HB

175

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

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Mary Van Nimwegen

HB 175

H HESS 3/9/89

H HESS 3/1/89

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 15, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 4/6/89

The HEALTH, EDUCATION, & SOCIAL SERVICES Committee considered: HB 175

HOUSE BILL NO. 175 [PROGRAMS & PROCEEDINGS RELATING TO MINORS]
"An Act relating to programs and proceedings concerning children; and emphasizing that the best interests of the child must be considered under certain programs and during certain proceedings involving children."

RECOMMENDS:

[ ] replacing with CS HB 175 (HESS) [ ] the same title [X] a new title
[ ] the attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ______ Committee

ADOPTS: House HESS letter of intent

ATTACHES NEW FISCAL NOTE(s):
[ ] fiscal impact
[ ] zero fiscal note
[X] zero with analysis

APPROVES PREVIOUS:
[ ] fiscal note(s) published: ______
[ ] zero fiscal notes(s) published: ______

SIGNING DO PASS:

[signatures]

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

[signature] no rec
([signature] no rec)

[signature]
Chairman's signature

(7)
Date Referred: April 7, 1989 FURTHER REFERRALS:

Date of Committee Action: 4/13/89

The JUDICIARY Committee considered: HB 175

HOUSE BILL NO. 175 [PROGRAMS & PROCEEDINGS RELATING TO MINORS]
"An Act relating to programs and proceedings concerning children; and emphasizing that the best interests of the child must be considered under certain programs and during certain proceedings involving children."

RECOMMENDATIONS:
[✓] be replaced with CS HB 175 (Jud) [ ] the same title [✓] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal impact_____ [ ] fiscal note(s) _____
[ ] zero fiscal note_____ [ ] zero fiscal note(s)_____
[ ] zero with analysis_____ [ ] zero fn/analysis _____

SIGNING DO PASS:

Mary Greenberg
Peter Pearce II
Ogg Davidson
John Ellis
Mike Miller

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Mike Miller		✓	
Terry Martin		✓	

Peter Pearce / Mary Greenberg
Chairman's Signature

DELIVER TO: CIOCION

ORIGINAL
SENT: 04/19/89 TIME 13:14
FROM: LTCCFBX
SUBJECT: LJUD,PL:1,HB175,4-19
PRINT DATE: 04/19/89 TIME 13:14

T/C NO 89-04-074

DATE APRIL 19, 1989
SPONSOR HOUSE JUDICIARY
SUBJECT: HB 175 PROGRAMS AND PROCEEDINGS RELATING TO MINORS
MODERATOR FRAN
SITE FAIRBANKS

PARTICIPANT LIST
FINAL STATS

TESTIFIED

NAME/REPRESENTING	ADDRESS	PHONE	BILL NO.
1. SHIRLEY DEMIENTIEFF - TANANA CHIEFS			
2.			
3.			
4.			
5.			

OBSERVED

NAME/REPRESENTING	ADDRESS	PHONE	BILL NO.
1.			
2.			
3.			
4.			
5.			

TESTIFIED
UNABLE
OBSERVED
TOTAL

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 175
Publish Date: 2/15/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act relating to programs & proceedings concerning children...
Sponsor: HESS
Requestor: HESS

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 9'	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 03/17/89

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 03/17/89
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION : CSHB 175
PUBLISH DATE : _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title : An Act relating to programs & proceedings concerning children...
Sponsor : House HESS Committee
Requestor : _____

Agency Affected : Health & Social Services
BRU : _____
Components : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary) Although CSHB 175 has a zero fiscal note, the legislation has potentially serious financial implications. If CSHB 175 does not become law, the Department will likely lose approximately $100,000 in federal grant funds which are currently used for child abuse and neglect programs within Alaska.

Prepared by : Yvonne Chase, Director
Division : Family and Youth Services
Phone : 465-3170
Date : 4-6-89

Approved by Commissioner : Myrna M. Munson
Agency : Department of Health & Social Services
Date : 4-6-89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

6-0717E
Lauterbach
3/17/89

Original sponsor: Health, Education and Social Services Committee

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

IN THE HOUSE

CS FOR HOUSE BILL NO. 175 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the construction of laws pertaining to adoption; modifying policy statements pertaining to removal of a child from the custody of the child's parents and from the child's home; requiring the court to make certain findings and conclusions of law related to children who are delinquent or in need of aid; modifying the definition of 'child abuse or neglect'; and emphasizing that the best interests of the child must be considered under certain programs and during certain proceedings involving children."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 25.23 is amended by adding a new section to read:

Sec. 25.23.005. CONSTRUCTION OF CHAPTER; RIGHTS OF PERSONS AFFECTED BY ADOPTION. This chapter shall be liberally construed to the end that the best interests of adopted children are promoted. Due regard shall be given to the rights of all persons affected by a child's adoption.

* Sec. 2. AS 47.05.060 is amended to read:

Sec. 47.05.060. PURPOSE AND POLICY RELATING TO CHILDREN. The purpose of this title as it relates to children is to secure for each child the care and guidance, preferably in the child's own home, that will serve the moral, emotional, mental, and physical welfare of the child and the best interests of the community; to preserve and strengthen the child's family ties <u>unless those ties are not in the</u>

best interests of the child [WHENEVER POSSIBLE], removing the child from the custody of the parents only as a last resort when the child's welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the child is removed from the family, to secure for the child adequate custody and care and adequate planning for permanent placement of the child.

* Sec. 3. AS 47.10.080(f) is amended to read:

(f) A minor found to be delinquent or a child in need of aid is a ward of the state while committed to the department or the department has the power to supervise the minor's actions. The court shall review an order made under (b) or (c)(1) or (2) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision, as it is being provided, is in the best interest of the minor and the public. The department, the minor, the minor's parents, guardian, or custodian are entitled, when good cause is shown, to a review on application. If the application is granted, the court shall afford these parties and their counsel reasonable notice in advance of the review and hold a hearing where these parties and their counsel shall be afforded an opportunity to be heard. The minor shall be afforded the opportunity to be present at the review. At a hearing held under this subsection, the court shall make specific findings of fact and conclusions of law, which shall be contained in an order relating to the hearing, regarding whether or not

(1) the child is able to be returned to the child's home; and

(2) the department has made reasonable efforts to avoid removal of the child or to facilitate the return of the child to the child's home.

* Sec. 4. AS 47.17.010 is amended to read:

Sec. 47.17.010. PURPOSE. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical abuse or neglect or sexual abuse or sexual exploitation, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the appropriate public authorities. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life unless it is not in the best interests of the child to do so [WHENEVER POSSIBLE].

* Sec. 5. AS 47.17.070(2) is amended to read:

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

Alaska Foster Parents Association
P. O. BOX 140651 • ANCHORAGE, ALASKA 99508

POSITION PAPER
HB 175
PROGRAMS AND PROCEEDINGS RELATED TO CHILDREN

The Alaska Foster Parent Association supports this legislation. Sections one, two and four contain long needed corrections to curren' statutes.

Section three contains language relating to termination proceedings that appears to make termination of parental rights, when appropriate, easier for the state to accomplish. We do have reservations about this specific language. However, in our contacts with legislators and legal professionals it would seem that there is about an equal opinion concerning this language and possible alternatives. It is our position that we agree with the intent of the language and if the legislature chooses to uphold rebuttable presumption, we feel we can only concur.

We agree whole-heartedly with the enhancement of the best interest of the child that this legislation will provide. Hopefully, it will give the courts in the state of Alaska a vehicle to provide children a permanent setting that is conducive to their well being and emotional and physical development. We cannot overstate the importance to children of a loving, nurturing family that they can call their own.

It should be considered, when termination is necessary, that one of the factors of determination should be the age of the child. Two years is not a long time to a teenager, however, to a four year old toddler it is half of their life! For extremely young children developmental years are crucial and the need for beneficial bonds with adult parents can have far reaching effects. For very young children whose families have an unfavorable prognosis, the decision to terminate parental rights should not be delayed unnecessarily.

Also, in discussing termination, we feel that the concept of open adoption should be considered when it can be accomplished without endangering the child or the child's new family.

Miriam Sumner
President

Frank H. Wasmer
Vice President

BILL 175 House Bill
3/9/89

RE: FOSTER CARE ISSUES: Please let me, Jeanine Brown - Foster Mom, voice my opinion on this bill. I have been at your hearings and listened to testimony regarding HB 175. As a foster parent of long standing, I support this bill and think it may be one of the most important bills before this legislation this year

I listened to Martha Holmberg this morning and could not help but think, "Is this the same policy that I deal with daily?" Peter Goll asked the right questions. Foster Parents see the failure of policy every day. I understand that good policy procedures exist, but are maybe not able to get down to our level of working with children under Alaska's protective services?

It is very frustrating. We all seem to want the best for these minors, and work toward that end. Why are we failing then? In my opionion, the ladder of policy seems to be inassessable. That child, needing our help, is almost abused by quote, "The System" as much as he/she was before being placed into protective services.

If I had to ask any foster parent to voice their main concern out of probably many concerns, the answer would be, "Why do these children remain in the system so long." Back and forth to parents, bounced between foster care providers, any persons chances go "down the drain" when their lives are uprooted, inconsistant, and uncertain of thier survival: and it is survival.

Consider the Dept. of H.S.S. the General: Foster parents the Sargents and foster care children the soldiers. These soldiers are on manuvers: survival the goal. Their training has been very limited if any. Not much of self-esteem, bonding, or security has been given them. They have no goals, battle plans, or futures that they can see. They have been sent to the isolation of unknown territory and given no weapons. Fear and uncertainy have been their background with little good modeling available for them. They deal

with a day to day existance and their own life style, cultural background or any other form of themselves on hold.

They live on threads of information, or misinformation and wait daily for the next "battle plan" to be told them. The most fortunate soldiers are too young to realize just why they are here. The older soldiers know exactly why they are here; they have been here many times before and know how to manipulate to survive. Soon these soldiers will be to "wise" for foster care and go on to the next level of manuvers, juvenile receiving homes and lock-up facilities. These soldiers are now into many different wars, including the war on drugs or alcohol. Running without any plan seems to be in most of these soldiers lives. These soldeirs are lost. The system has claimed them.

What we need to work on is how to get the soldiers new recruits who can help them to get through the wars going on in their lives. Many times we need to "muster out" these people before they get into the "hard timers". Termination can be their only resource.

Please, please, please, do not let (3) out of this bill. Do not white wash any bill dealing with foster care to get it passed. We need your input and interest in foster care children. They need you to help them through. I did not agree with Martha's estimate of how many children remain in the foster care system for long periods of time. I consider it a major number with difficult means to get children to be terminated. Even sending back home is a bad battle plan at times. More work has to be done in this area. More looking and asking will help. You are on the right track. Thank you.

Jeanine Brown

Jeanine Brown
P.O. Box 210584
Auke Bay, AK 99821

789-5051

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Representative Ann H. Spohnholz
District 13 Seat A

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811
465-2435

MEMORANDUM

TO: Members of the House HESS Committee

FROM: Representative Ann Spohnholz

DATE: March 10, 1989

RE: Attached comments

During discussion of HB175 at yesterday's meeting of the HESS Committee, one of the young people in the audience passed me the attached comments. I was moved by his statement and wanted to share it with you.

The young man's name is Tony Boykin, he is a student at East High School in Anchorage, and he was one of a group of students in attendance at yesterday's meeting as part of his participation in the CloseUp Program.

During the time I've been here and listen to this meeting I haven't heard anyone say or tell the kids side of it. Before you start making panels and making any other moves you should have your experts talk to kids because the things that kids tell other kids are the same things they will never tell a expert because an expert is not a friend but a person wanting to help so how that they listen but don't feel the pain with the kid. Our statements the system doesn't work because the kids don't understand why there lives are controlled by rules and Strangers that don't love them and only about how smoothly the system works. All I'm trying to say is talk to the kids and listen and feel.

During the time I've sat here and listen to this meeting, I haven't heard anyone try or tell the kids side of it. Before you start making parallels and making any other moves, you should have your experts talk to kids because the things we kids tell other kids are the same things they will never tell a expert because an expert is not a friend but a person wanting to help so bad that they listen but don't feel the pain with the kid. In shorter words, the system doesn't work because the kids don't understand why there lives are controlled by rules and strangers that don't love them and only about how smoothly the system works. All I'm trying to say is talk to the kids and listen and feel.

HB 175

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF FAMILY AND YOUTH SERVICES

PERMANENCY FOR DEPENDENT CHILDREN

AN INNOVATIVE PROJECT

March 1989

Every child should have the right to a permanent and safe home.

DOES EVERY CHILD HAVE A PERMANENT HOME?

No! At any time in Alaska 900 to 1,100 children are in out of home care. Today, there are 222 children in the custody of the State of Alaska who have been in continuous out of home care for more than two years.

Although most children in custody will return to their own homes, for some, termination of parental rights is the only way they will ever have a chance for a permanent family. A quick survey throughout the state revealed that there have been approximately 35 cases of nonvoluntary terminations of parental rights during the past 18 months. There have also been five guardianships, 17 relinquishments, and there are approximately 50 cases pending termination. Some parts of the state have not had a termination of parental rights case before the court for ten years.

More must be done to assure a permanent home for every dependent child. Better assessment and focused treatment are needed to help the child's parents, and, when that is unsuccessful, faster, more definitive action is needed to make a permanent, substitute home possible for the child.

WHAT CAN BE DONE TO ASSURE PERMANENCY FOR CHILDREN?

The Division of Family and Youth Services (DFYS), together with the Department of Law, is launching a new project, Permanency for Dependent Children (PDC). This project will be implemented in Nome, Bethel, Barrow, Fairbanks, Juneau, Anchorage, and Ketchikan by July 1, 1989. Training to prepare staff will occur in June.

The goals of PDC are to speed up recognition of those cases in which termination of parental rights, or another permanent plan, should be pursued and to reduce delays in court action necessary to achieve the permanent plan. There are many components to achieving these goals:

Permanency Planning Court Specialists --

At least one permanency planning court specialist will be identified and trained in each of the offices listed above. The social workers will be trained as a team so that standardized procedures are developed statewide and so that these specialists have special support for their work.

The court specialists will conduct periodic reviews of all cases in which a child has been in custody for one year or has been removed from parental care and placed in foster care more than once. The specialists will also be available to consult and assist regarding any child's case where the caseworker or supervisor believes that a permanent plan other than return to the parents may be needed.

In those cases where the parents are not actively involved and progressing, a team decision will be made about whether continued effort with the parents is most appropriate or termination of parental rights should be pursued. In the former cases, further review will occur quarterly to be certain that no "drift" occurs.

In situations where termination of parental rights is identified as the most appropriate permanent plan, the permanency planning court specialist will be responsible for preparing the case for presentation to the court. The specialist will prepare chronologies of events, organize the evidence, interview and prepare witnesses, identify and prepare expert witnesses, and generally assist the ongoing caseworker and the assigned attorney.

Freeing a child for adoption requires the court to terminate the most precious relationship in our society -- that between parent and child. Preparation for these proceedings is extraordinarily demanding, time consuming, and stressful. By assigning specialists, we expect to eliminate delays which occur when ongoing workers are trying to balance this kind of preparation with their day-to-day obligations to respond to the needs of children, parents, and foster parents. The added expertise the specialists can bring to consultation about ongoing cases will also help less experienced workers improve their assessment and treatment skills.

Training regarding Permanency Planning --

In conjunction with the Department of Law, training and orientation for all new social workers will include information concerning legal standards for termination of parental rights, documenting events and services offered throughout a case, and assessing when termination of parental rights or another permanent plan should be pursued.

Updates on these subjects will be included in periodic training for all of the social workers. This will help keep skills current and offer an opportunity to incorporate the findings of the permanency planning court specialists about how best to prepare for court proceedings when they are required.

Specialists will be trained as a team. Their training will focus on legal and child welfare issues associated with permanency planning. The training will include information on how to conduct case reviews, assessment of treatment plans and progress, weighing permanent plan alternatives such as guardianship, adoption and long-term foster care, and preparing for complex legal proceedings.

Department of Law Participation --

In the Fairbanks, Anchorage, and Juneau offices of the Attorney General, arrangements will be made to make attorneys available to assist with training the DFYS specialists and to consult with the specialists and take cases to court. In the other offices, the Assistant Attorneys General assigned to represent DFYS will be offered support and consultation from the three larger offices, as needed.

In Juneau, a paralegal position, which is currently not filled, will be dedicated specifically to child in need of aid termination proceedings.

In Anchorage, the 1990 budget request includes the addition of an attorney and a paralegal to the human services section. Both of those positions will be dedicated to children's proceedings--including consultation with other attorneys handling termination cases. The attorney specialist will also be responsible for developing and implementing the monitoring and evaluation system for all child protection attorneys' cases in Anchorage.

Fairbanks attorneys will continue weekly staffings on all pending cases. The Fairbanks office has been involved in vigorously pursuing termination cases for quite a period of time. They will participate in concerted monitoring of cases, and evaluation of this new statewide effort.

HOW WILL BE KNOW IF WE ARE SUCCEEDING?

No later than August 15, 1990, a report will be jointly issued by the two Departments on the project's first year of operation.

In developing this project, DFYS gathered significant information about the status of permanency planning in Alaska. With the

Department of Law, we closely examined statutes concerning termination of parental rights and the many perceptions about permanency planning and "the best interests of a child." The information we have gathered is set out here as the starting place for the project evaluation, which will be described in the August 1990 report.

The annual report will include an analysis of the impact the project has had on achieving a permanent plan for the children presently in placement more than two years. It will address the project's impact on reducing the average length of time before a permanent plan is achieved for all children in out of home care. It will also include findings about what works and what doesn't and plans and recommendations for further action.

WHY SHOULD WE START THIS PROJECT?

... What is happening to children in the custody of the State of Alaska?

... Are plans for permanency being made in a timely manner?

... What is the Division of Family and Youth Services doing to prevent foster care drift?

... What is in the best interest for each child?

... Are permanent plans being finalized for children?

... What are the barriers to quality care for children in State custody?

For several hundred children, the answers to these questions are vital elements in their day-to-day survival and their future well-being. These are questions considered by policy-makers, legislators, judges, social workers, guardians, and DFYS. These are the questions that drove us to the conclusion that we needed more focused attention than had previously been devoted to permanency planning in Alaska.

Even after a child has been removed from his or her home, the child's immediate safety is not assured. Without continuing appropriate service for the child and the family, the child is at risk of victimization by the protection system. Immediate and long-term goals are necessary for each child who is removed from his or her home. The nationally recognized term for this type of planning is "permanency planning."

WHAT IS PERMANENCY PLANNING?

Permanency planning for children is a concept, a philosophy, and the desired outcome of DFYS intervention with a family. In practice, permanency planning begins with the first act of intervention by the agency. Each child's situation is assessed in two ways: 1) The risk of harm to the child in his own home is determined. 2) The family is assessed to identify needed changes so the family can provide safe, nurturing care for the child.

Through permanency planning, the goal of safe, stable care is achieved individually for each child:

1. When the child's family can be rehabilitated in a reasonable period of time, the permanency planning goal is to reunite the child with his family;

2. When the potential for reuniting a child with his family exists, an interim placement should be found which "could be permanent" if the attempt to reunite the child with his family is unsuccessful. Future planning in this direction reduces the number of placements the child must experience;

3. Sometimes adoption is best for the child and is possible when the child's parents' rights are terminated in court;

4. When the child's family cannot be rehabilitated and relatives can provide a safe, nurturing environment, a permanent relative placement may be the plan;

5. For Alaskan Native children, relatives and tribal members must be considered, and are usually most appropriate to provide the needed permanent placement;

6. Foster families frequently are willing to provide permanent care to a child who cannot be freed for adoption and has no relatives who can provide safe and permanent care;

7. Guardianship is also an avenue for permanency which does not require termination of parental rights. Relatives, tribal members and foster families can be named guardians.

WHERE ARE WE IN MEETING PERMANENCY PLANNING GOALS IN A TIMELY MANNER?

According to a recent analysis (data from December 1985 and the most recent analysis in January 1989), approximately 21% to 23% of the children in state care have been there for more than two years. In Washington, Maine, and Massachusetts the statistic is 30%, 51% and 31%, respectively. Alaska has a lower percentage rate. However, for the 222 children in Alaska who have been in substitute care for more than two years, timely permanency planning has not occurred, and for the 33 children who are between the ages of two and five, out of home care represents the majority of their life span. The following chart shows the region, age, and sex of these children.

REGION	AGE AND SEX						TOTAL
	2-5 yrs.		6-10 yrs.		11-18 yrs.		
	M	F	M	F	M	F	
Western	2	6	4	6	3	4	25
Northwestern					1		1
Northern	1		7	5	8	18	39
Southcentral	12	15	18	13	32	41	131
Southeastern		1	4	1	10	10	26
Totals	15	22	33	25	54	73	222
	37		58		127		

Alaska also appears to be doing a better job than some of the other states by not "losing" children for years in the system.

At the same time, the number of moves a child makes from foster home to foster home and from the child's home to a foster home is a measure of the quality of care the child is receiving from the "system". In 1985, 74% of the children in DFYS custody had been in at least two placements and 25% had over five placements.

In comparison, New Jersey reports that 45% of their children in substitute care have had only one placement. However, the other 55% represent multiple placements. Washington State's data for FY 86 indicated that of the 5,745 children placed, 3,858 (67%) received one placement each; 1,114 (20%) received two placements; 711, three to five placements; and 62 children had received more than six placements. The Division's program goals include reducing the number of placements for each child as well as reducing the length of time in placement for children.

HOW DO STATUTES AFFECT THIS PROCESS?

State and federal statutes define standards of proof for termination of parental rights: state statute mandates clear and convincing evidence that the parents' conduct is likely to continue. The Indian Child Welfare Act mandates evidence beyond a reasonable doubt that continued custody by the parents is likely to result in serious physical or emotional damage to the child and proof that active efforts have been made to offer remedial services. The statutes do not give time frames for the filing of a petition to terminate parental rights.

Both the parents' ability to change and to meet the child's needs are key elements. Although there are barriers to the timely planning for children in custody in Alaska, the statutes are rarely, if ever, the barrier. Ideal progression is dependent on the resources and skill of staff in the state agency, the community's resources for assisting the parents to learn to care for their child and to overcome the parents' problems, the skill and availability of the state's attorney, and the wisdom of the court.

Permanent status for some children can be achieved only through the termination of their parents' rights. State and federal statutes give the legal rules and structure to the courts and the state agency to use in deciding when the termination of parental rights can be granted:

> AS 47.10.080 (c)(3) provides that by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under AS 47.10.010 (a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, 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, and the department or guardian shall report annually to

the court on efforts being made to find a permanent placement for the child.

The Indian Child Welfare Act (P.L. 95-608) provides in pertinent part that no termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) provides in pertinent part that effective October 1, 1983, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home; and it provides for the development of a case plan (as defined in section 475[1]) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) with respect to each such child.

The term 'case plan' means . . . a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child . . . 475(5) The term 'case review system' means a procedure for assuring that . . . (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review . . . in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship and

WHAT IS IN THE BEST INTERESTS OF A CHILD?

This question elicits emotional, philosophical, societal, tribal, and sometimes religious responses which are different for every child whose needs have not been met by the child's parents. The court ultimately may have to provide the answer for many children.

We believe it is in the best interest of every child to be loved and cared for by the child's own parents. Unfortunately, even with help to the parents, this is not always possible. The "reasonable efforts" requirement of the Adoption Assistance and Child Welfare Act of 1980 recognized, on a federal level, the bond which a child has with his family and the importance of maintaining that bond. The Indian Child Welfare Act has similar requirements. Both federal laws, like Alaska State law, recognize, however, that this goal may not be attainable for every child. When it is not, another permanent family must be found for the child.

FINALLY --

We will need lots of help to make this project work. We must have enough social workers and lawyers. Treatment providers must recognize the urgency. Tribal advocates and Native organizations must be included so we have the best possible support for parents of Native children and help finding and supporting the most appropriate substitute placements, when that is required. Guardians ad litem must advocate vigorously.

Meeting the goal of a permanent home for every child requires difficult decisions and painful choices. Most important, we need the commitment of every Alaskan to meeting this goal.

For more information, please contact:

Yvonne M. Chase, ACSW
Director
Division of Family and Youth Services
P.O. Box H-05
Juneau, Alaska 99811-0630
(907) 465-3170

Yvonne M. Chase, ACSW
Director
Division of Family
and Youth Services

Date: 3/8/89

Myra M. Munson
Commissioner
Department of Health and
Social Services

Date: 3/8/89

MEMORANDUM State of Alaska

TO: Eileen Self
Aide to Representative Ann Sp[illegible]

DATE: February 27, 1989

FILE NO:

TELEPHONE NO:

THRU:

SUBJECT: HB 175 - An Act Relating to Programs and Proceedings Concerning Children

FROM: Barbara Brink BB
Deputy Public Defender

The attached memo is in response to your request for comment on the above-referenced proposed legislation. The memo was prepared by one of our lawyers, R. Scott Taylor.

Do not hesitate to contact our office if you need further information and please let us know when hearings are scheduled concerning this proposal.

BB:sh
Attachment

MEMORANDUM State of Alaska

TO Barb Brink

DATE February 27, 1989

FILE NO

TELEPHONE NO

FROM Scott RST

SUBJECT HB 175

The substantive effect of this bill is to create a rebuttable presumption in a termination proceeding of a likelihood that the parental conduct that resulted in the child being in need of state aid will continue. Ostensibly, this change would make it easier for the state to meet its burden of proving "by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights." The amendment to AS 47.10.080(c) is ill-advised as it violates parents' due process rights, does not comport with the federal standards of the Indian Child Welfare Act of 1978, and will have the practical effect of complicating and prolonging litigation. These reasons for rejecting the proposed amendment are further outlined below:

1. A natural parent's "right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S.Ct. 1388, 71 L.Ed2d 599 (1982). The right of parents to the care, custody and control of their children "is an important and substantial right protected by ... both the United States and Alaska Constitutions." Matter of S.D., Jr., 549 P.2d 1190, 1200 (Alaska 1976). In Santosky the Supreme Court recognized that parents have due process rights at a termination of parental rights proceeding. Similarly, the Alaska Supreme Court has acknowledged that due process dictates that the state (the Division) carries the burden of proving its allegations by clear and convincing evidence. K.T.E. v. State, 689 P.2d 472, 476 (Alaska 1984). By creating a presumption of continuing parental conduct, the proposed amendment would unconstitutionally shift the burden of proof from the Division to the parents.

2. The majority of termination proceedings in Alaska involve Native children. For termination of parental rights of a Native child, the Indian Child Welfare Act (ICWA) requires "evidence beyond a reasonable doubt" "that continued custody of an Indian child is likely to result in serious emotional or physical harm." 25 U.S.C. Sec. 1912(f). Amending AS 47.10.080(c) will not affect most Alaska termination proceedings, since the ICWA pre-empts any lower standard for termination under state law.

3. In the remaining non-Native cases, to which the amended standard would apply, the process of creating the presumption will further complicate and prolong the proceedings. Under the present scheme, the court orders an appropriate disposition under AS 47.10.080(c). A treatment plan to promote reunification is agreed to by the parents and the Division without further court intervention. The state has the option of petitioning for termination as the disposition under subsection (c). The proposed amendment would require a court determination of what services are appropriate for reunification. Additional proceedings would be necessary with litigation over what services are appropriate, whether sufficient assistance was provided by the Division, whether there was substantial participation in services or whether there was good cause not to participate. By interjecting the need for additional court proceedings and findings over these new potentially divisive issues, the proposed amendment would ironically prolong the termination process, a result which is almost never in the child's best interest.

Recently, in considering this section, the Alaska Supreme Court concluded, "The statute is as specific as it can usefully be, even though its application requires interpretation. We believe that the scheme accomplishes its purpose of protecting children, while balancing the parents' interests and still allowing reasonable flexibility for the exercise of discretion in the individual case." R.C. v. State, DHSS, 760 P.2d 501, 506 (Alaska 1988). The supreme court is probably right; making the statute more specific will make it less useful.

The bill purports to emphasize that the best interests of the child must be considered. But termination proceedings are part of the dispositive phase of a children's case where consideration of the "best interests of the child" is already mandated pursuant to AS 47.10.082. The only change the bill will effect is to further complicate the process of terminating parental rights; a change which is clearly not in the children's best interests. I agree with the supreme court that the current statute is as specific as it can usefully be. There is no reason to change it, especially in a way that raises more issues for litigation while contravening parents due process rights and the Indian Child Welfare Act.

HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

P.O. BOX V, JUNEAU 99811
(907) 465-3759

HOUSE HESS COMMITTEE
LETTER OF INTENT TO HB 175

It is the intent of the House HESS Committee to endorse the Division of Family and Youth Services' "Permanency for Dependent Children" project as a means of expediting the planning and placement of children in state custody in permanent and safe homes. The Division is requested to report to the Committee on the progress of this project by October 15, 1989.

_____ _____

Rep. Johnny Ellis
Chairman

Date of Adoption

HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

P.O. BOX V, JUNEAU 99811
(907) 465-3759

STATEMENT ON HB 175
by the
HOUSE HESS COMMITTEE

House Bill 175, "relating to programs and proceedings concerning children", was introduced as one of a package of measures proposed or supported by the House HESS Committee, as a result of the Committee's comprehensive interim review of the state's child protection and foster care systems. This bill responds to testimony presented at hearings in the fall of 1988 regarding two different, but related concerns.

Sections 1 and 3 respond to concerns that the Division of Family and Youth Services and the court may not be given clear direction when deciding between the values of preserving family ties and the safety and welfare of children. The intent of these sections is to clarify that the best interests of the child shall be the state's paramount concern and that family preservation or reunification shall be promoted if they are in the best interests of the child.

Section 2 is offered in response to concerns that abused and neglected children often linger unnecessarily long in foster care when there is little or no hope of parental rehabilitation. The intent is to encourage parents to participate in services leading to a beneficial reunification and, if they do not, to make it easier to for the state to terminate parental rights. The ultimate goal is to expedite the placement of children in a secure and stable home so they can quickly reestablish family bonds which are so critical to their emotional well-being.

The rebuttable presumption in section 2, which was borrowed from the Nevada statutes, is a legal mechanism which switches the burden of proof from a state showing of parental unfitness to a parental showing of renewed fitness. It may not be the only or best means of securing the goals stated above.

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

HOUSE BILL NO. 175

For an Act entitled: "An Act relating to programs and proceedings concerning children; and emphasizing that the best interests of the child must be considered under certain programs and during certain proceedings involving children."

The intent of House Bill 175 is to carefully examine the best interest of a child in State custody and to terminate parental rights if the latter is in conflict with child's best interests.

There are potential problems with the proposed changes in Section 3. The amendment to AS 47.10.080(c)(3) will prolong termination litigation, is in conflict with the Indian Child Welfare Act, and may violate parents' due process rights.

By focusing on the Department's level of assistance rather than the parent's conduct in a termination hearing, the parent's attorney will have the opportunity to shift the focus and delay termination of parental rights based on the best interest of the child. Additional proceedings would be necessary with litigation over what services are appropriate, whether sufficient assistance was provided by the Division, whether there was substantial participation in the services or whether there was good cause not to participate. This could result in delaying the termination of parental rights in cases where termination is justified.

Defining "assistance" would be essential since it could range from facilitating a referral by telephone contact to personally transporting both parent and child to classes or psychiatric counseling. For example, the court could require the Department to pay for any treatment programs in-state or out-of-state and for all counseling. The Department's failure to pay for any or all treatment and treatment related expenses could result in removal of the presumption that the parents behavior will continue and termination of parental rights is justified.

Additional delays could occur by having the court determine what services are appropriate for facilitating reunification. Furthermore, the fiscal impact of this bill is similar to creating a new entitlement program. Without an entitlement "type" formula funding there is no predictability in service costs since the court will determine the appropriate service, not the Department.

Permanent status for some children can be achieved only through the termination of their parents' rights. State and federal statutes give the legal rules and structure to the courts and the State agency to use in deciding when the termination of parental rights can be granted.

There are many barriers to the progression of termination of parental rights for any child's case in the State of Alaska. The statutes are rarely, if ever, the barrier. Ideal progression is dependent on the State agency's capabilities, the community's treatment resources, the skill of the State's attorney, and the wisdom of the court.

Secondly, House Bill No. 175 is in conflict with the Indian Child Welfare Act. Public Law 95-608, 25VSC 1912 Sec.102(f) provides that:

> "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

Therefore, amending AS 47.80.080(c) will not effect many termination hearings, because federal law will pre-empt the state's lower burden of proof standard.

In an effort to determine if termination of parental rights is in the best interest of a child, the Division of Family and Youth Services, together with the Department of Law, is launching a new program, Permanency for Dependent Children (PDC).

This program will use a team of highly trained individuals who will provide specialized legal and social work expertise, to increase the State's ability to expeditiously handle termination cases and thereby promote early permanent placements of children in state custody.

This program will begin July 1, 1989, and initially will be implemented in Nome, Bethel, Barrow, Fairbanks, Juneau, Anchorage, and Ketchikan. A progess report regarding this program will be issued after the project has been in operation for one year.

DEPARTMENT POSITION

The Department cannot support HB 175 because it would in effect prolong termination hearings and decisions, which would not be in the best interest of the child.

POSITION PAPER/Department of Health & Social Services

RECOMMENDED: Yvonne M. Chase

Yvonne M. Chase, Director
Division of Family
and Youth Services

DATE: 3/8/89

APPROVED: Myra M. Munson

Myra M. Munson, Commissioner
Department of Health
and Social Services

DATE: 3/8/89

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM March 6, 1989

SUBJECT: Sectional Analysis
HB 175

TO: Representative Johnny Ellis, Chair
Health, Education and Social Services
Committee

FROM: Terri Lauterbach
Legislative Counsel

Following is an analysis of HB 175 with respect to its probable legal effects.

Sec. 1 enacts a new policy statement that will be applicable throughout AS 25.23. This chapter deals with adoptions. The best interests of the child are already important in adoption proceedings, but to the extent that a case is "close," this policy section could tip the scales in favor of the best interests of the child compared to other considerations such as the rights of the child's natural parents.

Sec. 2 amends a general policy statement that applies throughout AS 47. To the extent that a court considers a general intent statement when deciding specific cases under other sections of AS 47, clear changes in this general policy statement could affect some court decisions.

The changes on page 1, lines 24 - 25, appear to elevate the best interests of the child compared to the old language on those lines. However, the change on page 1, line 26, by using the phrase "when necessary," probably would allow a court to be as reluctant to remove the child from the home as it could have been under the old language. Therefore, I am uncertain whether the changes made in the section, on the whole, are clear enough to lead to any different results in children's proceedings.

Sec. 3 establishes a rebuttable presumption that would apply to proceedings to terminate parental rights. The presumption would be that the parental conduct that caused a child to be adjudicated a child in need of aid is likely to continue without termination of parental rights if the parents have failed, without good cause, to participate in services offered by the Department of Health and Social Services to help them become better parents, or in equivalent services.

In Alaska, once a presumption is established, the opposing party has the burden of proving that the nonexistence of the presumed fact is more probable than its existence. Rollins v. Liebold, 512 P.2d 937, 944.

With respect to the presumption described in sec. 3 of the bill, the presumption, if established, would shift to the parents the burden of proving that the parental misconduct is not likely to continue even though they failed to participate in rehabilitative services. Without the presumption, the burden would be on the department to show that the parental misconduct was likely to continue. With the presumption, the department can shift that burden of proof to the parents by concentrating on showing by clear and convincing evidence that they failed to participate in rehabilitative services. Regardless of the presumption and other evidence, however, the court would still need to find by clear and convincing evidence that the child was a child in need of aid as a result of parental conduct.

Given these considerations, the probable effect of this change in statutory language would be to indicate to the courts and to the parents a legislative intent that the failure to use rehabilitative services by the parents is to be given great weight. The courts and parents might already be giving these services this kind of importance, but these statutory changes would ensure it.

Sec. 4 amends another general policy statement. This statement occurs in connection with a specific chapter of AS 47, the chapter requiring certain persons to report cases of suspected child abuse. The change on lines 8 - 9 indicates a legislative intent that preservation of family life is important only to the extent that it is in the best interests of the child. While this changes the emphasis of the policy statement, it is impossible to predict whether this change will affect the outcome of actual cases.

Let me note as one final comment that the provisions of this bill and its amendments do not necessarily apply to cases involving Indian or Native children. Those cases are governed by the ICWA, a federal law. Where its provisions are more strict, they supersede state law.

I hope this discussion is helpful to you. Please let me know if I can be of further assistance.

TL:gc
WKG7/099

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

November 10, 1988

MEMORANDUM

TO: Representative Johnny Ellis

ATTN: Jim Nordlund

FROM: Patricia Young
Legislative Analyst

RE: Involuntary Termination of Parental Rights--An Overview
Research Request 89.089

You asked this agency to provide an overview of approaches taken by other states with respect to the involuntary termination of parental rights. You wished particularly to know of states with criteria for involuntary termination which varies from the norm.

General Background

The U.S. Supreme Court held in Santosky v. Kramer (1982) that the minimum standard of proof required in termination of parental rights cases is clear and convincing evidence of parental unfitness or inadequacy.[1] In addition, the petitioner must also prove that termination of the parent's rights would be in the best interest of the child. Traditionally, parents are held to have a fundamental, common law right to the custody of their children. Because of the serious penalty that termination represents, this demanding standard of proof has been deemed necessary, and courts have, in general, been conservative about terminating parental rights.

The rights and preferences of the parent must be weighed along with the needs of the child and a balance struck. What best serves a child's interests rarely lends itself to a simple formula; however, clearly defined grounds for termination provide needed guidance to courts and improve a child's chances for a permanent home. The mobility of individuals coupled with the dramatic increase in out-of-wedlock births suggests that the best interests of children would be best served by uniformity among states in their laws on the subjects of terminating of parental rights, notice of termination, visitation, custody, and withholding of consent to adoption. To this end, the National Conference

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[1]In cases involving Indian children, a state must make its findings beyond a reasonable doubt [25 USC 1912(f)(Supp V 1981)].

of Commissioners on Uniform State Laws are in the process of drafting the "Uniform Putative and Unknown Fathers Act" (Attachment A).

Mark Hardin, director of the Foster Care Project, National Legal Resource Center for Child Advocacy and Protection, made pertinent, specific suggestions concerning termination proceedings in a letter to Myra Munson, Commissioner, Alaska Department of Health and Social Services (Attachment B). According to Mr. Hardin, there are cases in which somewhat less stringent standards of substantive grounds for termination or notice are justified. Mr. Hardin particularly recommends the following special cases which apply only to infants 18 months of age or less and require a showing that adoption is in the child's best interest:

- failure of an unmarried father to provide reasonable child support within his ability to pay, or the failure to regularly visit the child when able to do so;
- disinterest in the child during the pregnancy of the mother; and
- conception as the result of rape or incest committed by the biological father.

Overview of Grounds for Termination of Parental Rights

Attachment C contains three overviews of various aspects of the termination issues. Extensive references to court decisions in various states are included. Most states provide for termination of parental rights on grounds of moral unfitness, serious and continuing neglect, or abandonment. Serious physical, sexual, or mental abuse of the child ranks among the highest grounds for termination. Mental illness, and drug or alcohol abuse are frequently grounds for termination. However, diagnosis per se does not constitute grounds. Termination generally requires a showing that the parent is unable to provide proper care for the child and that the inability is likely to continue for the foreseeable future. In most states, conviction of certain types of felonies or extended imprisonment constitute grounds for termination; however, incarceration per se does not constitute sufficient grounds. In some states, parental rights may be terminated if the child has been removed from the home for a certain length of time and there is little likelihood of returning home within the foreseeable future. Some states provide for termination if the parent is unable or unwilling to make adjustments or preparations necessary for the return of the child.

I have also attached information from a National Conference of State Legislatures (NCSL) survey of child welfare statutes and implementation patterns compiled in 1986 (Attachment D). Attachment E is a copy of the National Council of Juvenile Court Judges' "Model Statute for Termination of Parental Rights."

Recent Notable Variations in Termination Proceedings

Alaska is the only state which provides for termination of parental rights gained as the result of sexual assault or sexual abuse of a minor. Indiana, New York, and Wisconsin statutes provide that notice to putative fathers is not required in cases of termination of parental rights when rape is involved. Minnesota, like many states, allows for termination of parental rights if the parent is found to be morally unfit. Nevada has recently added "failure of parental adjustment," or the inability or unwillingness of a parent within a reasonable time to correct conditions or conduct which led to the removal of the child to the list of grounds for termination of parental rights. Louisiana has enacted legislation which provides for the involuntary termination of rights of a parent convicted of a felony under certain circumstances. (See Attachment F for Minnesota, Nevada, and Louisiana statutes.)

In addition to these statutory changes, the following rulings are of note:

- The Arkansas Supreme Court, relying on the U.S. Supreme Court's opinion in Lehr v. Robertson (1983), has ruled that a putative father who is ignorant of the existence of his child does not have to be given notice of an action to adopt the child.

- Acknowledging both a parent's lack of fitness as a parent and the close relationship between that parent and the children, the Montana Supreme Court has held that although parental rights be terminated, contact be maintained.

- A County Superior Court in New Jersey has held that a father's 30 year incarceration for murder of his wife is sufficient to terminate his parental rights. The court notes that although prior case law has established the principle that conviction per se should not be grounds for termination, the father's imprisonment is the consequence of his voluntary act, and he has thereby deprived his child of the regular and expected parental functions of care and support.

- The U.S. Supreme court has recently upheld the California Civil Code which authorizes termination of parental rights in cases where the parent has been convicted of a felony, the nature of which proves the unfitness of the parent.

I hope that this information is useful to you. If you have further questions, please call.

Attachments

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
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PHONE: (907) 465-3600
465-3603

April 19, 1989

The Honorable Max F. Gruenberg, Jr.
Co-Chairman of the House
Judiciary Committee
P.O. Box V
Juneau, AK 99811

The Honorable Peter Goll
Co-Chairman of the House
Judiciary Committee
P.O. Box V
Juneau, AK 99811

Dear Representatives Gruenberg and Goll:

The following are our concerns regarding section 3 of the committee substitute for House Bill No. 175. We apologize for not making our comments sooner.

1. Section 3 amends the wrong statute. Section 3 of CSHB 175 proposes to amend AS 47.10.080(f) by requiring the court to make certain findings at review hearings. The court is already required to make similar findings at review hearings pursuant to AS 47.10.083. It would be confusing and unnecessary for two separate statutes to require such findings. Therefore, if the language in section 3 must be somewhere, it should be part of AS 47.10.083, not AS 47.10.080.

2. Section 3 is redundant. The two findings required in section 3 of CSHB 175 are already essentially required under AS 47.10.083. The first court finding required by section 3 is whether or not "the child is able to be returned to the child's home." AS 47.10.033(6) requires the court to establish "when return of the child can be expected," which presumes that the child is not able to be returned at this time. The second court finding required by section 3 is whether or not "the department has made reasonable efforts to avoid removal of the child or to facilitate the return of the child to the child's home." This is addressed already in AS 47.10.083(2) and (5) by requiring the court to establish "what services have been provided to or offered to the parents to facilitate reunion" and "whether additional services are needed to facilitate the return of the child

to the child's parents." Furthermore, the "reasonable efforts" finding is already required to be made at the initial custody hearing pursuant to Child in Need of Aid Rule 10(c), so there is no need to reestablish this finding at the annual review hearing.

3. Section 3 will not aid federal reimbursements. We assume the intent of section 3 of CSHB 175 is to ensure that the court make certain findings required by the federal government under Title IV-E of the Social Security Act before it will reimburse the state for foster care placements. Section 3 is not necessary because the findings required for federal reimbursements are actively sought by the assistant attorneys general litigating child in need of aid cases, and, as stated in paragraph 2, these findings are required already in another statute and a court rule.

For the above reasons, we recommend that section 3 be deleted from CSHB 175. Please call if you have any questions.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Jan A. Rutherdale
Jan A. Rutherdale
Assistant Attorney General

JAR:ebc

cc: Robert Evans, Legislative Liaison
Arthur H. Peterson, Assistant Attorney General

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES

PO BOX H
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030

OFFICE OF THE COMMISSIONER

April 17, 1989

Mr. Hayden Kaden
Legislative Assistant
Representative Peter Goll
P.O. Box V
Juneau, Alaska 99811

Dear Mr. ~~Kaden~~ Hayden:

During House HESS hearings regarding HB 175, questions were raised regarding the cost of implementing the change in statute which would include mental injury within the definition of child abuse. Representatives of the Department of Health and Social Services testified that these implementation costs would be negligible. The attached letter from Region X indicates that other states have experienced this same result.

Also, please note that the letter reaffirms that Alaska's special waiver, which allows the state to receive federal child abuse and neglect funds even though the state has not included mental injury within it's child abuse laws, expires this year. The result of the loss of this waiver will mean the loss of approximately $100,000 in federal funds.

Sincerely,

Jay

Jay Livey
Legislative Liaison

JL:nb

attachment

06-F38LH

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Human Development Services

Region X
RX _____
2201 Sixth Avenue
Seattle, WA 98121

April 11, 1989

Yvonne Chase, Director
Division of Family and Youth Services
Department of Health and Social Services
P. O. Box H-05
Juneau, Alaska 99811-0630

Dear Yvonne:

I was very pleased to learn that the Legislature is considering legislation which would add the category of "mental injury" to Alaska's statutory definition of child abuse and neglect. Adding this category of child abuse would bring Alaska into compliance with the Child Abuse Prevention and Treatment Act (Title I of Public Law 100-294) and would enable the State to continue receiving federal funds authorized under this Act.

As you know, the State of Alaska is currently not in compliance with the federal statute because the issue of "mental injury" to children is not addressed in your child protection law. Ordinarily this would make the State ineligible for receipt of federal child abuse and neglect funds (both the basic state grant and Children's Justice Act funds). The State has continued to receive these funds under a special waiver enacted by Congress. This waiver, however, is due to expire at the end of the fiscal year.

Most States have included "mental injury" in their definition of child abuse and neglect and have found the fiscal impact to be negligible. Besides Alaska, only two other States do not include "mental injury" in their statutory definitions of child abuse and neglect. Of the three other States in Region X, Washington and Idaho have had so few child abuse and neglect cases fall solely into the "mental injury" category that they don't even maintain specific statistics on these types of cases. Officials from both States report that adding "mental injury" to their child protection statutes has had no measurable effect on state caseloads. The State of Oregon does track cases falling within the category of "mental injury." Statistics from 1988 indicate that 6.7% of 15,708 cases of documented child abuse and neglect were categorized as cases of "mental injury". By comparison, 30.6% were classified as sexual abuse, 24.3% as physical abuse and 38.3% as neglect. Officials indicate this trend toward small numbers of cases of mental injury continues.

Alaska's use of federal child abuse and neglect funds has been exemplary. Loss of these funds would be detrimental to your efforts aimed at preventing and treating this serious problem. Since Alaska's special waiver expires this year, I am hopeful that the Legislature will act favorably to bring Alaska in compliance with the Public Law 100-294 by adding "mental injury" to the State's statutory definition of child abuse and neglect.

Sincerely yours,

Richard McConnell

Richard McConnell, Chief
Children's Bureau

court proceedings, the inadequate funding of tribal courts and Indian child welfare services programs, the treatment of children in a sense as the chattel or property of the Indian tribe, and the special standards applicable to Indian children based only on their racial background.[208]

Termination of Parental Rights

§9.16 Termination of Parental Rights

Termination of parental rights actions are brought to secure permanent homes for children who are unable to return home. A termination of parental rights completely severs the parent's right to visit or communicate with the child and to receive information about the child. In most jurisdictions, it also abrogates the duty to support the child. Termination frees the child for adoption by removing the parent's right to consent to an adoption. Termination also closes off further litigation concerning the custody of the child.

Although termination proceedings vary by jurisdiction, all states require separate hearings based on a special petition or motion. When contested, termination actions should be full adversary hearings.[209]

The child's right to counsel in termination proceedings is not universally recognized. Some states have statutorily created a right to counsel for the child in termination proceedings,[210] and model acts on termination support a right to counsel for both the child and the parents.[211] Some state courts have also found a constitutional basis for the required appointment of counsel for children in termination actions.[212] The Supreme Court has not ruled on this question but, in a somewhat analogous situation, held that a child facing removal from a long-term foster home may not always be entitled to separate counsel.[213]

Appointment of counsel for indigent parents is provided for in most states by statute.[214] A constitutional right to counsel, however, does not appear to exist in all cases. The Supreme Court, in *Lassiter v Department of Social Services* stated that the right to counsel for indigent parents should be individually determined in each termination case.[215] Among the factors a court should consider in deciding on an indigent parent's need for the assistance of appointed counsel are the degree of complexity of the case and the possibility of criminal liability of the parent.[216]

The Supreme Court held in *Santosky v Kramer* that the state's constitutional minimum burden of proof in a termination of parental rights case is that of clear and convincing evidence.[217] The Court reasoned that a higher standard of proof than preponderance of the evidence is required because of the heavy penalty that termination represents—the total legal destruction of the parent-child relationship. In some states, the clear and convincing evidence requirement not only governs the trial court judge in termination proceedings but also demands additional scrutiny of the evidence by appellate courts.[218] Even in these states, however, appellate courts continue to defer to trial court determinations of fact which are based upon the demeanor of witnesses. It has also been held that a presumption which shifts the burden of proof onto the parents violates the requirement of proof by clear and convincing evidence.[219]

If a state divides its termination of parental rights proceedings into adjudicatory and dispositional hearings, under *Santosky* the clear and convincing evidence standard probably need apply only to the fact-finding stage of the proceedings.[220]

The policy issues surrounding the rationale and grounds for termination are quite complex, and states have dealt with these issues in a variety of ways. Even the different proposed model acts arrive at no clear consensus on the grounds for termination.[221] However, some general guidelines are possible in approaching the termination case. The first inquiry regarding the appropriateness of termination should be whether the child *can or should be returned to the parent within a reasonable time*. There are five common indicators that the child

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[208] Schweitzer, *The Indian Child Welfare Act and Children's Rights*, 2 Legal Response: Child Advocacy and Protection 2 (June-July 1979), but see American Indian Lawyer Training Program, Inc. Indian Child Welfare Act of 1978 "A Law for Our Children" (1979).

[209] Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in Foster Children in the Courts 194 (M. Hardin ed 1983).

[210] *See, e.g., In re* Child X, 617 P2d 1078 (Wyo 1980) (termination overturned where counsel not appointed for child, though such appointment mandated by statute).

[211] See, e.g., ABA/Inst of Jud Admin, Final Juvenile Justice Standards Commission Standards Relating to Abuse and Neglect, Standard 8.3 (1981).

[212] *See, e.g., In re* TMH, 615 P2d 468 (Okla 1980) (separate counsel for child required in all future termination cases since termination proceedings by their nature create potential conflicts between parent and child).

[213] Smith v Organization of Foster Families for Equality & Reform, 432 US 816 (1977).

[214] Hewett, *Defending a Termination of Parental Rights Case*, in Foster Children in the Courts 234 (M. Hardin ed 1983).

[215] 452 US 18 (1981).

[216] Hewett, *supra* note 230, at 234-36.

[217] Santosky v Kramer, 455 US 745 (1982).

[218] See M. Hanlon & M. Hardin, *Clear and Convincing Evidence in Termination of Parental Rights Cases: The Impact of Santosky v Kramer*, 5 Legal Response: Child Advocacy and Protection 11 (Win/Sp 1983).

[219] Washington County Dept of Social Serv v Clark, 296 Md 190, 461 A2d 1077 (1983) (statute which presumed that termination was in the best interest of child because child had been in foster care for two years found unconstitutional).

[220] The New York termination statute at issue did bifurcate the termination proceedings, and the Santosky decision clearly applied only to the adjudication. See M. Hanlon & M. Hardin, *supra* note 218.

[221] For a comparison of the various model acts see M. Hardin & P. Tatarra, *Termination of Parental Rights: A Summary and Comparison of Grounds for New Model Acts* (ABA 1981).

Robert M. Horowitz and Howard A. Davidson, Legal Rights of Children, Family Law Series (New York: McGraw-Hill, 1984) pp. 386-397.

usually cannot safely return home" extreme parental disinterest, failure of a parent to remedy the conditions which caused the separation, extreme or repeated neglect and abuse, parental incapacity to care for the child, and extreme deterioration of the parent-child relationship. The second inquiry is *whether termination is in the child's best interests*. Because termination ends all parent-child contact, it is important to consider whether termination will lead to a more secure and appropriate home for the child.

§9.17 —Extreme Parental Disinterest

Termination may be based on the parent's extreme disinterest in or lack of commitment to the child. In these cases it appears likely that the child will not be permitted to return home because the parent has demonstrated an unwillingness to take responsibility for the child.

Traditionally, termination by reason of lack of parental interest and concern for the child has been granted only in the event of abandonment. This restrictive legal approach focuses on the intent of the natural parents to give up their *right* to the child. In its extreme expression this has required an almost total lack of desire to retain parental rights.[222] Like the traditional property law concept of abandonment of chattel, this approach stresses the parent's *rights* to the child. Courts using this analysis may refuse to terminate based upon abandonment if there has been minimal contact between parent and child, or if the parent exhibits a desire to maintain contact.

With increased recognition of the importance of permanency to the child, many courts and legislatures have taken a broader view of abandonment. The abandonment concept has been expanded in several ways. First, some courts have interpreted an intent to abandon a child as an intent to refrain from accepting full responsibility as a parent, rather than an intent to give up all rights to the child.[223] Second, others have inferred intent to abandon by analyzing the parent's actions in light of what could reasonably be expected of the parent in the circumstances.[224] Still other courts have defined abandonment according to affirmative conduct, not intent.[225] Finally, some legislatures have rejected the abandonment concept entirely in favor of an examination of parental behavior showing lack of parental concern or commitment.[226]

In light of these more liberal approaches to the abandonment concept, several types of evidence may be pertinent in determining whether to terminate parental rights, including:

1. The parent fails to visit or communicate with the child.[227] This is especially persuasive when the agency has encouraged visits or made such visits possible.[228]
2. The parent makes a statement showing lack of interest in the child or a willingness to relinquish the child.
3. The parent exhibits a pattern of needlessly leaving the child with others for prolonged periods, despite the fact that the parent is capable of caring for the child.[229]
4. The parent fails to take affirmative steps to secure the return of the child from foster care.[230] Of particular interest here are both the degree of the parent's cooperation with the agency and the parent's progress toward removal of the barriers to return of the child.[231]
5. The parent, despite ability to pay, fails to provide support for the child when required to do so.[232] Failure to pay support is rarely the sole

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[222] *In re* DAH, 390 So 2d 379 (Fla Dist Ct App 1980) (parent's behavior must indicate a settled purpose permanently to forego parental rights and shirk parental responsibilities).

[223] *In re* Burns, 474 Pa 615, 379 A2d 535 (1977) (parental duty includes active performance of love, protection, guidance, and support of child and includes continuing interest in and genuine effort to maintain contact with the child).

[224] *In re* Adoption of David C, 479 Pa 1, 387 A2d 804 (1978) (abandonment found when, over a period of eight years, a father visited his son only once, failed to pay support, and only sporadically sent cards or gifts).

[225] *In re* Rose Lynn G, 57 Cal App 3d 406, 129 Cal Rptr 358 (1976) (desiring and demanding return of children not substitutes for displaying the emotional control or capability to care for them that would have resulted in their return); *In re* Vanessa F, 76 Misc 2d 617, 351 NYS2d 337 (Sur Ct 1974) (parents abandoned child that they had failed to visit for two years).

[226] *See, e.g., In re* Adoption of ILG, 492 Pa 507, 424 A2d 1306 (1981) (failure to demonstrate an interest in the child for longer than six month statutory period sufficient grounds for termination).

[227] *In re* Jessica B, 121 NH 291, 429 A2d 320 (1981) (abandonment established when natural mother made no attempt to communicate with her daughter for two years, even though they lived near one another). *But see In re* Snyder, 418 NE2d 1171 (Ind Ct App 1981) (termination denied because mother visited children when agency allowed and bought them clothes and gifts).

[228] *In re* Marilyn H, 106 Misc 2d 972, 436 NYS2d 814 (Fam Ct 1981) (mother's failure to maintain contact with child, even though agency provided her funds to do so, supported termination decision).

[229] *In re* Levi, 131 Ga 548, 206 SE2d 82 (1974) (termination warranted where, during the first 18 months of the child's life, mother had had the child less than one month and, on each occasion of custody, had casually left the child in the hands of strangers).

[230] *In re* Jennifer "S", 69 Misc 2d 951, 333 NYS2d 79 (Sur Ct 1972) (abandonment found where, during five and one-half years of child's life, the natural mother never made any effort to contact or visit the child or agency, made only one statement indicating her desire for the child's return, and never performed any act that would ensure the child's return).

[231] Appeal of Maricopa County Juvenile Action No JS-4283, 133 Ariz 598, 653 P2d 55 (1982) (mother's refusal to cooperate in any way with reunification plan justified termination on grounds of abandonment).

[232] McGowen v State, 558 SW2d 561 (Tex Civ App 1977) (termination granted when parent made no effort to pay support despite financial capability); *In re* Schulz Children, 605 SW2d 201 (Mo Ct App 1980) (termination granted because of mother's failure to pay support despite financial ability, lack of attentiveness to family matters, and failure to exercise her visitation privileges). See also Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in Foster Children in the Courts 205 (M. Hardin ed 1983).

justification for termination, especially where the parent had some past relationship with the child.[233]

Two special cases involving parental disinterest and lack of concern require special attention. The first is the abandoned infant. Some states have recognized and reacted to this phenomenon by shortening the time period necessary before a termination petition can be filed.

The second type of case raises the question whether a parent can abandon a child before it is born. States may deal with this by legislating grounds to terminate the parental rights of a father who abandons the mother during pregnancy.[234] Courts also have found abandonment in pregnancy based upon either repeated denials of paternity and failure to show concern for the welfare of mother or child[235] or statements of disinterest and intention to give up the child at birth.[236] The Supreme Court also has suggested that termination of the parental rights of unwed fathers of newborn infants might be permitted on the basis of abandonment when the father does not take affirmative steps to acknowledge paternity.[237]

§9.18 —Parent's Failure to Remedy Conditions Causing Removal

A basis for termination of parental rights may exist when a child has been in foster care for a long period of time and the parent has been unable or unwilling to make the adjustments or preparations necessary for the child's return.[238] In general, three requirements must be met for termination on this ground. First, there must have been good case planning by the agency, including a realistic program aimed at correcting the problems that caused the initial parent-child separation.[239]

[233] *See, e.g.*, Tex Fam Code Ann tit 2, §1502(1)(G) (Vernon 1981).

[234] *See, e.g.*, Tex Fam Code Ann tit 2, §15.02(1)(H) (Vernon 1981).

[235] State *ex rel* Lewis v Lutheran Social Servs, 68 Wisc 2d 36, 227 NW2d 643 (1975) (boyfriend's repeated denials of paternity and lack of concern for or interest in the support, care, and well-being of child and mother during pregnancy constituted abandonment).

[236] Diaz v Berger, 611 SW2d 726 (Tex Civ App 1981) (mother abandoned child during pregnancy when she agreed to give up the child to foster parents as soon as it was born in return for room and board and medical costs).

[237] Caban v Mohammed, 441 US 380 (1979).

[238] *See, e.g.*, Va Code §16.1-283 (Supp 1981); Wis Stat Ann §48.415 (West Supp 1982).

[239] *See, e.g.*, *In re* LaFreniere, 420 A2d 82 (RI 1980) (termination not permitted where agency attempted to discourage relationship between parents and children); *In re* Jones, 436 NE2d 849 (Ind Ct App 1982) (termination not permitted where agency failed to show by clear and convincing evidence that it had offered or provided parents with necessary services); Weaver v Roanoke Dept of Human Resources, 220 Va 921, 265 SE2d 692 (1980) (termination order reversed when agency provided some services to parent and encouraged contact with children, but failed to provide assistance in remedying the father's financial inability to provide for children, which was the reason behind foster care placement). See also KATZ, Model Act to Free Children for Permanent Placement, §4(c)(1),(2),(d)(2) in KATZ, *Freeing Children for Permanent Placement Through a Model Act*, 12 Fam LQ 203 (1978); HHS Model State Adoption Act §313(e)(2) (1980).

Second, the agency must have exercised due diligence in following through with its plan.[240] States may impose this *diligent efforts* requirement by case law or statute. Although agency behavior is scrutinized on a case-by-case basis, at least one court has attempted to define what is generally expected of the agency. Efforts at rehabilitation should be designed to remedy the particular deficiencies that mandated the separation; the plan should seek to achieve realistic short-term and long-term goals; diagnostic workups on adult and child should be obtained when necessary; and planning should involve the natural parent, foster parents, and child.[241]

Finally, despite agency efforts, the parent must have persisted in improper conduct or failed to correct the conditions that led to the original removal of the child.[242] For example, a parent may continue to maintain dangerous household conditions,[243] may exhibit bizarre, violent behavior,[244] may come in frequent contact with others who endanger the child,[245] or may fail to cooperate with the agency's efforts to provide services and reunite the family.[246]

[240] *See, e.g.*, State v Robert H, 118 NH 719, 393 A2d 1387 (1978) (state under obligation to make every effort to aid families facing termination). *See also* HHS Model State Adoption Act §313(e)(2) (1980).

[241] *In re* Raymond, 81 Misc 2d 172, 364 NYS2d 321 (Fam Ct 1975).

[242] *See, e.g.*, *In re* Gore, 174 Mont 321, 570 P2d 1110 (1977) (failure to seek counseling and help for established emotional and mental problems warrants termination); *In re* Robertson, 45 Ill App 3d 148, 359 NE2d 491 (1977) (death of one-month-old child in parent's home under circumstances suggesting abuse is evidence of parent's failure to correct conditions that led to removal of other child).

[243] *See, e.g.*, *In re* C & K, 322 NW2d 76 (Iowa 1982), *appeal dismissed*, — US —, 103 S Ct 711 (1983) (termination based on parent's inability to develop rudimentary skills to function adequately).

[244] *See, e.g.*, *In re* Fries, 416 NE2d 908 (Ind Ct App 1981) (mother's spouse's incarceration on felony murder conviction and mother's own recent convictions for theft, deception, and trafficking in a controlled substance support trial court's order for termination).

[245] *See, e.g.*, People *ex rel* CAK, 652 P2d 603 (Colo 1982), *rvng* People v CAK, 628 P2d 156 (Colo Ct App 1980) (mother's failure to protect child from abuse by child's grandfather was a contributing factor in decision to terminate).

[246] *See, e.g.*, Miller v Alabama Dept of Pensions and Sec, 374 So 2d 1370 (Ala Civ App 1979) (agency attempted alternatives to termination but absolutely no cooperation obtained from parents); *In re* Moreford, 207 Neb 627, 300 NW2d 795 (1981) (termination based on failure of mother to meet guidelines for establishing a stable home for the child); *In re* Gates, 37 Ill App 3d 844, 373 NE2d 568 (1978) (failure of mother to obtain special medical training necessary for her to care for handicapped child sufficient grounds for termination).

§9.19 —Parental Incapacity to Care for the Child

Termination of parental rights may also be appropriate when the parent has some mental or physical incapacity which is so severe that the parent is not capable of caring for the child. Principal causes of parental incapacity are mental or emotional illness,[247] mental deficiency,[248] alcohol or drug addiction,[249] and extreme physical disability.[250] Any disability, standing alone, is generally insufficient for terminating the parent-child relationship. In addition, the disability must prevent the parent from providing minimally acceptable care for the child.[251]

In states where parental incapacity is a basis for termination, an expert's diagnosis is usually necessary. The evaluation must establish the existence of a disability, the resulting inability of the parent to provide proper care, and the likelihood that this condition will not improve over time and with treatment or services.[252]

If the incapacity is sufficiently extreme, it may be unnecessary to provide services to reunite the family when it can be shown that the parent is incapable of responding to such services.[253] In most cases, however, evidence showing both parental incapacity and unsuccessful agency efforts to reunite the family is necessary.[254]

§9.20 —Extreme or Repeated Abuse or Neglect

Incidents of abusive conduct do not generally warrant termination, but some forms of abuse or neglect are so extreme or repetitious in character that termination is justified. Termination is permitted when the abuse or neglect is so terrible or prolonged that it is unlikely that the parent will reform,[255] or when the risk of harm to the child is too great to offer the parent further chances.[256] In some cases the abuse or neglect is so egregious that the agency need not work with the parents before seeking termination.[257] This is most often true when a serious crime has been committed affecting the child.[258]

Termination may also be ordered against the parent who permits, or is able but fails to prevent, serious abusive conduct against the child,[259] especially where the parent lives with the abusive adult.[260] Where one parent has committed a violent act against the other, especially where this act affects the child, termination of the perpetrator's rights may also be warranted. For example, termination may be justified when the father has been convicted of murdering

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[247] *See, e.g., In re* RLD, 253 NW2d 870 (ND 1977) (mother's recurring mental illness); *In re* N Children, 107 Misc 2d 763, 435 NYS2d 1018 (Fam Ct 1981) (mother's schizophrenia resulted in dangerous home situation for children).

[248] *See, e.g., In re* JLF, 416 So 2d 1250 (Fla Dist Ct App 1982) (mother mentally retarded and unable to consider child's welfare); *In re* PLL, 597 P2d 886 (Utah 1979) (mother's classification as borderline mentally retarded and passive dependent personality, plus evidence of her inability to care for special needs of child, held sufficient grounds for termination).

[249] *See, e.g., In re* Nelson, 216 Kan 271, 531 P2d 48 (1975) (father, sole custodian of eight children, was alcoholic and home environment problematic); *In re* RZF, 284 NW2d 879 (SD 1979) (mother a habitual pain-sniffer).

[250] *But see, e.g., In re* Swartzlager, 48 Or App 205, 616 P2d 572 (1980) (termination denied because mother's failure to provide for daughter's basic physical and psychological needs for one year reasonably based on mother's need to seek treatment for her own systemic lymphatic disease).

[251] State v. Blum, 1 Or App 409, 463 P2d 567 (1970). *See also In re* Vera v. Cherne, 80 AD2d 511, 435 NYS2d 398 (1981) (schizophrenic mother found at time of trial and for foreseeable future to be unable to care for child); *People ex rel* CR, 38 Colo App 252, 557 P2d 1225 (1976) (mentally retarded mother found unable to protect children now or in the future from abuse or to provide for their care).

[252] *See, e.g., In re* McDonald, 38 Or App 599, 590 P2d 289 (1978) (termination granted because father, a chronic alcoholic, failed several treatment programs and psychiatrist gave him no reasonable prospect for successful rehabilitation); Carter v. Dallas County Child Welfare Unit, 532 SW2d 140 (Tex Civ App 1976) (termination justified when mother, diagnosed as paranoid schizophrenic, mistreated children and doctors testified that she would never be completely cured); *In re* Hime Y, 52 NY2d 242, 418 NE2d 1305, 437 NYS2d 286 (1981) (termination overturned where psychiatrist testified that mentally ill mother could recover at some future time through therapy and medications). *But see In re* Vera v. Cherne, 80 AD2d 511, 435 NYS2d 398 (1981) (termination granted despite testimony of a psychiatrist that mother might possibly recover in the future if she took her medicine and nothing unusual occurred; the court not persuaded that, if cured, the mother would be capable of providing adequate care).

[253] *See, e.g., In re* Campbell, 208 Neb 574, 305 NW2d 915 (1981) (termination ordered where mother is a paranoid schizophrenic and has a history of drug abuse, and where children were not properly cared for).

[254] *See, e.g., In re* CG, 637 P2d 66 (Okla 1981) (termination overturned where agency failed to instruct mentally ill father of the minimum standards of proper parental conduct to which he must conform to prevent termination); *In re* Chapman, 33 Or App 268, 631 P2d 831 (1981).

[255] *See, e.g., In re* BJM, 266 SE2d 114 (W Va 1980) (court need not exhaust every speculative possibility of parental improvement where no reasonable likelihood that conditions of abuse or neglect can be substantially corrected).

[256] *See, e.g.*, Model Dissolution of Parent-Child Relationship Act §§VI(C)(2) and VIII(C)(4); RRI Guidelines for the Involuntary Termination of Parental Rights §III(C) in M. Hardin & P. Tazzara, *Termination of Parental Rights: A Summary and Comparison of Grounds for New Model Acts* (ABA 1981).

[257] *See, e.g., In re* Carlson, 207 Neb 540, 299 NW2d 760 (1980) (state need not implement case plan for parent if plan has little chance of success and not in best interests of child).

[258] *See, e.g., In re* Angelia P, 28 Cal 3d 908, 623 P2d 198, 171 Cal Rptr 637 (1981) (permanent brain damage inflicted through abusive conduct of father).

[259] *See, e.g.*, State v. Cook, 208 Neb 549, 304 NW2d 390 (1981) (mother permitted father's sexual abuse of child for two years and refused to cooperate with authorities).

[260] *See, e.g.*, People *in re* TLJ, 303 NW2d 800 (SD 1981) (mother's rights terminated because child severely burned while in her care and father's rights terminated because he intended to maintain household with wife and such a situation was potentially injurious to the child).

the child's mother.[261] Courts have held that where one child in a family is a victim of violent abuse, termination of parental rights for the other children may also be proper.[262] Further, a parent's felony conviction may be key evidence in a termination case when the crime committed is particularly violent.[263]

More commonly, however, acts of abusive or neglectful conduct, taken alone, are not used to justify termination. Rather, the history of past acts of abuse or neglect are usually considered in determining whether the parent has sufficiently improved so that the child can return home.[264] The level of parental improvement that the courts require depends upon the nature and extent of the past parental mistreatment. Where past abuse or neglect was particularly extreme or repeated, a marginal improvement may be an insufficient defense to termination.[265] Even in cases of repeated or extreme abuse or neglect, some courts impose on the agency a duty to provide services aimed at reunification of the family, similar to that required in termination cases based on parental failures to remedy the causes of separation.[266]

§9.21 —Extreme Deterioration of the Parent-Child Relationship

Another ground for termination is the serious erosion or nonexistence of the emotional bond between parent and child. The breakdown of the parent-child relationship is generally not sufficient on its own to support termination of parental rights. More commonly, it must be found in conjunction with other grounds.

In some instances, however, placement at home may be inappropriate for a child, even when the parent is rehabilitated and emotionally committed to the child. For example, deterioration of the parent-child relationship may be shown when the child, over a prolonged period, continuously displays hostility to or terror of the parent. The child may be terrified of the parent or may harbor deep, unrelenting hostility to the parent because of past abuse, and the continuing adverse reaction of the child to the parent can provide evidence against reunification.[267]

Where the antipathy of the child to the parent is not extraordinarily deep but the parent-child relationship has dissipated or broken down over time with the prolonged absence of the parent, the decision whether to return the child has caused the courts considerable difficulty. Courts have divided on how to weigh the development of substitute parent-child relationships in deciding whether to terminate. In most states, the *psychological parent* argument taken by itself is not enough to justify termination.[268] Rather, evidence of a psychological parent relationship is more often used in conjunction with other evidence to support termination.

Sometimes the cause of breakdown of a parent-child relationship is the prolonged imprisonment of the parent.[269] Courts are generally reluctant to terminate solely on this basis.[270] One explanation of this may be the court's reluctance to exact a double punishment against the parent. However, a number of courts have held that imprisonment may be taken into account as a factor in a termination decision, but that certain other factors must also be present.[271]

Termination of the rights of imprisoned parents typically depends largely on the nature of the parent-child relationship. Some important considerations are whether prior to imprisonment the parent had neglected or abused the child,[272] whether the parent failed to communicate with the child,[273] whether the parent provided support,[274] whether the child is living with relatives,[275] and whether the parent has an interest in and ability to maintain a close relationship with the child.[276] The length of the parent's sentence and the

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[261] *In re* Marcos S., 73 Cal App 3d 768, 140 Cal Rptr 912 (1977) (father's conviction for manslaughter of mother insufficient for termination where mitigating circumstances and children have positive relationship with father). *See also In re* Scott, 244 NW2d 669 (Minn 1976) (volatile nature of father's personality, exhibited by smashing a car window and shooting his wife dead while his son was in her lap, justified termination); *cf. In re Hare*, 99 SW2d 856 (Tex Civ App 1980) (evidence of violence between parents absent evidence of abuse of child not sufficient for termination order).

[262] *See, e.g., In re* TVK, 183 Mont 97, 598 P2d 593 (1979) (parents should not enjoy right to barter their children in succession).

[263] Adoption of DSC, 93 Cal App 3d 14, 155 Cal Rptr 406 (1979).

[264] *See, e.g., In re* Dodge, 655 P2d 135 (Kan Ct App 1982) (child had twice previously been removed from home because of severe abuse); *In re* Goudon, 303 NW2d 278 (Neb 1981) (termination ordered where mother allowed sexually abusive father to live with family and where family had a history of abuse and neglect proceedings).

[265] Failure to improve is discussed in more detail in §9.18.

[266] *See, e.g.* Hernandez v. State *ex rel* Arizona Dept of Economic Sec., 23 Ariz App 32, 530 P2d 389 (1975) (mother convicted of criminal abuse and neglect of child; in ruling on termination, court considered evidence of unsuccessful agency attempts to aid mother).

[267] *See, e.g., In re* BAM, 290 NW2d 498 (SD 1980) (father had murdered mother of child then set fire to family home; child suffered severe trauma and emotional detachment from father).

[268] *See, e.g., In re* J. & JW., 134 Vt 480, 365 A2d 521 (1976).

[269] See generally Mlyniec, *Preventing a Termination of Parental Rights Case*, in Foster Children in the Courts 206 (M. Hardin ed 1983).

[270] *See, e.g., In re* Marcos S., 73 Cal App 3d 768, 140 Cal Rptr 917 (1977); *In re* Abdullah, 90 Ill App 3d 1144 (1980), *rev'd* 423 NE2d 915 (Ill 1981).

[271] *See, e.g., In re* Dept of Pub Welf to Dispense with Consent to Adoption, 421 NE2d 28 (Mass 1981).

[272] *See, e.g.* Kunsey v. Kunsey, 208 Neb 193, 302 NW2d 707 (1981) (father neglected child and failed to perform parental duties).

[273] *See, e.g., In re* Adoption of Herman, 406 NE2d 277 (Ind Ct App 1980) (nature of relationship maintained through letters and telephone calls a consideration).

[274] *See, e.g., In re* Adoption of Jacono, 426 Pa 98, 231 A2d 295 (1967).

[275] *See, e.g., In re* Valdez, 29 Utah 2d 63, 504 P2d 1372 (1973).

[276] *See, e.g.* Brown v. Department of Human Resources, 157 Ga 106, 276 SE2d 155 (1981) (court looked at father's lack of financial support of children while incarcerated).

timing of possible parents as well as the age of the child or children may also be important.

§9.22 Termination and the Best Interests of the Child

With few exceptions,[277] there must be a showing that termination is in *the best interests of the child* in addition to the establishment of specific grounds indicating that a child cannot be returned home. This two-step analysis including both a specific ground and then an inquiry concerning the best interests of the child may be required by statute[278] or by case law.[279]

In deciding whether termination will be in the child's best interests, courts consider the likelihood that termination will lead to a better, more stable placement for the child. The prospect of adoption of the child is often a key factor. Evidence that a specific adoptive home has been selected is probably not required[280] and is often premature, given that the purpose of termination is to free the child for adoption, and termination and adoption are two distinct legal processes. The likelihood of adoption can often be demonstrated through evidence that similar children are regularly and expeditiously adopted, for example through the testimony of an adoption specialist. Some courts have elected to review the case after termination is granted to ensure that the agency is making reasonable efforts to place the child for adoption.[281] Federal law requires periodic review hearings for the entire length of time a child remains in agency care, even after termination.[282]

At the termination proceedings, courts may also consider whether adoption is a desirable option for the child.[283] This is not always the case. For example, termination may not improve the child's chances for a permanent home. The child may be living in the home of a long-term caretaker, such as a relative, who is unwilling or unable to adopt the child, and the child may be at risk of substantial emotional harm if removed from that placement. The child may be unalterably opposed to the adoption. Some states require that children of a certain age consent to adoption.[284] Also, a close and positive relationship may exist between the parent and child which should be maintained even though the child cannot be returned home.

Open adoption, or adoption with visitation rights for the biological parents, siblings, grandparents, or other individuals with whom the child has close ties, may be an important option, especially for older children whose family relationships have developed over time.[285] This alternative may not be legally available in all jurisdictions.[286]

Other types of placements which would not require a termination of parental rights may also be considered as alternatives to adoption. The juvenile court may have the power to create a legal guardianship or to give legal custody to an individual instead of freeing the child for adoption.[287] Long-term foster care is another placement option the court may consider[288] when the child cannot be returned home but where adoption is not a satisfactory alternative.[289]

and his ability to provide support. *In re* Adoption of MTT, 467 Pa 88, 354 A2d 564 (1976) (termination refused where father demonstrated interest in maintaining a parental relationship with his son, but agency made it impossible for him to locate his son).

[277] *See, e.g.*, DC Code Ann §16-2353 (1978) (only termination ground is best interests of the child).

[278] *See, e.g.*, Tex Welf Code Ann tit 2, §15.02(2) (Vernon 1981).

[279] *See, e.g.*, Chancey v Department of Human Resources, 156 Ga App 358, 274 SE2d 729 (1980) (court must consider parental fault or incapacity in addition to best interest of child).

[280] *See, e.g.*, *In re* Dept of Pub Welf to Dispense with Consent to Adoption, 421 NE2d 28 (Mass 1981).

[281] *See, e.g.*, *In re* Adoption of Seifner, 627 P2d 456 (Okla Ct App 1981) (final decree of adoption can be entered only after thorough investigation of adoptive parents).

[282] 42 USC §675(5)(B).

[283] Hardin, *Legal Placement Options to Achieve Permanency for Children in Foster Care*, in Foster Children in the Courts 129-35 (M. Hardin ed 1983).

[284] *See, e.g.*, Wis Stat Ann §48.84(1)(b) (West 1979).

[285] See generally Clausen, *Alternative Long-Term Arrangements*, in Protecting Children Through the Legal System 645 (ABA 1981); Baron, Panor & Soroosh, *Open Adoption*, 21 Soc Work 97 (1976); Hardin, *supra* note 283, at 173-75. *See also* HHS Model State Adoption Act, 45 Fed Reg 10622 (Feb 15, 1980).

[286] *See, e.g.*, Browning v Tarwater, 524 P2d 1135 (Kan 1974).

[287] See Hardin, *supra* note 283, at 150-57.

[288] *Id* 144-50.

[289] *Id* 129-35, 144-50.

[290] See generally H. Clark, The Law of Domestic Relations 602-71 (1968); A. Kadushin, Child Welfare Services 465-582 (1980).

[291] See generally E. Cole, *Adversary for Adoption Services*, in Foster Children in the Courts 449, 451-54 (M. Hardin ed 1983); Clark, *supra* note 290, at 602-05 (1968); Kadushin, *supra* note 290, at 465-69 (1980); Presser, *The Historical Background of the American Law of Adoption*, 2 J Fam L 443-60 (1972).

[292] *See, e.g.*, Cal Civ Code §226 (West 1982); Conn Gen Stat Ann §45-63(a)(1) (West 1981).

Adoption

§9.23 Introduction to Adoption

Adoption is the legal process through which a child loses legal ties with his or her biological parents and acquires similar legal ties with adoptive parents.[290] The adoption process is governed by statute in every state since adoption was not recognized under English common law.[291]

An adoption proceeding is initiated by petition, which generally must be filed by the prospective adoptive parents.[292] Where there have been prior

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NATIONAL COUNCIL OF JUVENILE COURT JUDGES

Model Statute for Termination of Parental Rights

PERMANENT CUSTODY

SEC. 1

The purpose of this act is to provide a judicial process for the termination of all parental rights and responsibilities in situations set forth in this act; to delineate mandatory, but not exclusive, criteria for judicial consideration; to acknowledge that the time perception of children differs from that of adults; to provide stability in the lives of children who must be removed from their home and to make the ongoing needs of a child for proper physical, mental and emotional growth and development, the decisive considerations in permanent custody proceedings. Proceedings shall be civil in nature and governed by rules of civil procedure.

SEC. 2

(a) The Court of juvenile jurisdiction has exclusive and original jurisdiction to terminate the rights and responsibilities of parents of any child under 18 years of age found in the State for the reasons and circumstances set forth in Section 12.

(b) Where the Court has terminated the rights and responsibilities of parents, and has placed custody with a public or a private agency for adoptive placement, the Court shall, at least yearly, as long as the child remains unadopted, review the circumstances of the child to determine what efforts have been made to assure that the child has been adopted.

If the child has not been placed in a home for adoption, the Court may enter such orders as it deems necessary to further the adoption including placement with another agency.

SEC. 3 PETITION

(1) (a) The petition to terminate parental rights and all subsequent Court documents in the proceeding shall be subtitled "In the matter of _____, a child." The petition shall be in writing and verified. The petition may be filed by a peace officer, Juvenile Court counselor, officer of the Court or employee of any public or private licensed child caring agency, with permission of the Court, by any interested person.

(b) A petition filed by a peace officer, Juvenile Court counselor, officer of the Court, or employee of a public or private licensed child caring agency may be on information and belief of the petitioner. In all other cases the petition shall be on the personal knowledge of the petitioner.

(2) The petition shall set forth in ordinary and concise language such of the following facts as are known and indicate any which are not known:

(a) The name, age, and residence of child.

(b) The facts which bring the child within the jurisdiction of the Court as provided in Section 12.

(c) The name and residence of the child's parents, guardian, lawful custodian and person presently having physical custody of the child.

(d) That the petition is for the purpose of divesting all parental rights.

(e) The Court may for good cause suppress the address of any party.

SEC. 4 SUMMONS, ETC.

(1) Upon filing of the petition summons shall be issued forthwith on all persons required to be named in Sec. 3 (2) (c).

(2) A copy of the petition shall be attached to the summons in all cases other than service by publication. When served by publication, the notice shall contain a statement of the substance of the facts. All summons shall contain a statement to the effect that the hearing is for the purpose of terminating parental rights.

(3) The summons shall require the person or persons who have physical custody of the child to appear personally and bring the child before the Court at the time and place stated in the summons. Where, at the Court's discretion, it is deemed in the interest of the child that he need not be brought before the Court, the Court may so indicate. The summons shall be served at least 72 hours before the time set for the hearing and a copy of the petition shall be served together with the summons, and shall be made in the manner provided in the rules of civil procedure.

SEC 5 SERVICE OF SUMMONS, ETC.

(1) Service of process shall be made according to the rules of civil procedure of the state.

SEC. 6 COMPLIANCE WITH SUMMONS

(1) If any person named in, and properly served with summons, shall without reasonable cause fail to appear or, when directed in the summons, to bring the child before the Court, then the Court may issue a bench warrant for such person, directing that he be taken into custody and brought before the Court.

(2) If the summons cannot be served or if the person to whom the summons is directed fails to obey it, the Court may issue an order to take the child into protective custody.

SEC. 7

(1) In any proceeding for terminating parental rights or any rehearing or appeal thereon, the Court shall appoint an attorney to represent the child as his counsel and guardian ad litem.

(2) If the parent, or parents of the child desire to be represented by counsel but are indigent, the Court shall appoint an attorney for such parent or parents.

SEC. 8

(1) In all proceedings under this act the standard of proof to be adduced in all proceedings to terminate the rights and responsibilities of parents shall be a preponderance of the evidence.

SEC. 9

(1) No doctor-patient privilege may be invoked with respect to hospital or medical records pertaining to any illness, trauma, incompetency, addiction to drugs or alcoholism of any parent.

SEC. 10

The record of the testimony of the parties adduced in any proceeding terminating parental rights and responsibilities to a child shall not be admissible in any civil criminal or any other cause or proceedings in any Court against a person named as respondent for any purpose whatsoever, except in subsequent proceedings involving the same child or proceedings involving the same respondent, under the above sections.

SEC. 11

(1) The Court may conduct hearings in an informal manner and may adjourn the hearing from time to time. Stenographic notes or other verbatim reports of the hearing shall be taken and such record shall be stored as a permanent record of the Court.

SEC. 12 TERMINATION OF PARENTAL RIGHTS

(1) The Court may terminate parental rights when the Court finds the parent unfit or that the conduct or condition of the parent is such as to render him/her unable to properly care for the child and that such conduct or condition is unlikely to change in the foreseeable future. In determining unfitness, conduct or condition the Court shall consider, but is not limited to the following:

(a) Emotional illness, mental illness or mental deficiency of the parent, of such duration or nature as to render the parent unlikely to care for the ongoing physical, mental and emotional needs of the child.

(b) Conduct towards a child of a physically, emotionally or sexually cruel or abusive nature.

(c) Excessive use of intoxicating liquors or narcotic or dangerous drugs.

(d) Physical, mental or emotional neglect of the child.

(e) Conviction of a felony and imprisonment.

(f) Unexplained injuries or death of a sibling.

(g) Reasonable efforts by appropriate public or private child caring agencies have been unable to rehabilitate the family.

(2) Where a child is not in the physical custody of the parent, the Court, in proceedings concerning the termination of parental rights, in addition to the foregoing, shall also consider, but is not limited to the following:

(a) Failure to provide care, or pay a reasonable portion of substitute physical care and maintenance where custody is lodged with others.

(b) Failure to maintain regular visitation or other contact with the child as designed in a plan to reunite the child with the parent.

(c) Failure to maintain reasonably consistent contact and/or communication with child.

(d) Lack of effort on the part of the parent to adjust his circumstances, conduct or conditions to meet the needs of the child.

(3) Where a child has been placed in foster care by a Court order or has been otherwise placed by parents or others into the physical custody of such family, the Court shall in proceedings concerning the termination of parental rights and responsibilities consider whether said child has become integrated into the foster family to the extent that his familial identity is with that family, and said family or person is able and willing to permanently so integrate the child. In such considerations, the Court shall note, but is not limited to the following:

(a) The love, affection and other emotional ties existing between the child and the parents, and his ties with the integrating family.

(b) The capacity and disposition of the parents from whom he was removed as compared with that of the integrating family to give the child love, affection and guidance and continuing the education of the child.

(c) The capacity and disposition of the parents from whom the child was removed and the integrating family to provide the child with food, clothing, medical care and other physical, mental and emotional needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining such continuity.

(e) The permanence as a family unit of the integrating family or person.

(f) The moral fitness, physical and mental health of the parents from whom the child was removed and that of the integrating family or person.

(g) The home, school and community record of the child, both when with the parents from whom he was removed and when with the integrating family.

(h) The reasonable preference of the child, if the Court deems the child of sufficient capacity to express a preference.

(i) Any other factor considered by the Court to be relevant to a particular placement of the child.

(4) The rights of the parents may be terminated as provided herein if the Court finds that the parents have abandoned the child or the child was left under such circumstances that the identity of the parents is unknown and cannot be ascertained, despite diligent searching, and the parents have not come forward to claim the child within three months following the finding of the child.

(5) In considering any of the above basis for terminating the rights of a parent, the Court shall give primary consideration to the physical, mental or emotional condition and needs of the child.

MEMORANDUM State of Alaska

TO: Eileen Self
Aide to Representative Ann Spohnholz

DATE: February 27, 1989

FILE NO:

TELEPHONE NO:

THRU:

SUBJECT: HB 175 - An Act Relating to Programs and Proceedings Concerning Children

FROM: Barbara Brink BB
Deputy Public Defender

The attached memo is in response to your request for comment on the above-referenced proposed legislation. The memo was prepared by one of our lawyers, R. Scott Taylor.

Do not hesitate to contact our office if you need further information and please let us know when hearings are scheduled concerning this proposal.

BB:sh
Attachment

02-001 (Rev 8/85)

MEMORANDUM State of Alaska

TO: Barb Brink

DATE: February 27, 1989

FILE NO:

TELEPHONE NO:

FROM: Scott RST

SUBJECT: HB 175

The substantive effect of this bill is to create a rebuttable presumption in a termination proceeding of a likelihood that the parental conduct that resulted in the child being in need of state aid will continue. Ostensibly, this change would make it easier for the state to meet its burden of proving "by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights." The amendment to AS 47.10.080(c) is ill-advised as it violates parents' due process rights, does not comport with the federal standards of the Indian Child Welfare Act of 1978, and will have the practical effect of complicating and prolonging litigation. These reasons for rejecting the proposed amendment are further outlined below:

1. A natural parent's "right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S.Ct. 1388, 71 L.Ed2d 599 (1982). The right of parents to the care, custody and control of their children "is an important and substantial right protected by ... both the United States and Alaska Constitutions." Matter of S.D., Jr., 549 P.2d 1190, 1200 (Alaska 1976). In Santosky the Supreme Court recognized that parents have due process rights at a termination of parental rights proceeding. Similarly, the Alaska Supreme Court has acknowledged that due process dictates that the state (the Division) carries the burden of proving its allegations by clear and convincing evidence. K.T.E. v. State, 689 P.2d 472, 476 (Alaska 1984). By creating a presumption of continuing parental conduct, the proposed amendment would unconstitutionally shift the burden of proof from the Division to the parents.

2. The majority of termination proceedings in Alaska involve Native children. For termination of parental rights of a Native child, the Indian Child Welfare Act (ICWA) requires "evidence beyond a reasonable doubt" "that continued custody of an Indian child is likely to result in serious emotional or physical harm." 25 U.S.C. Sec. 1912(f). Amending AS 47.10.080(c) will not affect most Alaska termination proceedings, since the ICWA pre-empts any lower standard for termination under state law.

3. In the remaining non-Native cases, to which the amended standard would apply, the process of creating the presumption will further complicate and prolong the proceedings. Under the present scheme, the court orders an appropriate disposition under AS 47.10.080(c). A treatment plan to promote reunification is agreed to by the parents and the Division without further court intervention. The state has the option of petitioning for termination as the disposition under subsection (c). The proposed amendment would require a court determination of what services are appropriate for reunification. Additional proceedings would be necessary with litigation over what services are appropriate, whether sufficient assistance was provided by the Division, whether there was substantial participation in services or whether there was good cause not to participate. By interjecting the need for additional court proceedings and findings over these new potentially divisive issues, the proposed amendment would ironically prolong the termination process, a result which is almost never in the child's best interest.

Recently, in considering this section, the Alaska Supreme Court concluded, "The statute is as specific as it can usefully be, even though its application requires interpretation. We believe that the scheme accomplishes its purpose of protecting children, while balancing the parents' interests and still allowing reasonable flexibility for the exercise of discretion in the individual case." R.C. v. State, DHSS, 760 P.2d 501, 506 (Alaska 1988). The supreme court is probably right; making the statute more specific will make it less useful.

The bill purports to emphasize that the best interests of the child must be considered. But termination proceedings are part of the dispositive phase of a children's case where consideration of the "best interests of the child" is already mandated pursuant to AS 47.10.082. The only change the bill will effect is to further complicate the process of terminating parental rights; a change which is clearly not in the children's best interests. I agree with the supreme court that the current statute is as specific as it can usefully be. There is no reason to change it, especially in a way that raises more issues for litigation while contravening parents due process rights and the Indian Child Welfare Act.

(f) **Dismissal.** The court may dismiss a petition at any time based on a finding of good cause consistent with the welfare of the child and the family.

(g) **Amendment.** A petition may be amended by leave of the court and with reasonable notice on all parties at any time before the adjudication order. Amendment with appropriate continuances will be permitted to promote the interests of justice and the welfare of the child and the family.

(SCO 845 effective August 15, 1987; amended by SCO 913 effective January 15, 1989)

PART V. PRELIMINARY PROCEEDINGS

Rule 10. Temporary Custody Hearing.

(a) **Time of Hearing.** At the request of the petitioner, the court shall schedule a temporary custody hearing:

(1) within 48 hours, including weekends and holidays, of when the court is notified of emergency custody taken pursuant to CINA Rule 6(a) or (b); or

(2) within a reasonable time following a petition for temporary custody or adjudication when emergency custody has not been taken.

(b) **Conduct of Hearing.**

(1) *Opening address.* The court shall determine whether all parties have received copies of the petition and understand its contents and shall advise the parties of the nature of the proceedings and possible dispositions. In addition, the court shall advise the parties of the possibility of a temporary custody or supervision order pending adjudication and final disposition.

(2) *Advice of rights.* The court shall advise the parties of their right to counsel, including the right to court-appointed counsel if applicable; the child's right to a guardian ad litem; their right to a hearing at which the state is required to present evidence to prove the allegations in its petition; their right to confront and cross-examine witnesses at such a hearing, to present witnesses on their own behalf, and to compulsory process to compel these witnesses to attend; and their privilege against self-incrimination. In cases involving an Indian child, the court shall also advise the parties of an Indian custodian's or tribe's right to intervene.

(3) In cases involving an Indian child, the Department must present evidence which demonstrates its efforts to comply with the placement requirements of 25 U.S.C. Section 1915(b).

(4) The court may admit hearsay evidence which would be otherwise inadmissable under the Evidence Rules if the hearsay is probative of a material fact, has circumstantial guarantees of trustworthiness, and the appearing parties are given a fair opportunity to meet it.

(c) **Findings of Fact and Order.**

(1) The court shall order the child returned to the home and dismiss the petition if the court does not find probable cause to believe the child is a child in need of aid under the provisions of AS 47.10.010(a)(2).

(2) The court shall order the child placed in the temporary custody of the Department or order the child returned to the home with supervision by the Department if the court makes a finding that there is probable cause to believe that the child is a child in need of aid.

(3) The court may grant the Department authority to remove the child from the child's home only if the court makes the following additional findings:

(A) either that reasonable efforts have been made to prevent removal of the child from the home in accordance with the Adoption Assistance and Child Welfare Act of 1980, 42 USC § 671(a)(15), or that, under the circumstances of the case, it is not reasonable to require such efforts prior to removal;

(B) in the case of a non-Indian child, that continued placement in the home is contrary to the welfare of the child;

(C) in cases involving an Indian child, either (i) that removal from the parent's or Indian custodian's care is necessary to prevent imminent danger of physical harm or damage to the child; or (ii) that there is clear and convincing evidence, including the testimony of qualified expert witnesses, that the child is likely to suffer physical or emotional damage if left in the custody of the parent or Indian custodian; and

(D) in cases involving an Indian child, concerning the Department's efforts to comply with the placement requirements of 25 U.S.C. Section 1915(b).

(d) **Review.**

(1) The court must hold a hearing to review an order for temporary custody or supervision not more than 90 days from the date of the original hearing or any subsequent review hearing.

(2) If circumstances relating to the child's placement change at any time between the temporary custody hearing and a final disposition, any party may request that the court review the initial temporary custody or supervision order. In cases involving an Indian child, any party may move the court to return the child to the home of the parents or Indian custodian. The court shall return the Indian child to the home if the movant shows by a preponderance of the evidence that removal is no longer necessary to

prevent imminent physical harm or damage.

(SCO 845 effective August 15, 1987; amended by SCO 898 effective July 15, 1988; by SCO 914 effective January 15, 1989; and by SCO 915 effective January 15, 1989)

PART VII. DISPOSITION

Rule 19. Review and Extension of Disposition Orders.

(a) **Annual Review.** The court shall review its disposition order annually. The review will take place without a hearing on the basis of written reports, statements and affidavits unless an evidentiary hearing is requested by a party or ordered by the court on its own motion. The Department shall serve the parties with copies of the reports, statements and affidavits submitted to the court for its annual review together with a notice of their right to submit statements, affidavits or other evidence to the court and notice of their right to request an evidentiary hearing within 10 days of service.

(b) **Review Upon Application.** A party may apply for review of a disposition order at any time. The court shall order an evidentiary hearing to review the disposition upon a showing of good cause by a party or on its own motion. Notice by a party that there is reason to believe that the Department has not followed the placement preferences of AS 47.10.230 or, in the case of an Indian child, of 25 U.S.C. Section 1915, constitutes good cause for purposes of this paragraph.

(c) **Notice—Indian Child.** In cases involving an Indian child, notice of an evidentiary hearing held under paragraphs (a) or (b) of this rule must be given to the child's tribe and Indian custodian, even if the tribe or Indian custodian has not intervened in the case.

(d) **Findings.** At the conclusion of a hearing under subparagraph (a) or (b), the court must make findings based on the totality of the evidence before the court. The child shall be returned home unless the court finds by a preponderance of the evidence that the basis upon which the child was adjudicated as a child in need of aid continues to exist. If the child is not returned home, the court shall establish on the record:

(1) why the child was removed from the home;

(2) what services have been provided to or offered to the parents to facilitate reunion;

(3) what services were utilized by the parents to facilitate reunion;

(4) the visitation history between the parents and the child;

(5) whether additional services are needed to facilitate the return of the child to the child's parents; and

(6) when return of the child can be expected.

(e) **Extension of Custody or Supervision.**

(1) *Petition.* The Department may file a petition for an extension of the commitment to custody or supervision no later than thirty days prior to the expiration of the existing disposition order. The Department shall notice a hearing on the petition. The child and the child's parents or guardian must be advised of their rights to an attorney and guardian ad litem at the extension hearing. In cases involving an Indian child, notice of the hearing must be given to the child's tribe and Indian custodian, even if the tribe or Indian custodian has not intervened in the case.

(2) *Extension of Custody.* At the conclusion of the hearing the court shall make findings indicating whether the child continues to be a child in need of aid under AS 47.10.010(a)(2) and whether a basis exists for continuing or modifying its disposition order.

(3) *Report.* The Department shall submit a written report comparable to the annual review report and make it available to all persons entitled to receive it ten days prior to the extension hearing, unless a different time period is ordered.

(4) *Status Pending Decision.* If the court is unable to decide the extension petition before expiration of the existing disposition order, the court may extend custody or supervision for a reasonable time pending a decision on the extension petition.

(SCO 845 effective August 15, 1987; amended by SCO 916 effective January 15, 1989)

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(d) A student shall be excused from service as a panel member if the student submits a written request to the court indicating the reason for not wishing to serve. (§ 2 ch 49 SLA 1966)

Legislative history reports. — For report on ch. 49, SLA 1966, see 1966 House Journal, p. 52.

Sec. 47.10.080. Judgments and orders. (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 delinquent or a child in need of aid.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Social Services for a period of time not to exceed two years or in any event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it; the department shall place the minor in the juvenile facility which the department considers appropriate and which may include a juvenile correctional school, detention home, or detention facility; the minor may be released from placement or detention and placed on probation on order of the court and may also be released by the department, in its discretion, under AS 47.10.200;

(2) order the minor placed on probation, to be supervised by the department, and released to the minor's parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it;

(3) order the minor committed to the department and placed on probation, to be supervised by the department, and released to the minor's parents, guardian, other suitable person, or suitable nondetention setting such as a family home, group care facility, or child care facility, whichever the department considers appropriate to implement the treatment plan of the predisposition report; if the court orders the minor placed on probation, it may specify the terms and conditions

of probation; the department may transfer the minor, in the minor's best interests, from one of the probationary placement settings listed in this paragraph to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(4) order the minor to make suitable restitution in lieu of or in addition to the court's order under (1), (2) or (3) of this subsection.

(5) order the minor committed to the Department of Health and Social Services for placement in an adventure-based education program established under AS 47.21.020 with conditions the court considers appropriate concerning release upon satisfactory completion of the program or commitment under (1) of this subsection if the program is not satisfactorily completed.

(c) If the court finds that the minor is a child in need of aid, it shall

(1) order the minor committed to the department for placement in an appropriate setting for a period of time not to exceed two years or in any event past the date the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; the department may transfer the minor, in the minor's best interests, from one placement setting to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer;

(2) order the minor released to the minor's parents, guardian, or some other suitable person, and, in appropriate cases, order the parents, guardian, or other person to provide medical or other care and treatment; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor, but the court may dispense with the department's supervision if the court finds that the adult to whom the minor is released will adequately care for the minor without supervision; the department's supervision may not exceed two years or in any event extend past the date the minor reaches age 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public, and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, 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, and the department or guardian shall report annually to the court on efforts being made to find a permanent placement for the child.

(d) An order issued under (c)(3) of this section authorizes the commissioner of health and social services or a designee or the guardian of the person of the child to consent to the adoption of the child.

(e) If the court finds that the minor is not delinquent or a child in need of aid, it shall immediately order the minor released from the department's custody and returned to the minor's parents, guardian, or custodian, and dismiss the case.

(f) A minor found to be delinquent or a child in need of aid is a ward of the state while committed to the department or the department has the power to supervise the minor's actions. The court shall review an order made under (b) or (c)(1) or (2) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision, as it is being provided, is in the best interest of the minor and the public. The department, the minor, the minor's parents, guardian, or custodian are entitled, when good cause is shown, to a review on application. If the application is granted, the court shall afford these parties and their counsel reasonable notice in advance of the review and hold a hearing where these parties and their counsel shall be afforded an opportunity to be heard. The minor shall be afforded the opportunity to be present at the review.

(g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon 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 proceedings 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.

(h) The department shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter, including hearings which result in the release of the minor.

(i) A minor, the minor's parents or guardian acting on the minor's behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

(j) *[Repealed, § 29 ch 63 SLA 1977.]*

(k) In making its order under (c) of this section, the court shall consider the fact, if it is a fact, that the minor was being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination. (§ 10(2) art I ch 145 SLA 1957; am § 2 ch 110 SLA 1960; am § 2 ch 118 SLA 1962; am § 1 ch 40 SLA 1967; am §§ 1—4 ch 27 SLA 1970; am §§ 12—15 ch 245 SLA 1970; am § 6 ch 104 SLA 1971; am §§ 6, 7 ch 1 SLA 1972; am §§ 1, 2 ch 125 SLA 1974; am §§ 14—18, 29 ch 63 SLA 1977; am § 6 ch 86 SLA 1979)

Cross references. — For the standard of proof for findings under this section, see Children's Rule 21, Alaska Rules of Court. See also, Children's Rules 22 and 23.

Editor's notes. — Section 31, ch. 63, SLA 1977, provides: "Section 18 of this Act has the effect of adding to the court's responsibilities when holding a review under Rule 28, Alaska Rules of Children's Procedure, by requiring the court to hold a hearing upon a showing of good cause, give notice, and afford an opportunity to be heard."

Section 34, ch. 63, SLA 1977, in the first sentence provides: "The portions of AS 47.10.080(b) and (c) in secs. 15 and 16 of this Act which specify the length of commitment to the department or probation or supervision by the department are applicable to those minors affected under former AS 47.10.080(b), (c) and (j) before the effective date of this Act (August 26, 1977) so that the commitment, probation or supervision of minors by the department before the effective date of this Act (August 26, 1977) shall continue, but may not exceed two years from the effective date of this Act (August 26, 1977) unless two-year extensions have been granted by the court under this Act." Subsection (j) of AS 47.10.080 was repealed by § 29, ch. 63, SLA 1977.

NOTES TO DECISIONS

Each category of children mandates differences regarding content of dispositional orders. — Alaska's pertinent statutory provisions and procedural rules distinguish between categories of children for purposes of administering Alaska children's laws. Of controlling significance is that each class or category mandates distinct differences regarding the permissible content of any dispositional order the trial court can enter. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Where a delinquent child was sentenced for a fixed time period and ordered to an adult institution, this amounted to a penal sentence as opposed to the juvenile disposition required under subsection (b)(1). B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Court cannot place child in particular institution. — Under this section as amended, the court no longer has discretion to order the delinquent child placed in a particular institution. The court only has authority to commit the child to the department, which then places the child. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974); A.A. v. State, Sup. Ct. Op. No. 1181 (File No. 2400), 538 P.2d 1004 (1975).

(3) a description of the potential harm to the child which may result from removal from the home and any efforts which can be made to minimize such harm; and

(4) any further information which the court may request.

(c) The court shall inform the child, the child's parents and the attorneys representing the parties and the guardian ad litem that the predisposition report will be available to them not less than 10 days before the disposition hearing.

(d) For purposes of this section "parents" means the n ural or adoptive parents, and any legal guardian, relative, or other adult person with whom the child has resided and who has acted as a parent in providing for the child for a continuous period of time before this action. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Applied in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.082. Best interests of the child. In making its dispositional order under AS 47.10.080(b) the court shall consider the best interests of the child and the public, and in making its dispositional order under AS 47.10.080(c) the court shall consider the best interests of the child; in either case the court shall consider also the ability of the state to take custody and to care for the child to protect the child's best interests under AS 47.10.010 — 47.10.142. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Showing required t justify termination of parental rights. — While best interests of the child become relevant at some point, there first must be a showing of parental conduct sufficient to justify termination. Nada A. v. State, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6693), 660 P.2d 436 (1983).

Cited in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979); M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.083. Review hearing information. In the case of a child in need of aid, the child shall be returned home at the review hearing under AS 47.10.080(f) unless the court finds by a preponderance of the evidence that the basis upon which the child was adjudicated under AS 47.10.010(a)(2) continues to exist. If the child is not returned home, the court shall establish on the record

(1) why the child was removed from the home;

(2) what services have been provided to or offered to the parents to facilitate reunion;

(3) what services were utilized by the parents to facilitate reunion;
(4) the visitation history between the parents and the child;
(5) whether additional services are needed to facilitate the return of the child to the child's parents;
(6) when return of the child can be expected. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities. (a) When a child is committed under AS 47.10.080(b)(1) or (c)(1) to the department or released under AS 47.10.080(b)(2) or (3) or (c)(2) to the child's parents, guardian, or other suitable person, a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, train and discipline the child, and the duty of providing the child with food, shelter, education, and medical care. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When parental rights have been terminated, or there are no living parents and no guardian has been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation,