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SENATE COMMITTEE REPORT

DATE: 3/9/92

FURTHER:

DATE TURNED INTO OFFICE: 3/17/92  
~~SB 396~~

Judiciary Committee considered SENATE BILL NO. 396

"An Act clarifying the responsibilities of the Department of Health and Social Services and parents for children who are committed to the custody of the department and are placed by the department with the parents; and providing for an effective date."

and recommends:

- replace with \_\_\_\_\_ CS SB 396 (HFSS)
- or  adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

adopts \_\_\_\_\_ Letter of Intent

further referral to the \_\_\_\_\_

- do pass
- do not pass
- no recommendation
- individual recommendations

**NEW FISCAL NOTES:** Dept/Date  
 zero fiscal notes \_\_\_\_\_

fiscal notes \_\_\_\_\_

appropriation--no fiscal note

**DO PASS:**

*[Handwritten signature]*

**PREVIOUS FISCAL NOTES:** Dept/Date  
 zero fiscal notes \_\_\_\_\_

fiscal notes \_\_\_\_\_

**OTHER RECOMMENDATIONS:**

*Patricia Jolley no rec.*

*Rick Halford do pass*

Chair: Signature and Recommendation

# FISCAL NOTE

No. 1

Bill Version: SB396

BILL (S) Publish Date: 3-9-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Dept. Affected Health and Social Services  
 Title: Medical costs...children in custody BRU: DFYS - Purchased Services  
 Component: Foster Care  
 Sponsor: Senator Collins  
 Requestor: Governor COMPONENT SERIAL NO. 0252

**Expenditures/Revenues**

(Thousands of Dollars)

	FY93	FY94	FY95	FY96	FY97	FY98
OPERATING						
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
CAPITAL						
REVENUE						

**FUNDING:**

(Thousands of Dollars)

	FY93	FY94	FY95	FY96	FY97	FY98
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

	FY93	FY94	FY95	FY96	FY97	FY98
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

**ANALYSIS:** (Attach a separate page if necessary)

This bill is critical to the Division of Family and Youth Services. There will be no increased costs incurred if this bill passes, but there is a serious potential for a sizeable increase in foster care costs if it does not pass.

Prepared by: Brian Saylor, Deputy Commissioner *Brian Saylor*  
 Division: Family and Youth Services

Phone: 465-3030  
 Date: February 25, 1992

Approved by Commissioner: *[Signature]*  
 Agency: Department of Health and Social Services

Date: 3/3/92

Distribution (by preparer):  
 Legislative Finance      OMB  
 Legislative Sponsor      Impacted Agency(ies)  
 Requestor

Changes in CS SB 396 HES  
 have no fiscal impact. This  
 fiscal note is appropriate.  
*[Signature]*  
 date      Comte Aide(initial)

# Alaska State Legislature

During Session  
State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-2828

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During Interim  
3111 C Street, Suite 540  
Anchorage, Alaska 99503  
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## Senator Virginia Collins

### CSSB 396 (HES)

#### Clarifying parental responsibilities for a child in state custody

CSSB 396 (HES) clarifies the responsibilities of the Department of Health and Social Services and parents for children who are committed to the custody of the department and are placed by the department with the parents.

The bill responds to a recent Alaska Supreme Court decision that will incur new and substantial costs to the state.

In the August 1991 decision in the case of In re E.A.O., the court reversed a lower court decision and ruled that the state must pay for the medical costs of a child in state custody even though the child lives with his or her parents.

Prior to this decision, the state interpreted the law to pay for medical care costs of children in physical custody of the state. Holding the state responsible for medical costs of children in its custody who are placed at home would result in less protection for these children and other children in need of aid.

The ramifications of this decision may also lead to the state's being held liable for other costs of child rearing such as food, shelter, and education.

In an era of projected declining revenues, CSSB 396 (HES) responds to these costly implications.

Sponsor Statement



# Alaska State Legislature

## Senate

Official Business

Pouch V  
State Capitol  
Juneau, Alaska 99811

M E M O R A N D U M

March 16, 1992

**SUBJECT:** Sectional Summary of CSSB 396 (HES)  
**TO:** Members, Senate Judiciary Committee  
**FROM:** Senator Virginia Collins *VC*

What follows is a sectional analysis of the above described bill. As a preliminary matter, please note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 amends AS 47.10.084(a) by clarifying responsibilities of a child's parent when a child is committed to state custody and placed by the state with the child's parent.

Section 2 makes the Act retroactive to August 30, 1991, the date of the Supreme Court decision in the case of In re E.A.O.

Section 3 makes the Act effective immediately.

Sectional Summary

STATE COMMITTEE REPORT  
FIRST COMMITTEE OF REFERRAL

*John*

DATE: 2/12/92

FURTHER: Judiciary

Date of 5-Day Notice: FEB 27, 92  
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: MARCH 06, 1992

HES Committee considered

SB 396

"An Act clarifying the responsibilities of the Department of Health and Social Services and parents for children who are committed to the custody of the department and are placed by the department with the parents; and providing for an effective date." and recommends it be replaced with

and recommends:

replace with \_\_\_\_\_ CS SB 396 (HES)

attaches amendment(s)

~~AND AMENDMENT~~  
~~NO. 50-1116WS~~ *tap*

- same title
- new title
- technical title change (HB only)

adopts \_\_\_\_\_ Letter of Intent

further referral to the \_\_\_\_\_

do pass

do not pass

no recommendation

individual recommendations

*OK*

NEW FISCAL NOTES: Dept/Date  
 zero fiscal notes DHSS 3-3-92

fiscal notes \_\_\_\_\_

appropriation--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date  
 Governor's bill with fiscal notes; zero fiscal notes \_\_\_\_\_

fiscal notes \_\_\_\_\_

DO PASS:

OTHER RECOMMENDATIONS:

*[Handwritten signatures]*  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

*[Handwritten signature: Curtis Stangorowski]*

Chair: Signature and Recommendation

STATE OF ALASKA \* DEPARTMENT OF HEALTH & SOCIAL SERVICES

SENATE BILL 396

"An Act clarifying the responsibilities of the Department of Health and Social Services and parents for children who are committed to the custody of the department and are placed by the department with the parents; and providing for an effective date."

The Department of Health and Social Services strongly supports SB396, which clarifies the responsibilities of the Department for children committed to its legal custody who continue to reside with the parent or parents. The Bill amends AS 47.10.084(a) to expressly require a parent or parents to provide for the day to day care of their children if the children are residing with them when the state has legal custody as a result of child protective services purposes.

This bill was made necessary as a result of the Alaska Supreme Court ruling in the case of In re E.A.O., 816 P.2d 1352 (Alaska 1991), in which the court ruled that the current AS 47.10.084 requires the department to pay for medical costs associated with the care of children, even though they live with their parents. The department has never interpreted the statute in this manner in the past. Therefore, absent an amendment, the department will incur substantial additional financial expenses for these medical costs and may also be exposed to legal suits to resolve the responsibility for other costs of child rearing, including food, shelter, and education, while a child is placed at home by the department. The department has not budgeted for these type of costs, and these costs would significantly impact our budget, as well as the Medicaid budget. Although the court did acknowledge a possible right of reimbursement from the parents, the collection would not be practical nor cost-effective.

The bill provides for a retroactive effective date to August 30, 1991, the date that the court issued its ruling. A retroactive effective date is necessary to avoid the additional unbudgeted expenses and to resolve a legal question as to the department's responsibilities for other expenses, such as shelter, which the court did not direct address in its decision.

The Department of Health and Social Services urges the passage of this bill.

Bruce L. King  
Deputy Commissioner  
Health and Social Services

Wendore Blum  
Commissioner  
Health and Social Services

Date: 3/3/92

Date: 3 March 1992

agree with Grasle that the "ordinary consumer" standard is necessarily objective. Grasle analogizes to *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984), where we stated that the ordinary user standard was an objective test for product liability cases based on a failure to warn. In *Prince*, we rejected the argument that the subjective knowledge of the actual user was relevant to the duty to warn. *Id.*

[14] The expectations of the ordinary consumer must also be an objective test. The focus in a strict product liability case is on the product, not on the conduct of the defendant. *Beck*, 593 P.2d at 883. If the defendant knew that one individual consumer could not safely use its product, that defendant may be negligent. That defendant will not be strictly liable under the first prong of *Beck*, however, unless the product fails to meet the safety expectations of the ordinary consumer. Therefore, the superior court correctly refused to instruct the jury that the class of ordinary consumers was limited to the unskilled employees of Ruby Electric.

### III. CONCLUSION.

The judgment entered below is AFFIRMED.

BURKE, J., not participating.



of this case, each side could argue its version to the jury. Similarly, Keogh could argue to the jury that the class of ordinary consumers eligible to sue in strict liability would not include "kite flyers and passerbys." On this record, we cannot say that Keogh was prejudiced by any

In the Matter of E.A.O. A Minor Under the Age of Eighteen (18) Years.

L.O., Appellant,

v.

STATE of Alaska, Appellee.

No. S-3467.

Supreme Court of Alaska.

Aug. 30, 1991.

After child was adjudicated child in need of aid, and was placed in temporary legal custody of Department of Health and Social Services, child's guardian ad litem filed motion to clarify Department's responsibility to provide costs of child's medical care. Department objected to master's report, following disposition hearing, by which master found that child should continue to be committed to custody of Department. The Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., released child to custody of parents subject to supervision of Department and ruled that Department was not responsible for costs of medical care of child in its legal custody who was returned to parents, and appeal was taken. The Supreme Court, Burke, J., held that Department was responsible for medical expenses incurred by child while she was in Department's legal custody, though she was placed in her parents' home.

Reversed and remanded.

### Infants ←228

Department of Health and Social Services was responsible for medical expenses incurred by child in Department's temporary legal custody, as child in need of aid, even during period that child was returned to her parents' home; it was relationship of legal custody, and not placement of child,

arguments Grasle raised to this effect. See Alaska R.Civ.P. 61. In short, the superior court did not abuse its discretion by rejecting Keogh's proffered instruction defining the class of ordinary consumers as the employees of Ruby Electric.

Case Law

that imposed on Department duty of providing child with medical care. AS 47.10.084(a), 47.10.142(e).

Blair McCune, Asst. Public Defender,  
John B. Salemi, Public Defender, Anchorage,  
for appellant, L.O.

Philip J. McCarthy, Jr., Deputy Public  
Advocate, Anchorage, guardian ad litem,  
for E.A.O.

Dianne Olsen, Asst. Atty. Gen., Anchorage,  
Douglas B. Baily, Atty. Gen., Juneau,  
for appellee.

Before RABINOWITZ, C.J., and  
BURKE, MATTHEWS, COMPTON and  
MOORE, JJ.

#### OPINION

BURKE, Justice.

In this appeal from the superior court, the mother and guardian ad litem of E.A.O. seek to clarify the responsibility of the Department of Health and Social Services for the medical costs of children in the department's legal custody who are placed in their parents' home. The superior court held that in such a case the department has no responsibility. We reverse.

#### I

E.A.O. was born prematurely on June 11, 1987, at Anchorage's Humana Hospital and soon transferred to Providence Hospital's Neonatal Intensive Care Unit. On August 12, 1988, the Department of Health and Social Services petitioned to have E.A.O. adjudicated a child in need of aid (CINA) under AS 47.10.010(a)(2)(A) based on the following facts:

[E.A.O.] was born prematurely (30 weeks gestation) due to alcohol abuse by her mother. [E.A.O.] has remained hospital-

ized at Providence Hospital since birth with one trip to Seattle for heart surgery. She must have 24 hour oxygen, BEM and heart monitor and be fed through a gastrometer. [E.A.O.] has stabilized enough to be discharged to a home setting. [E.A.O.'s mother] has completed in-patient treatment in Seattle and continues to receive aftercare through Charter North. She regularly attends Alcoholics Anonymous meetings. Her husband works out-of-town and they have three other children. The parents are requesting placement in a medical foster home until [E.A.O.'s father] returns in November. (A medical foster home has been recruited by this worker and is available.) Due to [the father's] absence and [the mother's] treatment needs, the parents are unable to provide the needed care for [E.A.O.] at this time.

At an emergency custody hearing on August 25, 1988, the parents stipulated to the facts alleged in the petition, and the superior court gave temporary legal custody to the department pursuant to AS 47.10.142.<sup>1</sup> The order authorized the department to place E.A.O. in a medical foster home.

The department apparently returned E.A.O. to her parents' home in October 1988. In an order effective December 7, 1988, the superior court adjudicated E.A.O. a child in need of aid, granting continued "temporary custody" to the department and authorizing the department "to place the minor in a home deemed suitable, which it indicates at the present time to be in the home of the minor's parents." On January 20, 1989, the child's guardian ad litem filed a motion to "clarify" the department's responsibility, as E.A.O.'s legal custodian, to provide the cost of her medical care.

Before any ruling on this motion, a disposition hearing was held on March 6, 1989. The parents and guardian ad litem argued

1. AS 47.10.142 provides:

(e) If the court finds that probable cause exists it shall order the minor committed to the department for temporary placement, or order the minor returned to the custody of the minor's parents or guardian subject to the department's supervision of the minor's care and treatment....

(f) When a minor is committed to the department for temporary placement under (e) of this section, the court order shall specify the terms, conditions, and duration of placement.

that the department should continue to have legal custody of E.A.O., emphasizing that the family had no means of paying for the extensive and continuing medical care required by E.A.O.<sup>2</sup> The department argued that the conditions justifying intervention—the mother's alcoholism and the father's work-related absence—no longer existed and that legal custody should be returned to the parents, with supervisory monitoring by the department. The department specifically rejected any assertion that it took action because of E.A.O.'s medical needs.

Subsequent to this disposition hearing, the Children's Master concluded that he could

not agree with the Department that the situation has improved to the extent that this court can approve a return of legal custody to the parents. I find that the Department must continue to play a pinnacle role in the coordination and delivery of services in this case, and that therefore, the child should be committed to the custody of the Department pursuant to AS 47.10.080(c)(1).

The master emphasized that the "fact that [E.A.O.] is a special needs child is a material factor in this case." He made no ruling on the guardian's motion concerning the department's responsibility for medical costs.

The department objected to the master's report on the ground that the family's limited abilities to meet E.A.O.'s medical needs "do not relate to any specific child protec-

2. E.A.O. was hospitalized for fluid in her lungs at the time of this hearing. She had been hospitalized numerous times during the period that the department had legal custody of her. The record reveals numerous, persistent medical problems requiring constant care.

3. The mother and guardian ad litem filed a joint appellant's brief. The guardian ad litem did not participate in the reply brief due to a change in attorneys. We have generally used the term "the mother" both to refer to the main appellant brief and to the reply brief.

4. The period of time during which the state had legal custody of E.A.O. but placed her in her parents' home was approximately nine months.

5. Because resolution of this issue involves statutory interpretation, this court will apply its inde-

tion risk caused by the parents. Under the circumstances, the department need not have legal custody of the child." The superior court agreed. It released E.A.O. to the custody of her parents subject to the supervision of the department. Concerning the guardian ad litem's motion for clarification of responsibility for medical costs, the court ruled:

The Department of Health and Social Services is not responsible for the costs of medical care of children in their legal custody who continue to reside with their parents.

... The Department of Health and Social Services is responsible for paying the costs of medical care of children in foster care, subject to the existence of other insurance and subject to reimbursement by the child's parents.

E.A.O.'s mother<sup>3</sup> appeals solely on the question of whether the department was responsible for the costs of E.A.O.'s medical care when the state had legal custody of the child, but she actually resided with her parents.<sup>4</sup>

## II

This narrow question requires us to interpret the provisions of Alaska's CINA statute.<sup>5</sup> Concerning legal custody and various rights and responsibilities, the law provides:

(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-

pendent judgment. *Waller v. Richardson*, 757 P.2d 1036, 1039 n. 4 (Alaska 1988).

As an initial matter, we note that E.A.O. is no longer in the legal custody of the state, nor is there any indication that she is likely to be again in the future. The case may therefore be technically moot. *Doe v. State*, 487 P.2d 47, 53 (Alaska 1971). We have long held, however, that the mootness doctrine in Alaska "is a matter of judicial policy, not constitutional law." *R.L.R. v. State*, 487 P.2d 27, 45 (Alaska 1971). We find the circumstances of this case to fall under the exception to the mootness doctrine for cases "where the matter is one of grave public concern and is recurrent but is capable of evading review." *Doe*, 487 P.2d at 53. We will thus consider the merits of the case.

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.

\*\*\*\*

(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, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 09.65.100, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section.

6. The department initially frames the issue in terms of whether parents are relieved of their responsibility to pay for the medical care of children who live with them merely because the children are in the legal custody of the state. The answer is clearly that the parents are not

AS 47.10.084. Although section .084 on its face only applies to cases where children are committed to the department after a disposition hearing, AS 47.10.080, the parties agree that its principles apply here, where the commitment was the result of a temporary placement hearing, AS 47.10.142(e). The parties also agree that when the department has legal custody over a child placed in a foster home, the department is responsible for the cost of the child's medical care. The parties disagree, however, over the scope of the department's responsibilities when it has legal custody, but chooses to place a child in the parents' home.

The core of the department's argument is that "AS 47.10.084 read in conjunction with other applicable statutes does not require the department to pay for the costs of medical care for E.A.O. during the time she resided with her parents, simply because the department had legal custody of her for child protection purposes."<sup>6</sup> Appellee's Brief at 9. It argues that the statutory scheme taken as a whole provides a rational basis for distinguishing the legal custody of children in the parental home from legal custody of children removed from the parental home.

The department points first to AS 47.10.084(c), which provides for residual parental responsibilities. The department would interpret that to mean that parental responsibility eliminates any departmental responsibility in the absence of a specific provision to the contrary. The department notes that other sections of the statute authorize it to pay maintenance costs and to apply for medicaid benefits when a child is placed in a foster home, AS 47.10.230(b), and require it to pay for the medical expenses of handicapped foster children, AS 47.10.230(d). The inclusion of these specific terms, the department argues, presumptively excludes terms which are not men-

relieved of ultimate responsibility, and the mother concedes as much; but the salient issue on the facts of this case is whether the department is also responsible, by virtue of having legal custody, for medical costs.

tioned. Thus, it is not authorized to pay costs of a child left in the parental home and it is not required to pay for the care of handicapped children left in the home.

The department buttresses this view of the law through reference to the statutory statement of "[p]urpose 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 unless efforts to preserve and strengthen the ties are likely to result in physical or emotional damage to the child; 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.*

AS 47.05.060 (emphasis added). The department asserts that the emphasized text accords with its view that the AS 47.10.084(a) discussion of the responsibilities of legal custody "primarily" applies to situations where the child is removed from the parental home.

The department refers to an analysis by the Legislative Affairs Agency of AS 47.10.084 before its enactment, which explained the rationale of the legal custody provision:

By stating the major rights and responsibilities of those with legal custody or appointed guardians it is hoped these persons can act without feeling unduly restrained, because of fear of not having

7. The first portion of the policy argument is entitled "The Alaskan child protection system is not an entitlement program of last resort." It attributes without specific citations a number of arguments to the appellants that they simply do not make. For example, the department alleges that the appellants "would have the court believe that E.A.O. was taken into custody because

the right and power to act in certain instances. By stating the residual rights and responsibilities of the parents it is intended to assert the parent(s)' inherent rights and responsibilities and thus help maintain the parent and child relationship.

Children's Code Revision Task Force, Legislative Affairs Agency, Memorandum to Rep. Terry Gardiner (April 13, 1977). The department translates this passage as meaning "the intent is to inform those with the physical care of the child that they may provide day-to-day care to the child, but not to limit the 'parent's inherent rights and responsibilities.'"

The department finally makes a vigorous policy argument against holding it responsible for the medical costs of children in its legal custody who are still living at home.<sup>7</sup> The result of such a holding, the department fears, could be "a chilling effect on the department's willingness to take legal custody of children," because it is not budgeted to pay for the medical care of children left at home. It points out that the medical costs of children placed in foster homes are generally covered by Medicaid, which often—as in E.A.O.'s case—is not available for children left at home. The goals of legal custody have only been to attain the power to protect the child and provide treatment services. The department fears that these goals would be sacrificed if legal custody were held to include a responsibility the department is not capable of accepting.

We find the department's arguments unpersuasive. We think it clear that the department is responsible for the medical costs of children in its custody, whether the children are placed at home or in a foster home. Alaska Statute 47.10.084(a) is very explicit in saying that the "relationship [of legal custody] imposes on the department

of [her extraordinary] medical needs." Appellee's Brief at 20. What the mother and guardian in fact say is that the "question is not so much why or under what circumstances the state obtained custody over E.A.O., but what its responsibilities were once it obtained custody." Appellant's Brief at 19.

... the duty of providing the child with ... medical care." As this court has noted, "[i]f the meaning of a statute is plain[,] it should be enforced as it reads without judicial modification or construction." *Horowitz v. Alaska Bar Ass'n*, 609 P.2d 39, 41 (Alaska 1980).<sup>8</sup>

Nothing in other statutory provisions necessarily contradicts the plain and unambiguous language of AS 47.10.084(a). Any apparent contradictions should be harmonized, if possible, rather than read to make one provision negate another. *In re Estate of Hutchinson*, 577 P.2d 1074, 1075 (Alaska 1978). The language concerning residual parental responsibilities, for example, should be read as clarifying that the department's responsibility for medical care does not mean that parents are *relieved* of responsibility. Rather, the law provides a basis for the department, having fulfilled its duty toward the child, to turn to the parents for reimbursement. AS 47.10.084(c); AS 47.10.120. The department's reading that residual parental responsibilities eliminate the department's responsibility, besides being strained, would unnecessarily contradict the plain language of section .084(a).<sup>9</sup>

Alaska Statute 47.10.230, which the department claims only allows it to pay maintenance costs of foster children, can also be harmonized with the explicit language of section .084(a). The only specific limitation concerning foster children appears in paragraph (d): "In addition to money paid for the maintenance of foster children under (b) of this section, the department (1) shall pay the costs of caring for physically or mentally handicapped foster children. . . ." AS 47.10.230(d). The paragraph goes on to specify various expenses related to caring for physically and mentally handicapped

foster children—such as "respite care"—that the department will pay.

This statute means what it says, but it does not imply that the state has no responsibility to pay for the medical care of its wards who are not foster children. Such an implication would mean that the state could not pay medical care for children under its jurisdiction who are institutionalized. Instead, as E.A.O.'s mother suggests, it seems far more likely that the statute was enacted to fulfill the legal commitments the state is required to make in order to receive federal funds under Title IV-E of the Social Security Act.

Section .084(a) plainly and specifically assigns the department the duty of providing medical care to children in its legal custody. Elsewhere, in the context of a discussion of placement of children in foster care, the law specifies that the department may pay the medical costs of foster children. AS 47.10.230(d). There is no more reason to view this as a prohibition of paying medical costs of children placed at home, than there would be to view it as a prohibition of paying medical costs of children placed in institutions.

The purpose sections of the statute and of the Legislative Affairs Agency memorandum are both vague and they do not provide any convincing reason to ignore the plain language of the statute. *Alex*, 646 P.2d at 208 n. 4. Section .060 is only obliquely supportive of the department's position. The memorandum is not at all inconsistent with the position of the mother.

The department's policy argument—that holding the department responsible for medical costs of children in its custody who are placed at home would result in less protection for children because of budgetary constraints—is beyond the purview of

8. We have rejected a "mechanical" plain meaning rule, recognizing that ambiguity is a matter of degree. *State v. Alex*, 646 P.2d 203, 208 n. 4 (Alaska 1982). The appropriate approach involves a "sliding scale," such that the plainer the language, the more convincing must be evidence contrary to that plain meaning. *Id.*; *State v. Haines*, 627 P.2d 1047, 1049 n. 6 (Alaska 1981). The statutory language of section .084(a) seems quite plain.

9. The term "subject to" in section .084(a) best connotes the idea that the state's responsibility is subordinate to that of the parent, not that it is eliminated because the parents are also responsible. See *Black's Law Dictionary* 1425 (6th ed. 1990) ("Subject to" defined as "subordinate, subservient, inferior").

this court. Whether the department is adequately funded to carry out its statutory responsibilities, or whether those responsibilities should be changed in response to budgetary realities, is a question for the legislature to answer. The law as it stands today clearly assigns to the department the duty to pay the medical costs of all children in its legal custody, subject to reimbursement from the parents.

The decision of the superior court is REVERSED and this case REMANDED for entry of appropriate judgment.



John J. SHAW, Appellant,

v.

STATE of Alaska, DEPARTMENT OF ADMINISTRATION, PUBLIC DEFENDER AGENCY, and David C. Backstrom, Appellees.

No. S-3720.

Supreme Court of Alaska.

Aug. 30, 1991.

Convicted criminal defendant, following postconviction relief, brought legal malpractice action against attorney and Public Defender Agency. The Superior Court, Fourth Judicial District at Fairbanks, Richard D. Savell, J., granted summary judgment in favor of counsel, and convicted defendant appealed. The Supreme Court, Rabinowitz, C.J., held that convicted criminal defendant must obtain postconviction relief before pursuing action for legal malpractice against his or her attorney and, thus, limitations period applicable to legal malpractice claim does not commence to run until postconviction relief is obtained.

Reversed and remanded.

1. Attorney and Client  $\S$ 129(1)

Limitation of Actions  $\S$ 105(1)

Convicted criminal defendant must obtain postconviction relief before pursuing action for legal malpractice against his or her attorney and, thus, limitations period applicable to legal malpractice claim does not commence to run until postconviction relief is obtained.

2. Attorney and Client  $\S$ 129(2)

Dispositive postconviction relief is relevant in convicted criminal defendant's legal malpractice action against his or her attorney as to issues of proximate causation and damages.

3. Judgment  $\S$ 559

If convicted criminal defendant had been denied postconviction relief, collateral estoppel would have served to eliminate any frivolous legal malpractice claim.

4. Attorney and Client  $\S$ 105, 129(1)

Elements of legal malpractice arising from civil litigation apply to malpractice action by convicted criminal defendant, with additional requirement that defendant must first obtain postconviction relief.

5. Malicious Prosecution  $\S$ 34

Establishing tort of malicious prosecution requires plaintiff to prove unsuccessful prosecution occurred, which element is not established until cessation of underlying action.

Joseph L. Paskvan, Hoppner & Paskvan, P.C., Fairbanks, for appellant.

Randy M. Olsen, Asst. Atty. Gen., Fairbanks, and Douglas B. Baily, Atty. Gen., Juneau, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

John Shaw brought suit against David Backstrom and the Public Defender Agency alleging legal malpractice. The superior court granted summary judgment, concluding

ing that the action was barred by the statute of limitations. We reverse and hold that a convicted criminal defendant must obtain post-conviction relief as a precondition to maintaining a legal malpractice claim against his or her attorney.

#### *Facts and Proceedings*

On March 8, 1973, John Shaw and Toney Powell, both represented by assistant public defender David Backstrom, were convicted of two counts of burglary not in a dwelling and two counts of larceny in a building. Powell had stolen seventeen pairs of pants from a men's store where he and Shaw worked as janitors, and Shaw had allegedly assisted him. Shaw has steadfastly maintained his innocence.

While representing both Shaw and Powell on the burglary and theft charges, Backstrom advised the superior court that a "conflict situation" was arising. However, separate attorneys for the defendants were never provided. The conflict continued through the trial. Powell was willing to testify that Shaw had nothing to do with the theft but defense counsel did not permit him to do so. Further, Backstrom did not advise Shaw that he could take the stand in his own defense, because he wanted to protect Powell. Additionally, several witnesses at trial were not allowed to testify as to statements by Shaw because of the threat to Powell.<sup>1</sup> As noted above, Powell and Shaw were convicted. Sentencing was set for April 10, 1973. Backstrom indicated to Shaw that he would file an appeal, but he did not. Nor did Backstrom contact Shaw, although he had indicated that he would.

Shaw never appeared for sentencing because "he was not going to jail for something he didn't do." He left the jurisdiction and from mid-March of 1973 until September of 1978, Shaw lived in St. Louis, Missouri. The superior court issued a bench warrant for his arrest. Shaw later returned to Alaska and on December 26,

1979, he was stopped in Fairbanks for operating a motor vehicle with a defective tail light. This stop resulted in a routine check, revealing the outstanding warrant for his arrest. Shaw was subsequently charged with failure to appear.

Thereafter, the superior court scheduled a sentencing hearing for Shaw's 1973 convictions. Shaw was originally represented by the Public Defender Agency ("PDA"), but, due to conflict, the superior court released the PDA as his counsel and appointed Daniel Saluri to represent Shaw. After a hearing, the court suspended imposition of a sentence for the 1973 convictions and placed Shaw on probation for two years.

Saluri also represented Shaw in his April 1980 jury trial for failure to appear. After his conviction for failure to appear, the superior court sentenced Shaw to a term of three years with two suspended. An appeal followed. While the appeal was pending, Shaw moved to Barrow, where he was employed by the North Slope Borough until his arrest in 1981 for receiving a stolen handgun and being a felon in possession of a handgun. Again represented by Saluri, Shaw pled *nolo contendere* to the possession charge, and the larceny charge was dropped.

After Shaw's arrest on the felon in possession charge, his probation officer petitioned to revoke Shaw's probation on the 1973 burglary and larceny convictions. Originally, Saluri represented Shaw on this matter, but later the law firm of Birch, Horton, Bittner, Pestinger and Anderson was appointed to represent Shaw. In early 1984, an attorney with that firm notified Shaw that he intended to argue that Shaw was denied effective assistance of counsel in connection with the 1973 burglary and theft convictions, based on Backstrom's original representation of Shaw.

Later, in 1986, the Office of Public Advocacy was appointed to represent Shaw in a sentence appeal for the felon in possession

1. On December 23, 1985, the Public Defender Agency raised the following argument in trying to get Shaw's original conviction vacated:

Because the State of Alaska provided one attorney for two defendants, the attorney did

not want to use Powell to exculpate Shaw, because then Powell would be prejudiced. This is a classic case of conflict of interest between clients.