lankford did agree that some of the girls at McLaughlin had been there for

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19. It is likely that the overwhelming majority of those found delinquent for violation of a statute have committed acts which if committed by adults would be misdemeanors rather than felonies, i.e., shoplifting, joy-riding, malicious mischief, minor in possession of alcohol or possesssion of marijuana. Thus, the majority of her fellow delinquents share L.M.'s complaint. This problem is mitigated, I believe, by the court's duty to reduce any claimed misdemeanor violation from "delinquency" to child in need of supervision where the child does not pose a substantial threat to the community and appears amenable to treatment as a child in need of supervision (cf. In Re H., 354 N.Y.S.2d 293 (N.Y. Fam. Ct. 1974)).

over a year). Nevertheless, to a certain extent the minor does "hold the key to her release" in her own hands since by her behavior in the institution she can effect her release within six months. Further, the legislature has afforded those adjudicated delinquent certain benefits that do not accrue to adult misdemeanants. For example, AS 47.10.080 provides in relevant part:

> (g) No adjudication under this chapter upon a status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction of a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state. 19a/

The thrust of L.M.'s argument is essentially that subjecting her as a minor contemnor to a greater potential period of incarceration than an adult contemnor denies her the equal protection of the laws. This argument has generally been rejected (see In Re K.V.N., 16 N.J. Sup. 580, 283 A.2d 337, aff. 291 A.2d 577 (N.J. 1972); In Re W., 264 A.2d 614 (Pa. 1970)). As the Alaska Supreme Court pointed out in Alex v. State, 484 P.2d 677, 684 (Alaska 1971):

> The requirement of equal protection amounts to a prohibition of laws which, in their application, make unjust distinctions between persons (footnote omitted) If a rational basis for a classification is reasonably apparent, there is no denial of equal protection. It is elementary that the power to define crimes and fix punishments rests in the legislature. In the performance of that function, that body is to use the discretion lodged in it, and not be confined by narrow or unduly restrictive limits. We cannot say that a legislative judgment was unreasonable if it bears a rational connection to a legitimate public purpose, so long as a legislative classification

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19a. See cases cited in n. 17a, supra, for a discussion of the benefits accruing to a minor under Title 47.

is not based upon an arbitrary or unjustifiable distinction and does invidiously discriminate between two groups, there is no denial of equal protection.

Given the fact that a child cannot be incarcerated with adults (AS Secs 47.10.190, 47.10.130), the purposes to be served by placement at the McLaughlin Youth Center, the fact that the minor is entitled to immediate release when and if her conduct will justify it (AS 47.10.200 and see AS 47.10.080(f)), the fact as noted in Alex, supra, that there is no obligation to institutionalize upon the finding of a contempt of court, or in fact no obligation to predicate delinquency on any act including a contempt of court if under all the facts and circumstances a finding of delinquency is not warranted, [19b] it does not seem that the potentially greater exposure to incarceration facing minors than adults for contempt of court, or for that matter facing minors than adults for misdemeanors, denies the minors the equal protection of the law.

Cases from other jurisdictions are in disagreement as to whether violation of court order can be an act of delinquency. Due to the substantial differences between the statutory schemes in those jurisdictions and in Alaska, I have given them little consideration In Re Presley, 47 Ill.2d 50, 264 N.E.2d 177 (1970) held, pursuant to a statute specifically making violation of a court order an act of delinquency, that a girl's running away from a foster home after having been previously adjudicated a child in need of supervision in violation of an order to remain in the home was an act of delinquency supporting her institutionalization (Accord, People v. Sekeres, 48 Ill.2d 431, 270 N.E.2d 7 (1971)). An intermediate Colorado appellate court held to the contrary (see People ex rel D. R. v. E. R., 29 Colo. App. 525; 487 P.2d 824 (1971)). The Colorado court based its

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19b. This seems implicit in the statute. Certainly if the intake officer has discretion to not proceed formally against a child who admits commission of a crime, the court has equal discretion, if all of the facts warrant the exercise of discretion. Further, it would seem that the court has discretion to treat all delinquents whose crime was a "misdemeanor" as children in need of supervision if warranted by the circumstances. See n. 19, supra.

determination on two considerations: first, that while the sta e did specifically allow a finding of delinquency based upon a violation of court order, a reading of the entire statute rendered this provision ambiguous since the legislature had gone to great lengths to distinguish between two classes, namely delinquents and children in need of supervision, and had specifically provided that a child in need of supervision could not be placed in the state training school. The court reasoned that the legislature could not have intended that conduct which initially could only result in an adjudication as a child in need of supervision would, if continued, result in a finding of delinquency and exposure to the state training school. This is a non-sequitur since the majority of modern statutes make exactly this provision, i.e., that children which we would classify as children in need of supervision cannot at the first instance be placed in a state training school, but may if the behavior which brought them to the attention of the court continues after adjudication as a child in need of supervision be placed in a state training school. 20/

In fact, without changing the classification from child in need of supervision to delinquent, this was exactly the procedure then applicable in Colorado (see Sec. 22-3-12, Laws of Colorado, Supplement 1967)). 21/

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20. See California Welfare Institution Code, Secs. 601, 730 and 777. This is the recommendation included in most of the model acts (see Novak, supra, n. 12, pp. 78-80); see also Forer, A Children and Youth Court: A Modest Proposal, 4 Col. Human Rights Law Review 337, proposed section 2(3) which defines as guilty of a delinquent act a child who "without cause repeatedly runs away from home but there shall be recognized justifiable runaways from an unjustifiable home." Id. at 348. Foere would permit institutionalization.

The Colorado courts' position is a variant of the argument made by the authorities cited in n. 12, supra, that there is no conceptual difference between running away before and after the entry of a court order. This argument shows ignorance of the entire history of the contempt power and the fact that most imprisonment for contempt follows violation of injunctions against conduct which is not independently a crime. In fact, for years equity would not prevent a commission of a crime.

21 It should be noted that the provision barring initial commitment at the state training schools in Colorado was repealed by Colorado Laws 1971, p. 294, sec. 2, so that at the present time children may be assigned to the state training school immediately upon adjudication as children in need of supervision. This cannot be done in Alaska; see In Re E.M.D., 490 P.2d 658 (Alaska 1971).

The second argument of the Colorado court was that the legislature had set up a specific procedure to be followed in the case of violation of probation, thereby precluding the necessity of resort to a finding of delinquency. The Colorado statute provided that after a hearing to determine whether the conditions of probation had in fact been violated, the court could make any order that it initially could have made. Included among those orders was commitment to the Colorado Youth Center. The Colorado law as it then existed permitted placement in the state training schools only at the direction of the Department of Corrections and not at the court's own order. (This practice was specifically rejected by our Supreme Court in In Re E.M.D., 490 P.2d 658 (Alaska 1971).)

In Alaska as one of the dispositions available for a child in need of supervision, the legislature has permitted the court to place the minor on probation under those conditions and limitations that the court may proscribe (see AS 47.10.080(j)); there is no provision in the statute or in the court rules governing what happens if the child violates the conditions of that probation. In fact, L.M. has argued throughout this case that the legislature's failure to spell out the consequences of a child in need of supervision's violation of her probation, coupled with the legislature's withholding of the power to institutionalize, establishes that the legislature did not really mean the word "probation" used in connection with children in need of supervision to have its functional or traditional meaning. Thus, she argues, the only available disposition is to treat her as a dependent child. Whether or not she is correct, it is clear that Alaska, unlike Colorado, does not have a "definitive" set of provisions governing revocation of probation that would conflict with a finding of contempt.

Before leaving this issue, it should be pointed out that L.M.'s primary argument in this case is that as a child in need of supervision whose conduct from the inception of the case to the present has not changed, should not be placed in a closed setting, i.e. one where the doors may be locked. The cases upon which L.M. relies proceed to a different point, namely, that the child should not be placed in a state training school. In Colorado, California, Illinois and New York, children in need of supervision can at

the first instance be placed in juvenile halls or youth centers, i.e. places with locked doors, but cannot be placed at the state training school, i.e. maximum security institutions. The McLaughlin Youth Center in Anchorage is more the equivalent of a juvenile hall than it is a state training school. It should be noted that Alaska has contracts with Colorado and California to place Alaska delinquents who are too sophisticated for McLaughlin in the state institutions in those states. Thus L.M. is not threatened with placement at either the California or Colorado training schools; she is threatened with placement at the McLaughlin Youth Center which is the equivalent of a California county juvenile hall or the Colorado Youth Center, dispositions which in California and Colorado are available for status offenders.

Finally, the recent New York Court of Appeal's decision in C. v. Redlich, 32 N.Y.2d 588, 347 N.Y.S.2d 51, 300 N.E.2d 424 (1973) requires comment. That court had recently held in Matter of Thomasita Ann, 30 N.Y.2d 927, 335 N.Y.S.2d 683, 287 N.E.2d 377 (1972) that the New York Code provisions similar to our provisions establishing children in need of supervision as a class were constitutional and that a child in need of supervision could be placed in a closed setting and deprived of her freedom. In that case Thomasita Ann had been sent to the state training school but had been released prior to the determination on appeal, thus, making that issue moot. In Redlich, supra, the court held that children in need of supervision could not be placed in the same facilities that treated delinquent children. The decision was made with specific reference to the New York state training schools. Those institutions are set aside for the most hardened of the delinquents. The court specifically did not hold that a child in need of supervision could not be placed in a "closed setting", i.e., one where the doors were locked and the child was not permitted to come and go as she pleased. The only placement that was precluded was one in a school for delinquents.

Substantial evidence was introduced during the many hearings of this case regarding the population at the McLaughlin Youth Center. Based upon that evidence, it

seems clear that the kind of children who are extremely aggressive, and extremely hardened in delinquency, are not treated at McLaughlin Youth Center, but are sent outside for placement at schools in Colorado and California under contract with the State of Alaska. While the population at McLaughlin is made up at the present time exclusively of "delinquents", the evidence introduced at trial, together with my own experience in the juvenile court, convinces me that while delinquency in some form is a prerequisite to gaining admission to McLaughlin, it is not the real reason that the child is at McLaughlin. The overwhelming majority of delinquents with strong family ties are treated in the community. Those delinquents who end up at McLaughlin are by and large there for the same reason that L.M. may be there, namely, an unwillingness to remain at home or a home substitute, and heed parental or a custodian's regulations. It should also be noted that the overwhelming majority of institutionalized delinquents committed misdemeanors, not felonies. Based upon the evidence I am convinced that L.M. and other chronic runaways would not be distinguishable in sophistication, exposure to criminal activity, etc. from the average girl in the population at McLaughlin, and that therefore the reasoning of the New York Court of Appeals should not apply to Alaska. 21a/

Finally, L.M. argues that the Alaska Supreme Court in Breeze v. Smith, 501 P.2d 159 (Alaska 1972) ruled that the right to liberty set out in Art. I, Sec. 1 of the Alaska State Constitution 22/ guarantees every Alaskan regardless of age ". . . total

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21a. It should also be noted that the group homes operated by Alaska Children's Services contract with both the Division of Corrections and the Division of Family and Children's Services, and consequently L.M. has met and will meet the same girls in the group homes as in the Youth Center. There is no empirical evidence of which I am aware that would enable an Alaskan court to distinguish between girls who will not live at home and as a result of shoplifting, joy riding, etc., end up at McLaughlin, and girls who as chronic runaways end up in group homes. In fact, I know of no evidence that either group comprises a homogenous class identifiable as such.

22. Art I of the declaration of rights of the Alaska State Constitution, Sec. 1, provides:

> Inherent rights. This constitution is dedicated to the principle that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.

personal immunity from governmental control: the right to be let alone . . ." (citing id. at 501 P.2d 168), which L.M. contends the Supreme Court qualified only to the extent that it " . . . must yield when (it) intrudes upon the freedom of others . . ." citing id. at 501 P.2d 170 (matter in parentheses supplied); therefore, L.M. continues, a citizen's right to liberty as enunciated in Breeze, supra, (bolstered by the more recently enacted "right to privacy"[23/] cannot be infringed by preventing him from doing anything that does not injure a specific definable victim. Consequently L.M. concludes since her conduct, i.e., running away from home and foster home placement did not injure anyone (except perhaps herself which she contends has not been proved), it necessarily follows that it cannot constitutionally be interfered with by the state.

It is not necessary to determine whether the Supreme Court has in fact read John Stewart Mill's essay on liberty into the Alaska State Constitution since L.M.'s conduct does satisfy both Mill's test and her test of controllable conduct, i.e., a definable victim whose rights are prejudiced by the conduct to be controlled.

L.M. begs the question when she assumes that the only interest to be protected by legislation affecting children in need of supervision is that of the subject child. In fact the parents' interest, paramount in the past, must be considered.[23a/] Properly understood proceedings against children alleged to be in need of supervision are in substance and effect custody disputes where the contestants are parent and child, and the parent appeals to the court to vindicate and enforce his custody rights in the child against that child.[24/] Viewed in this light, the statutes creating the status "child in need of supervision" bear the same relationship to a parent's custody rights as those

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23. Alaska Constitution, Art. I, Sec. 22, provides:

> Right to privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

defining theft bear to a citizen's right to private property. In each case the statute recognizes and protects a right deemed important by the community by punishing interferences with that right and, second, by providing a judicial remedy discourages

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23a. The U.S. Supreme Court has on a number of occasions held that a parent's "right" to the custody and control of his child was constitutionally protected. See Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed2d 147 (1973); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972); Stanley v. Illinois 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972); Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); May v. Anderson, 345 U.S. 528, 73 S. Ct. 840, 97 L.Ed. 1221 (1953); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1932). See discussion in: Burt, Forcing Protection on Children and their Parents, 69 Mich. L. Rev. 1259, 1268-1288 (1971); Dobson, The Juvenile Court and Parental Rights, 4 Family L.Q. 393 (Dec. 1970); Sullivan, Child Neglect: The Environmental Aspects, 29 Ohio State L.J. 85 (1968); Young, The Problem of Neglect: The Legal Aspects, 43 J. of Fam. Law 29 (1964); and Note: Child Neglect: Due Process for the Parent, 70 Col. L. Rev. 465 (March 1970).

Admittedly, only Wisconsin v. Yoder, supra, addresses the possible conflict between parental and children's rights and there expressly reserves the question, though there is strong dicta in some of the opinions favoring the rights of parents over their children and Justice Douglas disagrees.

Finally, it should be recognized that statutes penalizing runaways and incorrigible children as criminal substantially antedate the foundation of children's courts and the statutes establishing them. In fact, such statutes existed in colonial times. See Commonwealth v. Brasher, 270 N.E.2d 389 (Mass. 1971).

24. While there is much discussion of parental rights in reported cases, few cases attempt to define those rights making discussion difficult. A careful review of the literature, both case law, treatise and law review, indicates that the following have been listed as "parental rights" protected by the constitution:

(1) Physical possession of the child which, in the case of a custodial parent includes the day to day care and companionship of the child in the case of a non-custodial parent, the right to visitation.

(2) The right to discipline the child which includes the right to inculcate in the child the parent's moral and ethical standards.

(3) The right to control and manage a minor child's earnings.

(4) The right to control and manage a minor child's property.

(5) The right to be supported by an adult child.

(6) The right to have the child bear the parents name.

(7) The right to prevent an adoption of the child without the parents' consent.

resort to self-help and the attendant risk of violence.[25] Lest I be misunderstood, I do not hold that a parent's custody right is a property right. The theft analogy is just an analogy, nothing more.

Thus, before L.M. can sustain her case that the child in need of supervision procedure including the invocation of the court's contempt power to enforce orders made pursuant to it is an unconstitutional invasion of her liberty and privacy, she must first establish that her mother has no legally enforceable right to her custody. For if a parent has a legal right to the custody of his child, it necessarily follows that the right is enforceable against the child as well as others, since by definition a legal right is one enforceable in a court of law and the existence of the right in the parent entails the correlative duty in the child as well as others to respect that right.[26] True, like all legal rights a parent's right to the custody of his child is not absolute and may be

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24. (Cont'd)

Of these so called residual parental rights, those that remain after custody is placed in another, include the right to consent to an adoption and by withholding consent prevented, the right to visitation and the right to have the child bear the parents' name.

25. By withdrawing court assistance (and police assistance) from embattled parents the state is not inducing compromise but is in fact encouraging violence, since parents have the right under Alaska law to physically control their children. See AS 11.15.110 (1) as interpreted (in Oregon) in State v. England, 349 P.2d 668 (Ore. 1960), and compare the civil liability of parents for disciplining their children which is discussed in Hebel v. Hebel, 435 P.2d 8, 14-15 (Alaska 1967). See also Levee, Criminal Liability for the Punishment of Children, 43 Journal of Criminology, Criminal Law and Police Science, 719 (1952-1953) and Annot., Liability for Punishment of Children, 89 A.L.R. 2d 396 (1963).

In this context consideration should be given to the case of State v. Rigler, 266 A.2d 887 (Del. Supp. 1970) where a 15-year old girl cut her classes and went to her boyfriend's apartment, her mother followed and with the help of the mother's boyfriend, removed the girl from the apartment resulting in a scuffle leading to the boyfriend's conviction for technical assault on the mother.

Consideration should also be given to the fact that in our society the family relation is a frequent source of violence (see Pamas, Judicial Response to Inter-family Violence, 54 Minn. L. Rev. 585, esp. 641-44 (1970) and Id. The Response of Some Relevant Community Resources to Interfamily Violence, 44 Ind. L.J. 159 (1969); and id. The Police Response to Domestic Disturbances, 1967 Wis. L.Rev. 914. If parents have a right to the custody of their children and the right to use force to protect that right as they apparently do under Alaska law, then the availability of a judicial form for the resolution of inter-family disputes may be a necessary alternative to substantial inter-family violence.

lost through divorce,[27] by conduct depriving the child of the necessities of life,[28] by abandonment,[29] by the child's emancipation,[30] or, subject to constitutional limitations, where the child's best interests would be served by a limitation or termination of parental rights.[31]

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26. For the meaning of legal right and its relation to its correlative legal duty, see Wesley N. Hohfeld, Some Fundamental Conceptions as Applied in Judicial Reasoning, Part I, 23 Yale L.J. 16, 28-32 (1913); Part II, 26 Yale L.J. 710 (1917); J. C. Gray, The Nature and Source of the Law (2nd Ed.) (N.Y.: The McMillan Co. 1948, pp. 7-26, esp. p. 12.

27. AS 09.55.205 gives a court in a divorce action the right to provide for the custody of the children. The Supreme Court has indicated that a parent is entitled to a preference over third parties in an action for custody unless the third party establishes that the parent is unfit or alternatively that the welfare of the child requires placement with someone other than the parent (see Bass v. Bass, 437 P.2d 324 (Alaska 1968).

28. See AS 47.10.010(a)(5) which, when read in conjunction with AS 47.10.080(c) and AS 47.10.290(3), permits the state to take custody of a child who "lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian."

29. See AS 47.10.010(a)(4) which authorizes the state to take custody of a child who has been abandoned. See D.M. v. State, 515 P.2d 1234 (Alaska 1973); it would appear that the common law doctrine of "constructive desertion" would apply here as well as in domestic relations disputes. Under that doctrine, a spouse who leaves the family home because of cruelties or indignities is deemed not to have deserted the home but in fact to have been constructively deserted by the spouse causing the indignities or cruelty even though the spouse causing the cruelty continues to offer to maintain a home for the spouse that has left.

30. A child is emancipated as a matter of law when he or she reaches the age of majority which in Alaska is 19 years of age; AS 25.20.010. See R.L.R. v. State, 487 P.2d 27 (Alaska 1971). The legislature has the power to fix and change the age of majority (see Ruhsam v. Ruhsam, 515 P.2d 1199 (Ariz. App. 1973).

The common law permits emancipation where a parent by act or omission extinguishes parental rights and duties and removes the disabilities of infancy. See Vaupel v. Bellach, 154 N.W.2d 149, 150,51 (Ia. 1967); Allen v. Arthur, 220 N.E.2d 658 660, 119 Ind. App. 460 ( ); Perkins v. Roberbson, 295 P.2d 972, 975, 140 Ca.2d 536 ( ); but there is a strong presumption against emancipation prior to the age of majority (ibid.) and the acts of the child standing alone are not enough. See Schirtzinger v. Schirtzinger, 117 N.E.2d 42, 43-44, (Ohio App. 1952), but cf. Roe v. Doe, 29 N.Y.2d 188, 324 N.Y.S.2d 71, 272 N.E.2d 567 (1971). Generally, before a child can be said to be "emancipated" he must be capable of supporting

L.M. was given an opportunity to show any of the foregoing as a defense to a finding that she was a "child in need of supervision" or, subsequent thereto, to a finding that she had committed criminal contempt of court and was therefore delinquent by violating

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30. (Cont'd)

himself. In this context Alaska law substantially limits the ability of a child less than 16 to support himself (see e.g. AS 23.10.325-23.10.370, esp. 23.10.335, as interpreted by 8 AAC 05.010 and 8 AAC 05.030 which requires that a child between the ages of 14 and 16 not be employed during school hours.

31. As previously indicated the "best interests of the child" is the test normally applied in custody disputes whether between parents (see n. 27, supra) or third parties (see Hickey v. Bell, 391 P.2d 447 (Alaska 1964); Wilson v. Mitchell, 406 P.2d 4 (Alaska 1965); and Bass v. Bass, 437 P.2d 24 (Alaska 1968)). AS 47.10.010 gives the court jurisdiction "in a controversy concerning custody of a minor" to appoint a guardian of the person and property of a minor or place custody in the state Department of Health and Social Services and require a parent to support the child without a finding of dependency (see AS 47.10.010(c)).

And, while AS 47.10.080(f) is open to more than one interpretation, it appears to make the child's "best interest" the test of continued placement, probation or supervision for all dependents, delinquents and children in need of supervision, though the public interest is to be considered as well.

However, there are substantial constitutional problems where the "best interest of the child test" is used outside of the area of custody disputes between parents. See Levine, Caveat Parens: A Demystification of the Child Protection System, 35 Univ. of Pittsburgh L. Rev. 1 (1973); Thomas, Child Abuse and Neglect, Part I: Historical overview, Legal Matrix, and Social Perspectives, 50 N. Car. L. Rev. 293 (1972); Burt, Forcing Protection on Child and their Parents, 69 Mich. L. Rev. 1259, 1268-1288 (1971); Dobson, The Juvenile Court Parental Rights, 4 Family L.Q. 393 (Dec. 1970); Sullivan, Child Neglect: The Environmental Aspects, 29 Ohio State L.J. 85 (1968); Young, The Problem of Neglect: The Legal Aspects, 43 Journal of Family Law 29 (1964); and Note, Child Neglect: Due Process for the Parent, 70 Colum. L. Rev. 465 (March 1970). While each of these authorities criticizes the state's use of dependency proceeding to deprive parents of their children, because of disagreement traceable to social, cultural and economic considerations regarding proper child rearing techniques, they would seem to apply more forcefully where the state seeks to deprive a parent of his child for no cause at all other than the child's wishes. See cases cited supra, n. 23a.

It should be noted that Alaska law in a number of circumstances permits a child over the age of 14 to participate in the selection of a custodian or guardian; but California, with identical statutes, has held that such selection while entitled to consideration is not binding on the court (see Comment: The Role of The Child's Wishes in California Custody Proceedings, 6 U.C. Davis L.R. 332, 353 (1973)). Implicit in the court's power to order a custody arrangement over the child's objection is the power to enforce that order against the child. Of course, the exercise of that power is discretionary, not mandatory.

orders regarding her placement but she failed to do so.

Thus, by refusing to participate in a program of rehabilitation, i.e., by constantly running away in violation of the court order, L.M. directly defeated and prejudiced her mother's right to her custody, exposing L.M. to imprisonment if she were an adult (AS 09.50.020) [32/] and adjudication as a delinquent if a minor (see AS 47.10.010(a)(1)).

It might be argued that the foregoing only applies while L.M. is residing with her mother, and that L.M.'s running from the foster home and later the group home could not affect her mother's custodial rights which had already been suspended by the foster placement and assumption of custody in fact if not in law by the state. Further L.M. might argue whatever rights the state might have correlative to their duty to feed, clothe, shelter and supervise her did not rise to the level of the rights contemplated by AS 09.50.020.

Since it is clear that L.M.'s conduct even after placement in foster care prejudiced her mother's right, it is not necessary to determine whether (1) action prejudicial to the state's rights as custodian would justify imprisonment pursuant to AS 09.50.020; and if not, whether (2) a contempt must be punishable by imprisonment if committed by an adult, e.g., rather than merely a fine, before it can qualify as an act of delinquency if committed by a child.

L.M.'s argument again assumes that children in need of supervision are simply a sub-class of dependents and that the "supervision" contemplated by the statute is

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32. While it is unlikely that an adult under contemporary law would find herself in a position exactly analogous to that of L.M. at common law a spouse was frequently imprisoned for leaving his or her spouse without just cause, i.e. without divorce or a decree granting separate maintenance, and a law to this effect remained on the books in Scotland until 1971. (Matrimonial proceedings and Property Act 1970 Sec. 20, repealing Matrimonial Causes Act 1965 Sec. 13; but see note in 3 The Juridical Review 156 (1891).) It should be noted that L.M. seeks separation from her mother for reasons that would not enable one spouse to divorce or obtain separate maintenance from the other in a jurisdiction, not recognizing incompatability as a ground for divorce.

simply the furnishing of food, clothing, shelter and schooling in lieu of that which would otherwise have been provided by a parent. But this assumption begs the question for in fact, viewed historically, the purpose of the supervision or treatment contemplated by the creation of the status child in need of supervision and its predecessor non-criminal delinquency was reintegration of the child into her family and resumption of parental custody including parental control (cf. AS 47.10.280). Thus, the state's efforts regarding the child are not directed solely at providing an alternate living situation (as they are in a true case of dependency) but at putting the child back in her own home and the reestablishment of her mother's custody and supervision over her and any foster placement is merely a means to that end, not an end in itself. Thus, by rejecting "treatment" L.M. defeats, or at least slows, this reintregration process and thereby prejudices her mother's right to her custody and control, subjecting herself to the more severe sanction contemplated by AS 09.50.020.

CONCLUSION

Whether we characterize L.M. as a delinquent child, a child in need of supervision, a dependent child, or merely a child whose custody is disputed in a domestic relations proceeding, [33/] the court has (under existing law) authority to

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33. It must be understood that a minor L.M.'s age without doing anything to attract court attention, could have her custody placed in issue in a divorce or other domestic relations proceeding. The court would issue an order ultimately resolving the custody dispute which would be as binding on the child as on the disputants. True, the child if reasonably mature would be permitted to state a preference (see AS 09.55.205 (1) and cf. AS Secs. 13.26.040 and 13.26.055 which make fourteen the age at which a minor may express a preference as to his guardian); but the child's decision is not binding on the court if the child's proposed appointed guardian or custodian is, in the court's opinion, not consistent with the child's best interests (see AS 13.26.055). Hatherly, in his article The Role of The Child's Wishes in California Custody Proceedings, 6 U.C. Davis L. Rev. 332 (1973) discusses the California cases which interpret the interplay between the California equivalence of AS Secs. 09.55.205(1) and 13.26.055. But as the cases establish, the "child's best interest" is an ambiguous standard which

make orders affecting her custody (after extending to her all procedural safeguards including notice and an opportunity to be heard and, in appropriate cases, the appointment of counsel) and enforce those orders against her. Certainly, conciliation should precede coercion; and if coercion is necessary, mild sanctions should first be tried before more severe sanctions are imposed. But where mild sanctions fail, the court's orders must be enforced and severe sanctions will be imposed if necessary. I have considered those sanctions other than institutionalization, which are suggested in the literature, and must reject them for reasons which I will set out.

No sanction may be imposed on a child either directly or as a condition of probation unless it is clearly spelled out in the appropriate statutes. See In Re M.L., 34/ 317 A.2d 65, 64 N.J. 438 (1974). Thus, I cannot impose a fine on L.M. (ibid.), 35/ and the same principle precludes use of corporal punishment.

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33. (Cont'd)

means different things to different judges and appellate courts hesitate to overturn such decisions unless there is an apparent inadequacy in the trial court's chosen custodial home. See, e.g., Nichols v. Nichols, 516 P.2d 1215 (Alaska 1973). Thus, many children involved in child custody disputes will in the ordinary course find themselves placed with a less favorite parent and yet this decision will be binding upon them and enforceable against them. I have attempted to protect the interest of minor children in divorce cases by appointing counsel to represent them and treating them as parties to the case as I believe they are (see Hatherly, supra, esp. pp. 352-353), but this is not a general practice. The point I am making is that most children (and adults) who are permitted to fully participate in a court proceeding and have their position heard accept the judgment of the court whether they agree with it or not, and no problem of enforcement arises. But when a party does not acquiesce and refuses to comply with the court's orders, regardless of the nature of the proceeding, the contempt power is waiting.

34. L.M. being an unemployed minor, a fine would be an unproductive sanction in any event.

35. I have listed corporal punishment as a "milder" sanction than institutionalization because I believe most children (and adults) would prefer it to any extended period of incarceration. I also realize that a good argument could be made for the proposition that in cases such as this one (and most adult misdemeanors by other than hardened criminals), it would be a more effective sanction than incarceration. See Levy, Criminal Liability for Punishment of Children, 43 J. of C.C. and P.S., 719, 725 (1953-1963); cf. Singer, Psychological Studies of Punishment, 58 Calif. L.Rev. 405(1970). But Virginia is the only state which has ever permitted it as a juvenile disposition and

I have tried short periods of confinement unsuccessfully with L.M. and accept Ms. Lankford's testimony that short-term, i.e. 30 days or less, confinement would have no effect on L.M.'s future behavior; and if repeated each time L.M. ran away, would continue almost indefinitely into the future with L.M. enjoying brief periods of general freedom in the community between periods of confinement subjecting L.M. to all of the disadvantages of confinement with none of the advantages of participation in an institutional program. 36/

Finally, I have suggested placement outside the community in a private school or other open setting as an alternative to a closed setting in this community, but L.M. (through her attorney), her mother and the State of Alaska have all rejected this proposal and requested that L.M. remain in this community. Consequently, we are faced with the following facts: L.M. is a frequent, if not constant, runaway. While verbally willing to cooperate with state supervision towards reintegration into her family, she has consistently rejected it by her actions. She has been counseled by representatives of the Division of Mental Health, the Division of Corrections, and the Division of Family and Children's Services, as well as two separate private psychiatrists -- those connected with the

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35. (Cont'd)

that statute was repealed (see Levy, supra, citing Virginia Code Sec. 63-303 (1950) repealed Acts 1950, p. 698); and the Alaska statute clearly does not authorize it. Consequently, it is not necessary to determine whether corporal punishment, with or without the child's informed consent (e.g. as a condition of continued probation) would be constitutional. Cf. Ware v. Estes, 328 F. Supp. 653 (N.D. Tex. 1971, aff. 458 F.2d 1360 (5th Cir. 1971), cert. den. 409 U.S. 1027, 93 S. Ct. 463, 34 L.Ed.2d 321 (1972); Glaser v. Marietta, 351 F. Supp. 555 (D.C. Pa. 1972); Gonyaw v. Ladue, 361 F. Supp. 366 (D.C. Vt. 1973). (The foregoing all hold that corporal punishment in public schools is constitutional against a variety of challenges on the ground that it has historically been practiced there and is nationally a common practice, i.e. a usual practice, with Nelson v. Heyne, 355 F. Supp. 451 (D.C. Ind. 1973) (holding that corporal punishment in a juvenile correctional institution is unconstitutional on the ground that it is "cruel" and unusual, i.e. a practice which occurs in only a few states).) As previously indicated, I know of no state that permits corporal punishment as a judicial disposition in juvenile cases, either directly or as a condition of probation. (aff. 491 F2d 352 (7th Cir. cert. den. 94 S.Ct. 3183 (1974)

36. Those in dentention do not participate in the institution's "program".

Langdon Clinic and Dr. Barbare Ure, and if anything, her problem has continued to increase. In summary, every effort at in-community conciliation has been tried and I cannot but find on this record that her parents have cooperated fully in the conciliation program, meeting in group sessions with representatives of the Division of Corrections, Dr. Ure, Melissa Middleton, and the minor. We have reached the point in these proceedings where the court can find as a matter of fact that L.M. will not abide by any orders it enters regarding her supervision under AS 47.10.080(j), and is therefore in willful criminal contempt of the court's authority. Were she an adult, her actions would be characterized as a "crime" under Alaska statutes. She was, therefore, properly declared a delinquent and subject to those sanctions available for the correction of a delinquent minor's behavior; and all of these, save institutionalization, have been tried and have been unsuccessful. Since her adjudication as a delinquent, L.M. has twice left her custodial placements and been away in the community for a period in excess of thirty days without notifying any of the adults allegedly responsible for her. Consequently, the court has no choice but to order her institutionalization.

DATED at Anchorage, Alaska, this 13 day of June, 1974.

JAMES K. SINGLETON, JR.
JUDGE OF THE SUPERIOR COURT

cc: Honorable H. J. Butcher
John Van Winkle, Assistant Public Defender
Joseph D. Balfe, District Attorney
Timothy G. Middleton, Assistant Attorney General
Sheila Lankford, Probation Officer
Mr. and Mrs. Robert Crow