HB

339

HOUSE COMMITTEE REPORT

(9)
Date Referred: May 8, 1995 FURTHER REFERRALS: State Affairs
Judiciary

Date of Committee Action: 2/15/96

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 339

HOUSE BILL NO. 339 TERMINATE PARENTAL RIGHTS OF PRISONERS

"An Act relating to the termination of parental rights of incarcerated parents."

recommends it be replaced
with the following committee substitute CS HB 339 (HES) [ ] the same title [X] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

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

[ ] fiscal note(s) _____ [ ] fiscal note(s) _____

[X] zero fiscal note(s) H+SS [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
		✓	✓	
	✓			
			✓	
	✓			
	✓			
			✓	

CHAIR'S SIGNATURE Tom Brice _____

9-LS1124\F
Lauterbach
2/13/96

CS FOR HOUSE BILL NO. 339( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, Mulder, Robinson

A BILL

FOR AN ACT ENTITLED

"An Act relating to children-in-need-of-aid proceedings, including proceedings to terminate parental rights of incarcerated parents; and providing for an effective date."

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

* Section 1. PURPOSE. (a) The purpose of sec. 2 of this Act is to clarify statutes to expressly recognize the Department of Health and Social Service's long-standing interpretation of AS 47.10.010(a)(2)(A) that a parent cannot effectively care for a child unless the parent is both willing and able to care for that child. Section 2 of this Act is expressly intended to overrule the decision by the Alaska Supreme Court in In re S.A. and D.A. (Op. No. 4314, January 26, 1996).

(b) The purpose of sec. 3 of this Act is to respond to the Alaska Supreme Court's invitation in A.M. v. State of Alaska, 891 P.2d 815 (Alaska 1995) and Nada A. v. State of Alaska, 660 P.2d 436 (Alaska 1983) to create a statutory basis for making incarceration a factor that can be considered in termination proceedings concerning children in need of aid.

* Sec. 2. AS 47.10.010(a) is amended to read:

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

(1) to be a delinquent minor as a result of violating a criminal law of the state or a municipality of the state; or

(2) to be a child in need of aid as a result of

(A) the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian, or relative [CARING OR] willing **and able** to provide care, including physical abandonment by

(i) both parents,

(ii) the surviving parent, or

(iii) one parent if the other parent's rights and responsibilities have been terminated under AS 25.23.180(c) or AS 47.10.080 or voluntarily relinquished;

(B) the child being in need of medical treatment to cure, alleviate, or prevent substantial physical harm, or in need of treatment for mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others, and the child's parent, guardian, or custodian has knowingly failed to provide the treatment;

(C) the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by the child's parent, guardian, or custodian or the failure of the parent, guardian, or custodian adequately to supervise the child;

(D) the child having been, or being in imminent and substantial danger of being, sexually abused either by the child's parent, guardian, or custodian, or as a result of conditions created by the child's parent, guardian, or custodian, or by the failure of the parent, guardian, or custodian adequately to supervise the child;

(E) the child committing delinquent acts as a result of pressure,

guidance, or approval from the child's parents, guardian, or custodian;

(F) the child having suffered substantial physical abuse or neglect as a result of conditions created by the child's parent, guardian, or custodian.

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

(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 that 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 that 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 **or incarceration,** and upon a showing in the disposition by clear and convincing evidence that the parental conduct **or the period of incarceration** is likely to continue to exist **sufficiently long to seriously damage the parent and child relationship or to cause serious emotional or physical harm to the child** 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.

*** Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 13, 1996

Honorable Norman Rokeberg
Alaska State Legislature
State Capitol-Room 110
Juneau, AK 99801

Re: HB 339

Dear Representative Rokeberg:

Per your request, the following is my sectional analysis of the current draft CS for HB 339.

Section 1. Subsections (a) and (b) are included in HB 339 to make clear that this bill is enacted in order to change the rulings of two recent Alaska Supreme Court cases. In both cases, the supreme court gave a literal interpretation of the statutes in question. As discussed in sections 2 and 3, these interpretations frustrate the state's mission to protect children and to place children in permanent homes when remaining with their parents is not possible.

By making clear that it is the intent of the legislature to change these rulings by amending the statutes, the legislature will help avoid later litigation concerning legislative intent. Although this purpose section will not be a part of the codified laws, it will be printed in Volume 14 of the Alaska Statutes, which contains temporary and special acts of the legislature. In addition, the editorial notes at the end of the amended statute will state the session law in which this purpose language can be found. Therefore, courts will be able to easily discover the legislative intent of this bill.

Section 2. This section amends AS 47.10.010(a)(2)(A) to change the ruling in In re S.A. and D.A., (Op. no. 4314, January 26, 1996). In that case, the supreme court held that the phrase "having no parent, guardian, custodian, or relative caring or willing to provide care" in AS 47.10.010(a)(2)(A) meant that even if the parent was not able to care for the child, the state could not seek custody under subsection (A) as long as a parent professed a willingness to provide care. In so holding, the supreme court expressly reversed its previous holdings in other cases, which had interpreted subsection (A) in a way that reads meaning into it, i.e., that if there were no parent, relative, etc., able to care for the child, the state could assume custody of

that child even if the parent expressed a desire to care for the child. It should be noted that the phrase "care or caring" is defined in AS 47.10.990(1) as meaning "to provide for the physical, emotional, mental, and social needs of the child."

By interpreting this phrase of subsection (A) literally, the S.A. case affects many cases, since a great majority of child custody proceedings fall under this phrase of AS 47.10.010(a)(2)(A). Why this phrase is necessary in the overall statutory scheme of AS 47.10.010 is best described by Justice Eastaugh's dissent on pages 20-22 of the S.A. case, which is attached to this letter for easy reference.

To cure this problem, section 2 makes the phrase conjunctive, rather than disjunctive, so that the parent cannot defeat jurisdiction by being willing but not able to care for the child. Section 2 also changes the wording slightly to make clear that the state can obtain custody if the parent is not able to care. Otherwise, under the supreme court's strict interpretation of the statute, a parent could defeat jurisdiction by caring for a child, but in a way that is extremely deficient and harmful to the child. The phrase "willing and able to provide care" makes it more clear that a parent's inability to provide care is the key to state involvement.

Section 3. Section 3 provides substitute language for the original HB 339 and is meant to cure some of the problems discussed when this bill was first before the House HESS committee. By way of background, this section addresses the problems discussed in A.M. v. State, 891 P.2d 815 (Alaska 1995) and Nada A. v. State, 660 P.2d 436 (Alaska 1983). In those cases, the supreme court noted that AS 47.10.080(c)(3) allows termination of parental rights only in those cases in which it can be proven that the child is in need of aid "as a result of parental conduct." It then held that incarceration is not conduct, because incarceration is an involuntary act. Therefore, although a child can be placed in foster care under AS 47.10.010(a)(2)(A) (because incarceration is a form of abandonment), the state cannot terminate parental rights of that parent when the period of incarceration is lengthy because incarceration is not conduct. In both cases the Alaska Supreme Court invited the legislature to amend the statute to change this result.

This section does just that: it allows termination if the child is a child in need of aid "as a result of parental conduct or incarceration." This is an improvement over the original bill because by changing AS 47.10.080(c)(3) directly, it eliminates any argument that incarceration is not conduct. Now either inadequate parental conduct or incarceration satisfies one of the prerequisites to terminating parental rights.

Clearly, a short period of incarceration should not result in a person's parental rights being terminated. The question is what period of incarceration would justify terminating parental rights? This would depend on the circumstances of the individual case. In order to offer some guidance for the courts to determine which cases should result in termination, this section focuses on the effect the incarceration has on the child.

Under this amendment, the state must prove that "the parental conduct or the period of incarceration is likely to continue to exist sufficiently long to seriously damage the parent and child relationship or to cause serious emotional or physical harm to the child if there is no termination of parental rights." Applying the first part of this standard, the court would not terminate the parental rights of an incarcerated parent who has a well-developed relationship with an older child. Conversely, the court could terminate parental rights for the same period of incarceration when the child is too young to have developed much of a relationship before the incarceration began, and the period of incarceration would seriously damage that tenuous relationship.

Alternatively, even if the parent-child relationship remains intact, the court could terminate parental rights if the conduct or incarceration continues to the point that "serious emotional or physical harm" would result if parental rights were not terminated. Assuming the child is in a safe foster home, it is hard to imagine serious physical harm occurring if parental rights were not terminated, unless, for example, the child engages is self-destructive conduct because of the trauma of having no permanent home.

With respect to serious emotional harm there is wide support for the likelihood that a child in perpetual "foster care drift" will suffer extreme emotional harm. For example, if a child fails to form an emotional bond with a parent figure because it is shifted from one temporary placement to another, personality disorders often result. A less dramatic example is that the child often feels unloved and unwanted and tends to think something is wrong with him or her if there is no permanent parental figure. Or the child refuses to accept the authority of the foster parent because he or she is not a "real" parent, which could have emotionally harmful consequences.

It should be noted that by modifying the phrase "likely to continue to exist," this new standard would apply to all termination cases, not just cases involving an incarcerated parent. This should help the court in all cases. For example, assume that the state may be able to prove that a parent is unable to care for a child because of chronic alcoholism, but statistics or an expert witness for the parent shows that the parent will eventually maintain sobriety. This modification makes clear that even though the insobriety may not continue forever, parental rights should be

terminated if the insobriety continues through enough of the child's minority to cause serious damage to the parent-child relationship or serious emotional or physical harm to the child.

Another change from the original bill is that there is no provision in this section that allows the incarcerated parent to prevent termination of parental rights if adequate provisions for the child's care were made prior to the incarceration. This provision was not included in this section because it is unnecessary. The state would never get custody of the child in the first place if there were another "parent, guardian, custodian, or relative" willing and able to care for the child. See AS 47.10.010(a)(2)(A). It is only in those situations in which there is no other parent, relative or non-relative guardian to care for a child that the state can place the child in foster care and then, if the facts so warrant, seek termination of the incarcerated parent's parental rights.

Section 4. Because of the urgent need for this bill, especially section 2 of the bill, this bill provides for an immediate effective date.

I hope this analysis explains the bill to your satisfaction. Please call me if you need additional assistance on this matter.

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Jan Rutherdale
Jan A. Rutherdale
Assistant Attorney General

JAR:pao

Enclosure

cc: Elmer Lindstrom, Special Assistant
Department of Health & Social Services

Kathy Tibbles, Social Services Program Officer
Department of Health & Social Services

Excerpt from Justice Eastaugh's dissent in In re S.A and D.A (Op. No. 4314, January 26, 1996).

(B) through (F). Second, it asserts that unlike subsection (A), subsections (B) through (F) set "clear, specific standards for adjudicating a child CINA based on a parent's inability to care." Third, it argues that considering ability to care under subsection (A) "would make subsections (B) through (F) virtually superfluous." Opinion at 11-12.

In my view, these grounds are unconvincing. Both as a matter of statutory construction and common sense, ability to care is and must be relevant to an inquiry under subsection (A).

Alaska Statute 47.10.010(a)(2) contains six subsections which state alternative grounds for finding a child in need of aid. The grounds and subsections are independent, but are not necessarily discrete because more than one ground may apply in a given case.

It is first essential to recognize the evil at which subsection (A) is aimed. Subsection (A) is directed at two basic problems: (1) conduct of the child which deprives the child of available care ("the child being habitually absent from home," i.e., running away, or "refusing to accept available care"); and (2) want of a person (parent, or guardian, custodian, or relative) to provide care to the child ("the child . . . having no parent . . . caring or willing to provide care"). Subsection (A) focuses on the two situations in which the child is deprived of care, the first when the child's acts or omissions prevent delivery of care, and the second when there is no one to deliver care. Subsection (A) thus addresses two different sources of a single fundamental

evil: a failure of care for the child. If the child does not receive the necessary care, there has been a failure of care.

Comparison of subsection (A) with subsections (B) through (F) confirms the legislative scheme. Although those other subsections address what might initially seem to be relatively more specific and harmful hazards, the legislature put subsection (A) on an equal footing with the other subsections as a basis for adjudicating a child in need of aid. We must assume that the legislature considered hazards posed by a failure of care to be equivalent to those addressed in subsections (B) through (F). It is not for us to make explicit or implicit value judgments about whether a child deprived of care is entitled to less protection than one placed in imminent danger. The child deprived of care may ultimately suffer as much as the child who is a victim of more violent but less insidious conditions, and the arrangement of AS 47.10.010(a)(2) suggests that the legislature recognized this.

Subsection (A) does not require that the child be in grave danger. Indeed, under some circumstances a runaway child might fare better outside the home than in it. The subsection specifies physical abandonment as an example of a deprivation of care sufficient to invoke the subsection, but does not require conduct that dramatic for CINA jurisdiction to be appropriate. The physical abandonment example does suggest, however, that the legislature was concerned about relatively serious failures of care, in which the ostensible caregiver has functionally, if not physically, abandoned the child.

Subsection (A) thus contemplates two alternative grounds for finding the child to be in need of aid, one attributable to the child who runs away or refuses care, and the other attributable to persons who should or could care for the child. Common to both grounds is the notion that there will be a fundamental deprivation of care. This notion is important. Notwithstanding past failures, CINA status under subsection (A) is not warranted unless the child will be fundamentally deprived of care in the future. A CINA adjudication therefore requires the court to predict as best it can whether the present failure of care is resolved, and whether the child will henceforth get the necessary care.

It necessarily follows that subsection (A) deals with the delivery and the deprivation of care. That conclusion is irreconcilable with this court's reading of subsection (A), because this court appears to think that willingness to provide care can substitute for delivery of care. Opinion at 11. To the contrary, subsection (A) is concerned with performance, not intentions.

The legislature provided a definition of "care" and "caring" to be applied in disputes under AS 47.10.010(a)(2)(A): "'care' or 'caring' under AS 47.10.010(a)(2)(A) . . . means to provide for the physical, emotional, mental, and social needs of the child." AS 47.10.990(1). We must apply this definition here. The court's contention -- that AS 47.10.010(a)(2)(A) merely requires that an eligible person be willing to care for the child regardless of ability to provide care successfully -- ignores both the express words of this definition, and its implications.

THE SUPREME COURT OF THE STATE OF ALASKA

IN THE MATTER OF: S.A. DOB: 8/4/89 D.A. DOB: 7/18/90 Minors under the Age of Eighteen (18) Years.	Supreme Court No. S-6619 Superior Court No. 4FA-91-100 CP O P I N I O N [No. 4314 - January 26, 1996]
N.A., Appellant, v. STATE OF ALASKA, Appellee.	

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Robert S. Noreen, Michelle McComb, Law Offices of Robert S. Noreen, Fairbanks, for Appellant. Karla Taylor-Welch, Assistant Attorney General, Fairbanks, Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton and Eastaugh, Justices.

MATTHEWS, Justice.
EASTAUGH, Justice, with whom COMPTON, Justice, joins, concurring in part and dissenting in part.

N.A. appeals the termination of her parental rights over S.A. and D.A. N.A. originally lost custody of S.A. and D.A. because she was unable to take care of them due to alcohol abuse. N.A. later entered alcohol rehabilitation and has been sober for two years. Nevertheless, the superior court terminated her parental rights.

This case requires us to resolve a conflict in our prior decisions concerning the interpretation of AS 47.10.010(a)(2), the statute which governs when a child may be adjudicated to be a child in need of aid (CINA). We must determine which subsections of AS 47.10.010(a)(2) permit a CINA adjudication based on a parent's or caregiver's inability to care for a child.

1. FACTS AND PROCEEDINGS

N.A. is the mother of two boys, S.A., born August 4, 1989, and D.A., born July 18, 1990. The father of both children is R.S. S.A. and D.A. are developmentally delayed. Their most significant delays are in the area of speech. Until 1992, N.A. abused alcohol. At times, her alcohol abuse made her incapable of taking care of her children.

The State filed a petition for temporary custody of S.A. and D.A. in June 1991. The superior court granted the petition, adjudicated the boys CINA, and committed them to the custody of the Department of Health and Social Services (DHSS). Custody was given to the State because N.A. was unable to take care of the boys at times because of intoxication, and R.S. was in sexual abuse

treatment which prohibited him from having unsupervised contact with children. S.A. and D.A. were eventually placed with foster parents.

In November 1992, N.A., again pregnant by R.S., entered the Dena A. Coy Center for Pregnant Women. N.A. stayed at Dena A. Coy until June 1993. She received alcohol rehabilitation, parenting training, and other services there. N.A. stopped using alcohol near the time she entered Dena A. Coy, and had been sober for two years at the time of trial.

Sh.A., a female, was born to N.A. at Dena A. Coy in May 1993. N.A. has had continuous custody over Sh.A. Social workers who worked with N.A. testified that N.A. is a good parent to Sh.A., and the State admits that N.A. is able to meet Sh.A.'s needs.

After leaving Dena A. Coy, N.A. utilized numerous, extensive services to help her maintain sobriety and improve her parenting skills. She attended Alcoholics Anonymous meetings and received other services to prevent a relapse into alcohol abuse. She regularly worked with several counselors on her parenting.

Despite N.A.'s progress, the State filed a petition for termination of her parental rights over S.A. and D.A. in September 1993, contending that "[t]he boys' needs are great and they need highly skilled parents to raise them in a healthy manner to their potential" and that N.A.'s "gains . . . are not sufficient to parent the boys." The trial took place in August 1994. R.S. relinquished his parental rights at the beginning of the trial.

N.A. and R.S. were no longer in a romantic relationship at the time of trial.

At trial, the State presented three types of evidence in order to make a case that S.A. and D.A. would suffer harm in N.A.'s care. First, the State introduced testimony that the boys' progress in overcoming their developmental delays would lessen under N.A.'s care because N.A. is not able to provide the boys with "structure and consistency." Second, there was evidence that N.A. sometimes disciplines the boys by yelling at them. Third, witnesses for the State testified that they were concerned that S.A. or D.A. could suffer physical injury as a result of encountering an environmental hazard in N.A.'s care. The superior court terminated N.A.'s parental rights over S.A. and D.A.

II. STANDARD OF REVIEW

Under AS 47.10.080(c)(3), a superior court may terminate parental rights only "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." The superior court found by clear and convincing evidence that S.A. and D.A. are children in need of aid under AS 47.10.010(a)(2)(A) and (C) as a result of conduct by N.A. which is likely to continue. N.A. argues that the superior court erred in making this finding.

In a CINA case, we will overturn the superior court's findings of facts if they are clearly erroneous. We will declare a trial court's findings to be clearly erroneous if a review of the entire record leaves us with a definite and firm conviction that a mistake has been made. See In re T.W.R., 887 P.2d 941, 944 (Alaska 1994); K.N. v. State, 856 P.2d 468, 475 (Alaska 1993). Determinations of law are reviewed de novo. E.g., Langdon v. Champion, 745 P.2d 1371, 1372 n.2 (Alaska 1987).

III. IMMINENT AND SUBSTANTIAL RISK OF SUBSTANTIAL PHYSICAL HARM

We will consider whether the superior court clearly erred by adjudicating S.A. and D.A. CINA under AS 47.10.010(a)(2)(C) (subsection (C)) before discussing AS 47.10.010(a)(2)(A) (subsection (A)). A child can be declared CINA under subsection (C) upon a showing of

> the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by the child's parent, guardian, or custodian or the failure of the parent, guardian, or custodian adequately to supervise the child[.]

(Emphasis added.) A careful and thorough review of the entire record leaves us with a definite and firm conviction that the record cannot support a finding that S.A. and D.A. have suffered substantial physical harm as a result of parental conduct which is likely to continue or that there is an imminent and substantial risk that they will suffer such harm due to conduct by N.A. which is likely to continue.

The evidence presented by the State that N.A. is unable to provide her sons with sufficient "structure and consistency" cannct support a CINA adjudication under subsection (C). The only consequence that the State's witnesses predicted would flow from a failure to give S.A. and D.A. the necessary "structure and consistency" was that the boys would not "meet their potential" or make the kinds of gains in overcoming their developmental delays which they would make otherwise. If S.A. and D.A. would indeed suffer this type of harm under N.A.'s care, the harm would be gradual and not imminent, and it would not be substantial physical harm. The State's witnesses did not identify any concrete physical harms that the boys would suffer as a result of not being supplied with enough "structure and consistency."

Likewise, the testimony that N.A. sometimes disciplines S.A. and D.A. by yelling at them cannot justify a CINA adjudication under subsection (C). According to the State's witnesses, this manner of disciplining the boys could cause them to suffer a loss of self-esteem. The possibility of a gradual loss of self-esteem does not amount to an imminent risk of substantial physical harm.[1]

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[1] The record does not contain evidence that N.A.'s yelling amounts to severe emotional abuse of the sort that could support a CINA adjudication under AS 47.10.010(a)(2)(B), which permits a CINA finding as a result of

> the child being in need of medical treatment to cure, alleviate, or prevent substantial physical harm, or in need of treatment for <u>mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others</u>, and the child's parent,

(continued...)

Finally, some of the State's witnesses had concerns about the physical safety of S.A. and D.A. in N.A.'s care, as the boys are very active and may enter dangerous places in their environment if not watched. But the State introduced no evidence that N.A. was so unaware of potential dangers that it was likely that S.A. or D.A. would be seriously injured as a result of encountering an environmental hazard in her care. The State's witnesses did not testify that the boys were ever in any immediate danger under N.A.'s care; in fact, there was testimony that N.A. removed her sons from potentially dangerous situations. The State only presented testimony that N.A.'s awareness of possible dangers was not as great as that of the social workers observing her, and that N.A. was not able to keep her attention focused on S.A., D.A., and Sh.A. all of the time.[2] The record in this case thus cannot

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[1](...continued)
guardian, or custodian has knowingly failed to provide the treatment.

(Emphasis added.)

[2] Three of the State's witnesses testified about possible safety risks to the boys with N.A. DHSS social worker Paula Bettano Everts stated that she had safety concerns for the boys, as "the boys are very easy victims because they can't talk," and "the boys' behavior is very unpredictable." Everts expounded that the boys run around a lot and could encounter a physical danger in their environment because N.A. is unable to focus her attention on them all of the time.

Connie Kind, a family consultant who worked with N.A. on parenting skills, stated that "there . . . could be some safety issues" if S.A. and D.A. were placed with N.A. Kind explained that at times she feared that the boys would enter places that were not safe. But Kind also stated that she never saw the boys in "any immediate danger" while under N.A.'s care, and acknowledged that she never saw N.A. "expose her sons to anything that would put them
(continued...)

support a finding that S.A. and D.A. would face an imminent and substantial risk of substantial physical harm as a result of the possibility of encountering a physical hazard in N.A.'s care, and the superior court's CINA adjudication under subsection (C) is reversed.[3]

IV. ABILITY TO CARE

Since the superior court's CINA adjudication cannot be upheld under subsection (C), we must determine whether it can be

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[2](...continued)
in physical danger while she was with them." Kind elaborated that her own awareness of potential safety risks was greater than N.A.'s and that Kind "was quicker to react than [N.A.] was sometimes to [potential] dangers."

Lillian Coleman, a counselor who worked with N.A., testified that S.A. and D.A. require constant supervision and at times engage in behavior that raises concerns about their safety. Coleman also testified, however, that N.A. removed the boys from danger when they engaged in risky behavior, and that she never saw N.A. do anything to endanger S.A. and D.A. When asked whether the boys would be at risk if placed in N.A.'s care, Coleman responded, "I don't know."

In addition, Carolyn Cyr, a therapist at Dena A. Coy, testified that N.A. never did anything to jeopardize the safety of her sons during visits. Ruth Evans, one of N.A's counselors, stated that the boys would be safe with N.A. N.A. herself testified that supervising S.A. and D.A. required preventing them from "getting into stuff . . . like the medicine cabinet, and running out to the street, and . . . play[ing] with anything that's dangerous, like tools, knives."

[3] N.A.'s past alcohol abuse also cannot support the superior court's finding that S.A. and D.A. are CINA under subsection (C) as a result of conduct by N.A. which is likely to continue. N.A. no longer uses alcohol. Cf. In re R.K., 851 P.2d 62, 66-67 (Alaska 1993) (reversing superior court's termination of parental rights where father had once neglected his children, apparently because of alcohol or drug use, but claimed to no longer be using alcohol or drugs; explaining that father's substance use could be monitored).

justified under subsection (A). Subsection (A) permits a child to be declared CINA as a result of

> the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment by
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> (i) both parents
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> (ii) the surviving parent, or
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> (iii) one parent if the other parent's rights and responsibilities have been terminated under AS 25.23.180(c) or AS 47.10.080 or voluntarily relinquished[.]

(Emphasis added.) The superior court's decision that S.A. and D.A. are CINA under subsection (A) as a result of parental conduct which is likely to continue is based on a finding that N.A. cannot provide the care required by the boys and cannot meet their needs.[4] This finding raises the issue of whether a parent's inability to care for a child can support a CINA declaration under subsection (A) if the parent is willing to care for the child.

Our prior decisions conflict in their resolution of this issue. In In re J.L.F., 828 P.2d 166, 170 (Alaska 1992), we stated, without analysis: "While a finding of inability to care

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[4] The superior court stated in its written decision:

> The evidence demonstrates clearly and convincingly, however, that [N.A.] is not able to understand and meet the children's significant needs for structure, stability, consistency and nurturing.
>
> The court finds by clear and convincing evidence that the parental conduct which caused the children named above to be children in need of aid is likely to continue if [N.A.]'s parental rights are not terminated. [N.A.] has never demonstrated an understanding of or ability to meet her children's needs.

would be grounds for jurisdiction under subsection (2)(A), that finding must also extend to any relatives who are in fact caring for or willing to assume care." We cautioned, however, that "adjudication under subsection (2)(A) normally would arise under abandonment." Id. at 170 n.9. In A.M. v. State, 891 P.2d 815, 824 (Alaska 1995), and In re T.W.R., 887 P.2d 941, 945 (Alaska 1994), we interpreted J.L.F., again without analysis, as meaning that a CINA adjudication under subsection (A) may be predicated on a parent's lack of ability to care for a child.

But in F.T. v. State, 862 P.2d 857, 861 (Alaska 1993), we rejected an argument that inability to care could support a finding that a child is CINA under subsection (A). We stated, "AS 47.10.010(a)(2)(A) would support a CINA adjudication only if [the child] had no parent, guardian, custodian, or relative caring or willing to provide care. Specifically, the parties' dispute whether [the parent] was willing to provide care." Id. The State argued "that [the parent] could not have been willing to provide care because he was unable to meet [the child's] needs." Id. We rebuffed this argument and the State's "conclusion that if a child has needs a parent cannot meet, then the parent cannot be 'willing to provide care' for that child." Id. We explained that "the State's conflation of willingness to care and ability to satisfy needs leads to absurd conclusions." Id.

We now determine that the approach taken in F.T. is the correct one, and we hold that a parent's or caregiver's inability to care for a child cannot support a CINA adjudication under

subsection (A) if the parent or caregiver is willing to care for the child. Our conclusion is based on the plain language of subsection (A) and a careful examination of the structure and purposes of AS 47.10.010(a)(2) as a whole.

The clear language of subsection (A) covers only willingness to care, not ability to care. Subsection (A) allows a CINA adjudication if there is no "parent . . . caring or willing to provide care." (Emphasis added.) Subsection (A) does not state "having no parent . . . caring and willing to provide care."

The State has argued that subsection (A) covers ability to care because AS 47.10.990(1) states, "'care' or 'caring' under AS 47.10.010(a)(2)(A) . . . means to provide for the physical, emotional, mental, and social needs of the child." See F.T., 862 P.2d at 861 & n.5; J.L.F., 828 P.2d at 169. However, plugging the definition in AS 47.10.990(1) into subsection (A) results in the following: "having no parent . . . providing for the physical, emotional, mental, and social needs of the child or willing to provide for the physical, emotional, mental, and social needs of the child." The statute still would not require ability to care -- willingness is enough.

An analysis of the structure and purposes of the entirety of AS 47.10.010(a)(2) shows that while ability to care is relevant under subsections (B) through (F) of the statute, it is not relevant under subsection (A), for three main reasons. First, the State's interpretation of subsection (A) would permit CINA adjudications based on parenting deficiencies much less severe than

those covered under AS 47.10.010(a)(2)(B)-(F). Second, unlike subsection (A), subsections (B) through (F) set clear, specific standards for adjudicating a child CINA based on a parent's inability to care. Third, permitting ability to care to be considered under subsection (A) would make subsections (B) through (F) virtually superfluous.

The full text of AS 47.10.010(a)(2) states:

> (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the court finds the minor
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> . . . .
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> (2) to be a child in need of aid as a result of
>
> (A) the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment by
>
> (i) both parents
>
> (ii) the surviving parent, or
>
> (iii) one parent if the other parent's rights and responsibilities have been terminated under AS 25.23.180(c) or AS 47.10.080 or voluntarily relinquished;
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> (B) the child being in need of medical treatment to cure, alleviate, or prevent substantial physical harm, or in need of treatment for mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others, and the child's parent, guardian, or custodian has knowingly failed to provide the treatment;
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> (C) the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by the child's parent, guardian, or custodian or the failure of the parent, guardian, or custodian adequately to supervise the child;
>
> (D) the child having been, or being in imminent and substantial danger of being,

> sexually abused either by the child's parent, guardian, or custodian, or as a result of conditions created by the child's parent, guardian, or custodian, or by the failure of the parent, guardian, or custodian adequately to supervise the child;
>
> (E) the child committing delinquent acts as a result of pressure, guidance, or approval from the child's parents, guardian, or custodian;
>
> (F) the child having suffered substantial physical abuse or neglect as a result of conditions created by the child's parent, guardian, or custodian.

Under subsections (B) through (F), only serious forms of parental misconduct can support a CINA adjudication. Subsection (B) deals with failure to provide needed medical treatment. Subsection (C) concerns "substantial physical harm" caused by parental conduct. Subsection (D) addresses sexual abuse. Subsection (E) is about parental encouragement of criminal conduct. And subsection (F) speaks of "substantial physical abuse or neglect." The legislature thus intended for the State to be able to assume custody of minors only to remedy severe parenting deficiencies and prevent significant harm to children.

But the State's reading of subsection (A) would give the State the power to assume custody over children for much less serious types of parental misconduct and harm to children. The State would define ability to care as the ability to provide for the physical, emotional, mental, and social needs of a child, relying on AS 47.10.990(1). See F.T., 862 P.2d at 861 & n.5; J.L.F., 828 P.2d at 169. This interpretation would permit the State to assume custody over any child who had needs the child's parents could not meet. Applied to the facts of this case, the

State's interpretation would justify terminating N.A.'s parental rights on the grounds that S.A. and D.A. would not "meet their potential" with N.A. because she would not be able to satisfy their needs for "structure and consistency."

The better way to interpret subsection (A) is in accordance with its plain intent -- subsection (A) is designed to deal with situations where the parent abandons the child, the child runs away, or the child refuses to accept the parent's care. The seriousness of these kinds of situations is congruent with the types of circumstances covered by subsections (B) through (F).

Unlike subsection (A), which focuses on a parent's willingness to care and does not explicitly give superior courts guidance in determining what constitutes inability to care, subsections (B) through (F) contain specific standards for adjudicating a child CINA and terminating parental rights based on a parent's or caregiver's[5] inability to care. Under subsection (B), inability to provide needed medical treatment can support a CINA finding. Subsection (C) covers inability to care that causes, or creates an imminent and substantial risk of, substantial physical harm. Subsection (D) deals with sexual abuse or a danger of sexual abuse caused by a parent's inability to supervise a child or by other conditions created by the parent. Subsection (E) permits a CINA adjudication if a parent approves the commission of

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[5] If a parent intends to place a child with a caregiver who would harm the child as proscribed in subsections (B) through (F), the child can be declared CINA under the appropriate provision(s) of subsections (B) through (F).

delinquent acts by the child. Subsection (F) concerns "substantial physical . . . neglect."

Reading subsection (A) as permitting a CINA adjudication based on inability to care would make all these parts of subsections (B) through (F) superfluous. A superior court would not have to determine whether the requirements in subsections (B) through (F) were met if the court could easily declare a child CINA upon a general finding of inability to care under subsection (A).[6] Such a result would violate basic principles of statutory construction. See, e.g., Journey v. State, 895 P.2d 955, 959 n.10 (Alaska 1995) ("as a general rule, statute should be construed so that effect is given to all its provisions and no part is inoperative or superfluous, void or insignificant") (citing Homer Elec. Ass'n v. Towsley, 841 P.2d 1042, 1045 (Alaska 1992)).

For these reasons, we overrule A.M., 891 P.2d at 824, T.W.R., 887 P.2d at 945, and J.L.F., 828 P.2d at 170, to the limited extent that those cases stated that ability to care may be considered under subsection (A). We continue to follow the central teaching of those cases -- parental rights may be terminated

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[6] For example, in this case, while the superior court did declare S.A. and D.A. CINA under subsections (A) and (C), its findings appear to fit in mainly under the State's interpretation of subsection (A). And we are aware of at least two other pending termination of parental rights appeals where the superior court adjudicated children CINA only under subsection (A), without considering other subsections, even though the records in those cases arguably could have supported CINA adjudications under subsections (C) or (F).

because a parent is unable to care for a child.[7] We only clarify that superior courts should be guided by the specific, explicit standards of subsections (B) through (F) in determining whether a parent or caregiver is able to care for a child.

Since a child may not be adjudicated CINA under subsection (A) based on a parent's inability to care for the child if the parent is willing to care for the child, we overturn the superior court's finding that S.A. and D.A. are CINA under

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[7] The results we reached in A.M., T.W.R., and J.L.F. would not change under our holding in this case. In A.M., the superior court's termination of parental rights was based solely on a finding that the father had abandoned his children. 891 P.2d at 820. We ruled that the abandonment finding was clearly erroneous. Id. at 824. We remanded the case for consideration of whether the father was able to care for the children. Id. at 824-25. We noted:

> The superior court specifically found, beyond a reasonable doubt, that A.M.'s daughter was likely to suffer sexual abuse if placed in his custody; that both children were likely to suffer physical abuse resulting from A.M.'s domestic violence; and that both were likely to suffer physical deprivation due to A.M.'s inability to meet their needs on a consistent, ongoing basis.

Id. at 25. These findings would support CINA adjudications under subsections (D), (C), and (F), respectively.

In T.W.R., we affirmed the superior court's termination of parental rights and finding that the mother was unable to care for her children. 887 P.2d at 945. In that case, the record showed and the superior court specifically found that the children were CINA under subsection (B) as a result of the mother's failure to provide them with needed medical attention. Id. at 946.

In J.L.F., we refused to uphold a termination of parental rights where the superior court relied only on subsection (A). 828 P.2d at 169-70. We noted that the superior court's findings "fit well under subsection (2)(C)." Id. at 170. We remanded for determination of whether parental rights could be terminated under subsection (C). Id.

subsection (A). We realize that our opinions in A.M., J.L.F., and T.W.R. may have led some superior courts to make CINA findings solely under subsection (A) and not address subsections (B) through (F) in cases where the evidence would support a CINA adjudication under subsections (B) through (F). If this were such a case, the proper remedy would be to remand for consideration of whether the children are CINA under the appropriate provision(s) in subsections (B) through (F). However, the record in this case cannot support a CINA adjudication under subsections (B) through (F), meaning that the termination of N.A.'s parental rights must be reversed.[8]

V. CONCLUSION

We hold that a child may not be adjudicated CINA under AS 47.10.010(a)(2)(A) on the grounds that the child's parent or caregiver is unable to care for the child if the parent or caregiver is willing to care for the child. A parent's or caregiver's ability to care may be considered under the specific, explicit standards of AS 47.10.010(a)(2)(B)-(F). We thus overturn the superior court's determination that S.A. and D.A. are CINA under AS 47.10.010(a)(2)(A). We also conclude that the superior

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[8] Our resolution of the AS 47.10.010(a)(2) issues makes it unnecessary to consider the other arguments made on appeal by N.A., who is an Alaska Native. We doubt, however, that the evidence presented by the State in this case satisfied the requirements of Alaska Child in Need of Aid Rule 18(c)(2), which prohibits termination of the parental rights of a Native parent unless the evidence shows beyond a reasonable doubt that custody of the child by the Native parent will likely cause the child to suffer serious emotional or physical damage. See also 25 U.S.C. § 1912(f) (1988); K.N. v. State, 856 P.2d 468, 474 (Alaska 1993).

court's holding that S.A. and D.A. are CINA under AS 47.10.010(a)(2)(C) is erroneous. The record cannot support a CINA adjudication under any other sub-ection of AS 47.10.010(a)(2). The termination of N.A.'s parental rights is REVERSED.

EASTAUGH, Justice, with whom COMPTON, Justice, joins, concurring in p[illegible] and dissenting in part.

I agree with Parts I, II and III of the court's opinion.

I disagree with Part IV of the court's opinion because I conclude that ability to care is a relevant consideration under AS 47.10.010(a)(2)(A). I nonetheless agree that on the facts presented here the trial court erred in relying on AS 47.10.010(a)(2)(A) as one basis for CINA jurisdiction. Consequently, the result reached by this court is appropriate.

The court announces three main grounds for its conclusion that ability to care is irrelevant to AS 47.10.010(a)(2).[1] Opinion at 11. First, it asserts that a contrary interpretation of subsection (A) "would permit CINA adjudications based on parenting deficiencies much less severe" than those covered under subsections

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[1] AS 47.10.010 provides in pertinent part:

> (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the court finds the minor
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> . . . .
>
> (2) to be a child in need of aid as a result of
>
> (A) the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment by
>
> (i) both parents,
>
> (ii) the surviving parent, or
>
> (iii) one parent if the other parent's rights and responsibilities have been terminated under AS 25.23.180(c) or AS 47.10.080 or voluntarily relinquished.

(B) through (F). Second, it asserts that unlike subsection (A), subsections (B) through (F) set "clear, specific standards for adjudicating a child CINA based on a parent's inability to care." Third, it argues that considering ability to care under subsection (A) "would make subsections (B) through (F) virtually superfluous." Opinion at 11-12.

In my view, these grounds are unconvincing. Both as a matter of statutory construction and common sense, ability to care is and must be relevant to an inquiry under subsection (A).

Alaska Statute 47.10.010(a)(2) contains six subsections which state alternative grounds for finding a child in need of aid. The grounds and subsections are independent, but are not necessarily discrete because more than one ground may apply in a given case.

It is first essential to recognize the evil at which subsection (A) is aimed. Subsection (A) is directed at two basic problems: (1) conduct of the child which deprives the child of available care ("the child being habitually absent from home," i.e., running away, or "refusing to accept available care"); and (2) want of a person (parent, or guardian, custodian, or relative) to provide care to the child ("the child . . . having no parent . . . caring or willing to provide care"). Subsection (A) focuses on the two situations in which the child is deprived of care, the first when the child's acts or omissions prevent delivery of care, and the second when there is no one to deliver care. Subsection (A) thus addresses two different sources of a single fundamental

evil: a failure of care for the child. If the child does not receive the necessary care, there has been a failure of care.

Comparison of subsection (A) with subsections (B) through (F) confirms the legislative scheme. Although those other subsections address what might initially seem to be relatively more specific and harmful hazards, the legislature put subsection (A) on an equal footing with the other subsections as a basis for adjudicating a child in need of aid. We must assume that the legislature considered hazards posed by a failure of care to be equivalent to those addressed in subsections (B) through (F). It is not for us to make explicit or implicit value judgments about whether a child deprived of care is entitled to less protection than one placed in imminent danger. The child deprived of care may ultimately suffer as much as the child who is a victim of more violent but less insidious conditions, and the arrangement of AS 47.10.010(a)(2) suggests that the legislature recognized this.

Subsection (A) does not require that the child be in grave danger. Indeed, under some circumstances a runaway child might fare better outside the home than in it. The subsection specifies physical abandonment as an example of a deprivation of care sufficient to invoke the subsection, but does not require conduct that dramatic for CINA jurisdiction to be appropriate. The physical abandonment example does suggest, however, that the legislature was concerned about relatively serious failures of care, in which the ostensible caregiver has functionally, if not physically, abandoned the child.

Subsection (A) thus contemplates two alternative grounds for finding the child to be in need of aid, one attributable to the child who runs away or refuses care, and the other attributable to persons who should or could care for the child. Common to both grounds is the notion that there will be a fundamental deprivation of care. This notion is important. Notwithstanding past failures, CINA status under subsection (A) is not warranted unless the child will be fundamentally deprived of care in the future. A CINA adjudication therefore requires the court to predict as best it can whether the present failure of care is resolved, and whether the child will henceforth get the necessary care.

It necessarily follows that subsection (A) deals with the delivery and the deprivation of care. That conclusion is irreconcilable with this court's reading of subsection (A), because this court appears to think that willingness to provide care can substitute for delivery of care. Opinion at 11. To the contrary, subsection (A) is concerned with performance, not intentions.

The legislature provided a definition of "care" and "caring" to be applied in disputes under AS 47.10.010(a)(2)(A): "'care' or 'caring' under AS 47.10.010(a)(2)(A) . . . means to provide for the physical, emotional, mental, and social needs of the child." AS 47.10.990(1). We must apply this definition here. The court's contention -- that AS 47.10.010(a)(2)(A) merely requires that an eligible person be willing to care for the child regardless of ability to provide care successfully -- ignores both the express words of this definition, and its implications.

The court reads the clause "willing to provide care" as though willingness is independent of a performance standard, and simply turns on the willingness -- the good intentions -- of a would-be provider. That reading of the statute is conceptually erroneous. When the definition found in § 990(1) is inserted into AS 47.10.010(a)(2)(A), CINA jurisdiction exists when there is no eligible person who is presently providing for the child's needs and there is no other eligible person willing to provide for those needs. The phrases "caring" and "willing to provide care" are not alternatives; instead, they express two conditions which must both exist for CINA jurisdiction. Jurisdiction exists if the child's needs (1) are not currently being met (no one is now "caring" for the child), and (2) will not be met by other eligible persons (no one is "willing to provide care" in the future). Subsection (A) does not make good intentions a substitute for good care. Mere "willingness" is not an acceptable alternative to "caring," and the legislature did not intend it to be. A would-be provider who is unable to provide care does not have the willingness subsection (A) contemplates. The overriding concern expressed in AS 47.10.010(a)(2), including subsection (A), is the child's receipt of care. Thus, the "willingness" which the statute demands must be accompanied with the ability to provide care successfully.

The court interprets the clause "caring or willing to provide care" as though "caring" and "willing" are parallel alternatives. That interpretation ignores the evil addressed by subsection (A), the deprivation of care. It also overlooks the

legislature's scheme, that a child is in need of aid if there is a present failure of care, and if care will not be provided by an eligible person in the future. The word "willing" in the clause "willing to provide care" must be understood in the context of CINA disputes. Such cases arise because the present custodian has failed to deliver the necessary care; nonetheless, the child is not in need of aid if some other eligible person stands ready to deliver that care in the future. The element of "willingness" simply conveys the other person's commitment to deliver care.

A mere expression of good intent is insufficient if the care will not in fact be provided. The person who is well-meaning, but hopelessly incapable, may be "willing" in the broadest sense, but is not "willing to provide care" in the sense required by subsection (A). The clause "willing to provide care" is intended to guarantee that care will be delivered in the future, and the inability of the prospective caregiver is just as relevant to the adjudication as the present ability of the current custodian is.

The structure and purpose of AS 47.10.010(a)(2) confirm this reading. In each of its subsections, AS 47.10.010(a)(2) invites inquiry into whether a child's "physical, emotional, mental, and social needs" are actually being met. These subsections contain objective performance standards[2] because good intentions alone do not ensure that a child's "physical, emotional,

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[2] The other jurisdictional bases contemplated by subsection (A) and in subsections (B) through (F) concern the quality of care the child actually receives or is likely to receive.

mental, and social needs" are satisfied. Thus the structure and purpose of AS 47.10.010(a)(2) preclude a conclusion that the legislature intended to withhold CINA jurisdiction when a parent has good intentions, but is responsible for conditions that endanger a child.

Furthermore, the legislature could not have intended that a person who is unable to care is "willing to provide care." Consider a parent whose fundamental lack of mental capacity results in an inability to meet the child's normal needs, and thus in a lack of "caring" as that word is used in subsection (A). If the court were correct, that parent could defeat CINA jurisdiction simply by professing that she/he is "willing" to provide care despite her/his demonstrated inability to do so. The child would then return to the parent, whose inability would again be demonstrated, again placing the child in jeopardy. Assuming the conditions created by the parent then put the child in substantial danger, DHSS would again try to intervene to protect the child. Either the superior court would find CINA jurisdiction to protect the child (possibly under subsection (A) on an abandonment theory or under subsection (C) if the harm were "imminent"), or the willing parent could again defeat jurisdiction at continuing risk to the child. The legislature could not have intended the latter result, and the former is an exercise in judicial circuity that needlessly exposes the child to harm.

Likewise, consider the example of a relative who professes a willingness to care for the child. According to this

court, the superior court could not assert jurisdiction over the child, regardless of the relative's proven inability to provide care in the future. However, if the relative took custody and subsequently failed to "provide for the physical, emotional, mental, and social needs of the child," the relative would not be "caring" for the child under subsection (A). The superior court could then assert CINA jurisdiction (unless, of course, some other well-meaning but incapable relative expressed a willingness to provide care). It makes more sense to allow the court to consider whether the parent or relative is able to provide care before he or she obtains custody on the sole basis of professed willingness to provide care. It makes no sense to deny CINA jurisdiction where an eligible adult is willing -- but indisputably unable -- to provide care if the court will have to take jurisdiction once the well-meaning but incapable custodian inevitably creates conditions which jeopardize the child.[3]

The court should consequently hold that a trial court may consider relevant the would-be custodian's ability to care in determining whether a child is in need of aid under AS 47.10.010(a)(2)(A).

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[3] The specification of "physical abandonment" in subsection (A) does not suggest it is the only circumstance in which there is no eligible person caring or willing to provide care for the child. Subsection (A) uses the word "including" to introduce physical abandonment as one such circumstance. According to Webster's Third New International Dictionary 1142 (1969), "include" means "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate."

The court first reasons that this interpretation of subsection (A) would permit CINA adjudications based on parenting deficiencies "much less severe" than those covered under subsections (B) through (F). Opinion at 11, 13-14.

This reason is unpersuasive. It erroneously assumes that, in the eyes of the legislature, the evil addressed in subsection (A) is inherently less severe than those evils addressed in subsections (B) through (F). The legislature made subsection (A) an independent basis for asserting CINA jurisdiction. It did not require that the child be in imminent danger for adjudication under subsection (A). This court fails to recognize that the legislature considered the failure to provide care for the child to be an evil just as deserving of intervention as those hazards addressed in subsections (B) through (F). The court thus errs in assuming the legislature did not intend the ostensibly "much less severe" deficiency of failure of care to be the basis for intervention.[4]

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[4] Although the hazards specifically addressed in subsections (B) through (F) might at first glance appear substantially more severe, and therefore more deserving of legislative attention and DFYS intervention than the failure of care addressed in subsection (A), the court's assumption that this is so puts more reliance on labels than on the words of the statute. It also reflects a policy decision which appears to have been made by the legislature, and which is beyond our province to alter. Further, I am not convinced that a failure of care for children is any less damaging to their long-term well-being than some of the hazards which are the subject of subsections (B) through (F). See generally Oliver C.S. Tzeng & Jamia Jacobsen, Sourcebook for Child Abuse and Neglect 53-77 (1988); Henry B. Biller & Richard S. Solomon, Child Maltreatment and Paternal Deprivation 14-20 (1986); Harold P. Martin, Abused Children - What Happens Eventually, in Child Abuse: A Community Concern 154-69 (continued...)

The second reason announced by the court is also unpersuasive. The court finds inability to care to be irrelevant to subsection (A) because subsections (B) through (F) contain specific standards for CINA jurisdiction based on inability to care. Opinion at 12, 14-15. That subsections (B) through (F) arguably set "clear, specific standards" for CINA adjudications does not mean that the court can ignore subsection (A). I do not see the dichotomy the court perceives between subsection (A) and subsections (B) through (F). Just because acts or omissions of parents or caregivers may fall within subsections (B) through (F) does not mean that inability to care is irrelevant to subsection (A). Further, I do not agree that subsection (A) is without standards. "Care" and "caring" are defined by AS 47.10.990(1), and the concepts addressed in subsection (A) are readily understood.

The third reason, the danger subsection (A) would make the other subsections "virtually superfluous," is easily avoided by recognizing that subsection (A) is directed at failure of care. Subsection (A) encompasses that specific evil, as distinguished from the acute hazards addressed by the other subsections. The situations addressed in subsection (A) are not necessarily the same as those addressed in subsections (B) through (F). More than one subsection may apply in any given case, but that does not mean the

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[4](...continued)
(Kim Oates ed., 1984); Vincent J. Fontana & Douglas J. Besharov, The Maltreated Child (1979). Therefore, not only is the court potentially making value judgments reserved for the legislature, it may well be reaching erroneous conclusions.

47.10.010(a)(2)(A). For jurisdiction to be found under subsection (A), the inability to care would have to lead to a harm or a threat of harm of a gravity comparable to that presented by the circumstances specified in other parts of AS 47.10.010(a)(2).[5] See Rosenberg v. Smidt, 727 P.2d 778, 786 n.18 (Alaska 1986) (applying the principle of statutory construction that "the meaning of doubtful words may be determined by reference to their association with other associated words and phrases").[6] That comparison, of

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[5] Subsection (A) itself specifies three different circumstances in which such a harm is present or threatened: the child is habitually absent from the home, the child refuses to accept available care, and the child is physically abandoned. AS 47.10.010(a)(2)(A). As discussed above, "physical abandonment" is not the exclusive basis for determining under subsection (A) that there is no eligible person "caring or willing to provide care" to the child. See supra, note 8. For example, a parent who remains in the child's immediate vicinity may not have physically abandoned the child, but may have through inability or disinterest so ignored the child's needs as to have constructively abandoned the child.

The other circumstances specified by AS 47.10.010(a)(2) in which such harm is present or threatened are: the child's not having received necessary medical treatment because of a parent's knowing failure to provide it (subsection (B)); the child's having suffered, or facing an imminent and substantial risk of suffering, substantial physical harm as a result of a parent's acts or omission (subsection (C)); the child's having been, or being in imminent and substantial danger of being, sexually abused by a parent or as a result of parental neglect or facilitation of the abuse (subsection (D)); the child's committing delinquent acts as a result of parental pressure, guidance, or influence (subsection (E)); and the child's having suffered substantial physical abuse or neglect as a result of conditions created by the parent (subsection (F)).

[6] Requiring that the inability to care present a harm or threat of harm as serious as those reflected in the other circumstances enumerated in the subsections of AS 47.10.010(a)(2) ensures that those subsections are not rendered superfluous. See Journey v. State, 895 P.2d 955, 959 n.10 (Alaska 1995) (explaining that "as a general rule, statute should be construed so that effect is given to all its provisions and no part is inoperative or superfluous, void or insignificant") (citation omitted).

course, requires recognition that a failure of care under subsection (A) could be sufficiently grave in the eyes of the legislature to justify intervention as a matter of social policy.

According to the court, the State's reading of subsection (A) in this case would permit the State to assume custody over "any child who had needs the child's parents could not meet." Opinion at 13. As noted above, I agree that such a reading would be too broad. That does not mean, however, that this court's reading is correct.

The court argues that the better way to interpret subsection (A) is "in accordance with its plain intent . . . ." Opinion at 14. I agree. I read subsection (A), however, to express a different intent.

Because the court misinterprets subsection (A), it erroneously concludes that inability is irrelevant to a CINA adjudication under that subsection. To repeat, the inability to care is relevant to both conditions which have to be met under subsection (A) in a case like this. There must first be no parent or other eligible caregiver who is in fact "caring" at present for the child, i.e., there must be a present failure of care. Second, there must be no other parent or caregiver "willing to provide care" if the child's custody were to be changed to some other eligible caregiver. The court erroneously reads "caring" and "willing to provide care" to be two separate alternatives. It reads willingness as a substitute for ability. Its reading fails to distinguish between the status quo and the future. Assuming the

other subsections are rendered superfluous or that the legislature intended the reading this court now imposes on the statute.

Any possible superfluity is avoided by limiting subsection (A) in a manner consistent with its terms. The legislature could not have expected that a mere best interests analysis would establish CINA status under subsection (A). Further, the specific circumstances noted in subsection (A) (i.e., running away, physical abandonment) illustrate the magnitude of the sort of failure of care the legislature intended to address. Further, the reference to "available care" implies that the legislature did not intend to require perfect care. This court previously gave content to subsection (A) and limited its application by appropriately rejecting the equivalent of a best interest analysis during a CINA adjudication. F.T. v. State, 862 P.2d 857 (Alaska 1993). In that case, the State argued that a father could not have been "willing to provide care" because he was unable to meet his child's special needs due to the child's severely emotionally disturbed condition. Id. at 860-61. I agree with that result. In those circumstances, no parent could be expected to "cure" the child or meet other than the child's most basic needs. The holding in F.T. appropriately limits CINA adjudications under subsection (A). This limitation prevents subsection (A) from swallowing up the other subsections.

Unfortunately, in my view, the court in F.T. then proceeded to expand on this narrow and appropriate holding. It rejected an argument that inability to care could support a finding

that a child is in need of aid under AS 47.10.010(a)(2)(A). It stated, "AS 47.10.010(a)(2)(A) would support a CINA adjudication only if [the child] had no parent, guardian, custodian, or relative caring or willing to provide care. Specifically, the parties' [sic] dispute whether [the father] was willing to provide care." Id. at 861. DHSS argued "that [the father] could not have been willing to provide care because he was unable to meet [the child's] needs." Id. This court rejected that argument and DHSS's "conclusion that if a child has needs a parent cannot meet, then the parent cannot be 'willing to provide care' for that child." Id. The court stated that

> the State's conflation of willingness to care and ability to satisfy needs leads to absurd conclusions. By the State's logic, the parent of any child with an incurable disease is not willing to care for that child, since by definition the parent will not be able to meet the child's medical need for a cure.

Id. The F.T. opinion reasoned that inability to care was insufficient to support a finding that a child is in need of aid under subsection (A). The question actually presented there was, in my view, substantially narrower than this court's broad language would suggest.

The actual holding in F.T. is nonetheless correct, and instructive. The ability of a parent or relative to provide care should be compared to a normal level of parental fitness. For example, if no person could successfully provide the care required to cure an incurably-ill child, general parental fitness would nonetheless be sufficient to defeat jurisdiction under AS

current caregiver is presently failing to provide the necessary care, a CINA adjudication is nonetheless inappropriate if some other eligible caregiver is able to provide care in the future. Willingness alone is no substitute for an ability to perform. The court looks at willingness in isolation, and fails to give appropriate weight to the clause "to provide care."

For these reasons, this court should not overrule its prior opinions in which it found inability to provide care to be relevant to a subsection (A) inquiry. See A.M. v. State, 891 P.2d 815, 824 (Alaska 1995); In re T.W.R., 887 P.2d 941, 945 (Alaska 1994); In re J.L.F., 828 P.2d 166, 170 (Alaska 1992). I would consequently disavow the language in F.T., 860 P.2d at 860, by which the court rejected an argument that inability to care could support a finding that a child was CINA under subsection (A). I would not overrule the explicit holding in F.T.

In the case now before us, the record does not warrant a finding that S.A. and D.A. are CINA under AS 47.10.010(a)(2)(A), because the facts do not justify a conclusion that N.A. was, at the time of the trial, unable or unwilling to provide the kind of care contemplated under subsection (A). I consequently agree that the termination of N.A.'s parental rights should be reversed.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HB339

Revision Date:
Title: Termination of Parental Rights
Sponsor: Representative Rokeberg
Requestor: House (HES)

Dept. Affected: Health and Social Services
BRU: Family and Youth Services
Component: DFYS Central Office
COMPONENT SERIAL NO. 259
See also (SN#):

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY96) cost: $0.0

ANALYSIS: (Attach a separate page if necessary)

There would be no fiscal impact to the Division if this bill were to become law.

1/19/96 Prepared by: for L. Diane Worley, Director — Phone: 465-3191
Division: Family & Youth Services — Date: 01/19/96

Approved by Commissioner: Karen Perdue, Commissioner — Date: 1/22/96
Agency: Department of Health & Social Services

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January 23, 1996

Mr. Norm Rokeberg
716 W. 4th Avenue
Anchorage, AK 99501

via facsimile: 465-2040

Re: House Bill No. 339

Dear Representative Rokeberg:

I want to thank you sincerely on behalf of the children, parents, and families that you will create through the introduction of House Bill No. 339. As an attorney who practices family law extensively, I have seen too many parents that desperately wanted to adopt a child when the child was prevented from being adopted by the potential future parenting of a birthparent in jail for a long term sentence. I sincerely appreciate the fact that you heard the Alaska Supreme Court's plea to provide our courts with a little more flexibility in approving an adoption when the birthparent is likely to be incarcerated for the minority of the child.

It is tragic watching children suffer for their parent's crime. Children need a real sense of family and the security of belonging to a family unit. Your bill, House Bill No. 339, will undoubtedly provide a more solid foundation for these children who had been forgotten for so many years.

I hope that the Legislature will support House Bill No. 339 and pass it quickly.

Thank you.

Sincerely,

Kathleen A. Weeks

KAW/jmh

LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM January 26, 1996

SUBJECT: Termination of parental rights of incarcerated parents (Work Order No. 9-LS1124\C)

TO: Representative Norman Rokeberg
Attn: Mia Costello

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft CS for HB 339.

I have moved the reference to "incarceration" up to line 5, and I have rewritten the other paragraphs of the original version of HB 339. This re-write is intended to clarify the following points:

(1) incarceration is the "parental conduct" causing the child to be a child in need of aid, not the criminal conduct that may have led to the incarceration;

(2) incarceration for a significant period is the parental conduct that "is likely to continue"; there is no requirement that the court find that the prior crime may again be committed; and

(3) whether the incarceration includes a "significant" portion of the child's minority is to be determined based on the child's age, the child's need for care and control by an adult, and how much of the parent's incarceration will occur during the child's minority.

I hope this draft suits your purposes. Please let me know if you need additional assistance on this matter.

TML:klb:glc
96-035.klb

Enclosure

9-LS1124\C
Lauterbach
1/26/96

CS FOR HOUSE BILL NO. 339( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, Mulder

A BILL

FOR AN ACT ENTITLED

"An Act relating to the termination of parental rights of incarcerated parents."

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

* Section 1. AS 47.10.080 is amended by adding a new subsection to read:

(o) For purposes of terminating a parent's parental rights under the standards in (c)(3) of this section, the court may determine that incarceration of the parent is sufficient grounds for determining that a minor is a child in need of aid under AS 47.10.010(a)(2)(A) as a result of parental conduct and that the conduct is likely to continue if the court finds, based on clear and convincing evidence, that the

(1) period of incarceration that the parent is scheduled to serve during the child's minority is significant considering the child's age and the child's need for an adult's care and control; and

(2) parent has failed to make adequate provisions for care of the child during the period of incarceration that will be during the child's minority.

Peggy Thomas
9208 Long Run Drive
Juneau, Alaska 99801
January 19, 1996

The Honorable Norman Rokeberg
Alaska State Legislature
State Capitol, Room 110
Juneau, Alaska 99811

Re: House Bill No. 339
An act relating to the termination of parental rights of incarcerated parents

Dear Representative Rokeberg:

I am writing in support of HB 339. The case appealed to the supreme court in A.M. v. State, 891 P.2d 815, 822 (Alaska 1995), are the children I have presently in my care. I am a foster parent and the two children, Samantha and Marc, will have been with me five years on February 22nd.

The children's mother relinquished her parental rights with the understanding that I would adopt the children and the father's rights be terminated.

Marc and Samantha were taken into custody at age 3 and 18 months, respectively, because their father, Anthony Mancini, was arrested for Theft in the Second Degree and Sexual Abuse of a Minor in the Second Degree. Mr. Mancini was subsequently convicted of those charges. He received 10 years incarceration with one year suspended for a total of nine years. In jail time that means ne will have served five years. He is due to be released May 14th of this year.

SUPPORT

Mr. Mancini's parental rights were terminated by Judge Carpeneti. Mr. Mancini appealed. The supreme court remanded this case March 10, 1995, to Judge Carpeneti and we are again awaiting his decision as to termination. Justice Compton of the Alaska Supreme Court has twice urged the legislature to "define more clearly the effect of incarceration on parental rights." (A.M. v. State, pp. 29-30 of the opinion)

Mr. Mancini has an extensive juvenile as well as adult criminal history. He has no relatives in the state of Alaska. In July 1990 he placed the children in state care (because he had no one to care for the children) while he served two weekends of jail time. His criminal acts have been willful and seem likely to continue.

These children have grown up in my home; they have become a part of my family. They have been in limbo the five years while waiting for the courts to decide their fate. While the children have frequent contact with their mother and weekly court-ordered telephone contact with their father, they still have a need to belong to a family--permanently.

I urge you to support this bill to give the courts another option in deciding children-in-need-of-aid cases. This case seems to demonstrate perfectly the need for this legislation.

Sincerely,

Peggy Thomas

Attachments

(1) Supreme Court Opinion Nada A. v. State
(2) Supreme Court Opinion A.M. v. State
(3) First letter asking for sponsorship of legislation

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS

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Representative Norman Rokeberg

Sponsor Statement HB 339
"An act relating to the termination of parental rights of incarcerated parents"

This bill gives the courts the authority to consider incarceration in child custody cases dealing with termination of parental rights. Currently, the court does not have the statutory authority to do this. HB 339 will allow the courts to: look at a parent's imprisonment; whether the length of the prison term will include a significant portion of the child's minority; and to consider whether or not the parent has failed to make adequate provisions for care of the child during the prison term.

If a parent is in prison for 10 or 15 years and parental rights have not been terminated, the child can linger in a foster home for years, without any sense of permanency and belonging. This bill will let the courts look at the effect on the relationship when a parent is in prison and ultimately, give them a tool to make better custody decisions for children.

In order to terminate parental rights, the courts have the burden of proof of showing that the youth is a Child In Need of Aid (CINA) as a result of parental conduct, and that conduct is likely to continue to exist. Alaska Statute 47.10.010 says that the court may order the state to assume custody of a minor who is found to be a child in need of aid as a result of the child having no parent, guardian, custodian, or relative willing to provide care, including physical abandonment. "The destruction must be brought about by the acts of the parent, and in order to constitute abandonment, the acts of the parent must be willful." A.M. v. State of Alaska, 891 P.2d 815,822 (Alaska 1995). Being sent to prison does not, by itself, qualify as willful abandonment.

The courts have explicitly asked the legislature to amend the statutes to cover situations where parents are in prison. The first time was more than a decade ago in Nada A. v. State. Last year, Alaska Supreme Court Justice Compton again re-iterated his request for legislative relief in A.M. v. State of Alaska.

I urge you to support this bill as it will ultimately give the courts the ability to make better decisions for children.

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Juneau, Alaska 99801-2105

MEMORANDUM January 10, 1996

SUBJECT: Sectional Analysis for HB 339

TO: Representative Norman Rokeberg
Attn: Mia

FROM: Terri Lauterbach
Legislative Counsel

Your staff has asked for a sectional analysis of HB 339.

The bill is one section in length and provides as follows:

> For purposes of terminating parental rights under AS 47.10.080(c)(3), the court may determine that a minor is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct and that the conduct is likely to continue if there is no termination of parental rights if the court finds, based on clear and convincing evidence, that the
>
> (1) parent is incarcerated as the result of a voluntary act committed by the parent;
>
> (2) period of incarceration imposed includes a significant portion of the child's minority; and
>
> (3) parent has failed to make adequate provisions for care of the child during the period of incarceration.

If you have questions about this bill that are not answered by this sectional analysis, please let me know.

TML:pl
96-012.plm

SECTIONAL ANALYSIS

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MEMORANDUM April 25, 1995

SUBJECT: Termination of Parental Rights (Work Order No. 9LS-1124\A)

TO: Representative Norman Rokeberg
Attn: Mia

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft for discussion purposes relating to termination of parental rights when a parent is incarcerated. I have also enclosed excerpts from two court opinions on this subject, with highlighted portions indicating the court's wish for legislative guidance in this area. Please let me know if I can be of further assistance.

TML:glc
95-302.glc

Enclosure

TWO EXCERPTS FROM COURT OPINIONS - FROM LEGAL SERVICES

parent-child bond.

In sum, to the extent the record supports the conclusion that A.M.'s parent-child relationship has been destroyed, that destruction appears to have resulted from the fact of his incarceration. However, A.M.'s incarceration could not serve as the proper basis for a finding of destruction of the parent-child relationship, since it was not the conduct upon which the court relied in finding that A.M. had consciously disregarded his parental obligations.[8] Conversely, the conduct involved in A.M.'s conscious disregard of his parental obligations was not the conduct that "led to the destruction of the parent-child relationship."

The superior court's conclusion that A.M.'s disregard of his parental responsibilities led to the destruction of his parent-

---

[8] Indeed, A.M.'s incarceration is not the type of willful act upon which abandonment may be based. Nada A., 660 P.2d at 439. The State nevertheless invites us to hold that A.M. was incarcerated as a result of his voluntary acts, that his incarceration was a foreseeable consequence of his misconduct, that the inability to provide for his children resulting from A.M.'s incarceration is therefore a result of his voluntary conduct, and that, in this sense, A.M.'s parent-child relationship has been destroyed by his pre-incarceration disregard of his parental duties. In support of this theory, the State cites a number of cases that liken voluntary criminal acts to acts of abandonment. See, e.g., Huston v. Haggard, 475 S.W.2d 330, 333 (Tex. App. 1971); In re Dobbs, 531 P.2d 303 (Wash. App. 1975).

The State's theory is essentially the same theory addressed by Justice Compton's concurrence in Nada A., 660 P.2d at 441. The gist of Justice Compton's Nada A. concurrance, however, was that termination of parental rights under this theory was impermissible under the statutory framework then in existence. Justice Compton urged the legislature to amend Alaska law to allow termination under this theory. Id. The statutory framework in existence when Nada A. was decided remains essentially unchanged, despite the concurring opinion. We decline the State's invitation to adopt this theory in the absence of a statutory change.

[Excerpt from AM v. State (March 10, 995]

COMPTON, Justice, with whom RABINOWITZ, Justice, joins, concurring.

Once again the textual fabric of AS 47.10.080 confines us to an uncomfortable fit. See Nada A. v. State, 660 P.2d 436, 441-43 (Alaska 1983) (Compton, J., concurring). A.M. is serving a prison term of almost ten years for sexually abusing his stepdaughter. However, we are unable to affirm the termination of his parental rights. I agree with our disposition of the legal issues in this case because I do not believe the wording of the statutes give us any choice. Further, the doctrine of stare decisis commands that we follow statutory interpretation established by precedent. I write separately to express my continuing belief that a legislative response to this issue is appropriate, and also that it is now long overdue.

When we, as a society, terminate parental rights, we sever the fundamentally important relationship between parent and child. In our society this relationship is highly valued, yet at times it must be severed. We sever it only when the health and safety of the child mandate that we do so. The balancing of the parental relationship against the health and safety of the child is a complex decision replete with social policy choices. However, the task of determining desirable social policy in the sphere of preservation or termination of the parent-child relationship is a task which courts are not equipped to undertake. It is not a sphere in which the judiciary should engage in social engineering.

In Nada A., I urged the Alaska Legislature to define more

clearly the effect of incarceration on parental rights. Id. at 441. I do so again. What is needed is an informed social policy. The fact that difficult social policy choices must be made is not a justification for ignoring the issues from which the difficulties have sprung. I think it unfortunate that the legislature continues to ignore the effect of a parent's incarceration on a child and on the continuation of the parent-child relationship.

In this case, it would have been preferable for the court to re-instruct the jury. Its failure to do so, however, did not so prejudice Drott as to constitute reversible error. Therefore, we affirm the superior court's ruling on the offered instruction.

F. Test Performed by Yukon

[13] Shortly before trial, Rohloff (Yukon's mechanic), Sundborg (Yukon's expert mechanic) and Yukon's attorney conducted experiments on the brake system of the same crane involved in Gordon's accident. Drott attempted to introduce evidence of the experiments at trial. The trial court determined that the evidence was relevant, but that it was inadmissible because it was cumulative.

Drott argues that the evidence should have been admitted. The purpose of the proffered testimony was not to have the jury draw conclusions about the particular crane, but to show the capabilities of Drott 250 cranes in general. According to Drott, the results of the experiments showed that the brake system, if properly maintained, was not defective. Drott argues that having an adverse party perform the tests merely made the results dramatic and probative.

> Alaska Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As Gordon argues, there was a danger of unfair prejudice from the brake test evidence because the testing procedure was slipshod and no written records were kept. Because the tests were performed on the same crane that was involved in Gordon's accident, there was also a danger that the issues would be confused, or the jury would be misled by the test results. Further, as the trial court found, the evidence was cumulative. In light of these considerations, we hold that the trial court did not abuse its discretion in deciding that the probative value of Yukon's experiment results was outweighed by the possibility of resulting jury prejudice and undue trial delay.

The judgment below is AFFIRMED.

NADA A., Appellant and Cross-Appellee,

v.

STATE of Alaska, Appellee and Cross-Appellant.

Nos. 6546, 6693.

Supreme Court of Alaska.

Feb. 25, 1983.

Natural mother appealed from order of the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., which terminated parental rights and stayed cross appeal. The Supreme Court, Connor, J., held that: (1) evidence sustained finding of abandonment; (2) trial court applied proper test defining abandonment; but (3) evidence did not support finding that the act of abandonment was likely to continue or be repeated; and (4) there was no denial of equal protection to child in permitting mother to seek reconsideration of termination order prior to final adoption decree.

Reversed.

Compton, J., filed a concurring opinion.

1. Infants ⇐157

Test for abandonment involves consideration of whether the parent's conduct has evidenced a disregard for the parental obligations and whether that disregard has led to a destruction of the parent-child relationship.

2. Infants ⇐180

Evidence that mother had fled from city, leaving child with a babysitter, and evidence of eight-month period during which mother lived in a different city than the child sustained finding of abandonment.

3. Infants ⇐210

Record demonstrated that court did not consider incarceration of mother in determining issue of abandonment of child by mother.

4. Motions ⇐62

When written findings of fact conflict with an oral statement made by judge, written findings are controlling.

5. Infants ⇐210

Record demonstrated that trial court considered many facts, in addition to best interests of the child, in determining to terminate parental rights.

6. Infants ⇐210

Trial court's finding that mother was likely to continue to demonstrate a conscious disregard of the obligation owed by parent to a child even after her release from incarceration because she suffered from an impulsive personality disorder was insufficient to support finding, required for termination of parental rights, that the parental conduct warranting termination was likely to continue. AS 47.10.080(c)(3).

7. Infants ⇐155

Mother's impulsive personality disorder was not, itself, conduct and thus not a ground for termination of parental rights. AS 47.10.080(c)(3).

8. Infants ⇐157

Where mother's abandonment of child was taken under stressful and unique circumstances, involving her imminent incarceration for killing the child's father, it would be unjustified to infer likely future abandonment from that incident. AS 47.10.080(c)(3).

9. Constitutional Law ⇐82(10)

Child's right to a permanent, adequate home is not fundamental and any difference between treatment of children whose natural parents seek reconsideration of termination order and treatment of other children whose parents' rights have been terminated need only satisfy reasonable basis test.

10. Action ⇐68

Good cause required for natural parent to stay adoption proceedings pending reconsideration or order terminating parental rights is a showing that it would be in the best interests of the child to resume living with the natural parents because they have sufficiently rehabilitated themselves to provide proper guidance and care for the child.

11. Constitutional Law ⇐225.1

Review of termination orders by parents who assert that they can now take care of the child properly does not deny equal protection to children awaiting adoption.

John Hagey, Asst. Public Defender, Fairbanks, Dana Fabe, Public Defender, Anchorage, for appellant and cross-appellee.

D. Rebecca Snow, Asst. Atty. Gen., Fairbanks, Wilson L. Condon, Atty. Gen., Juneau, for appellee and cross-appellant.

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

OPINION

CONNOR, Justice.

Nada A. appeals the termination of her parental rights to her son, O.A. At the conclusion of the termination hearing in superior court, the judge found that O.A. was a child in need of aid and that his mother's disregard of her parental obligations was likely to continue. The court ordered the termination of her parental rights, but further ordered that in the event of a change in circumstances, Nada could apply for a reconsideration of the termination at any time before O.A. is adopted. The state cross-appeals this order permitting a reconsideration of the termination.

Nada gave birth to O.A. on June 29, 1978. Her husband, Mohammed, repeatedly battered both his wife and child. In January, 1979, shortly after one of these incidents, Nada shot and killed Mohammed. She was then 17 years old. After the shooting, Nada left Fairbanks with O.A. and went to stay with her sister, Marie Gee, in Washington State. A few days after her arrival, Nada was arrested and charged with first degree murder. She was then incarcerated in a juvenile facility in Washington until she reached age 18. With the exception of a few months spent in temporary foster care, O.A. lived with Marie while Nada was incarcerated. Marie brought O.A. to the prison facility twice weekly for visits with Nada.

After entering a negotiated plea to the charge of manslaughter in Fairbanks, Nada was sentenced in July of 1980. Marie brought O.A. with her to Alaska for the sentencing. After sentencing, Nada was released on appellate bond and O.A. rejoined her.

On October 15, 1980, Nada took O.A. to the babysitter's, packed a few clothes and went to Anchorage to escape mounting personal pressures. Nada did not return to Fairbanks because she feared that she would be put in jail and would be unable to get O.A. back.

Emergency custody of O.A. was assumed by the Division of Family and Youth Services [DFYS] on October 16, 1980. From the last week in October of 1980 until the present, O.A. has remained in the foster care of the L. family.

Nada remained in Anchorage until June 27, 1981, when she voluntarily turned herself in to the authorities. After she was transported back to Fairbanks, Nada tried to make contact with O.A. through the DFYS. Her request was refused, because the DFYS had decided to seek termination of her parental rights. On July 1, 1981, a petition for termination of parental rights was filed by the state. The court found O.A. to be a child in need of aid as a result of physical abandonment under AS 47.10.010(a)(2)(A). It then had authority under AS 47.10.080(c)(3) to terminate Nada's parental rights upon a showing, by clear and convincing evidence, that parental conduct leading to the "child in need of aid" determination was likely to continue.[1] The order terminating Nada A.'s parental rights was signed on January 11, 1982. This appeal followed. Adoption proceedings have been stayed pending disposition of the appeal.

I. ABANDONMENT

Nada argues that the trial court erred in its finding of "physical abandonment." She claims that the trial court applied an incorrect legal standard in reaching this determination. Specifically, Nada alleges that the court relied on the subjective viewpoint of the child rather than on an objective standard. She contends that a proper application of the abandonment test would result in a finding that her conduct did not evidence a disregard of her parental obligations.

In *D.M. v. State*, 515 P.2d 1234 (Alaska 1973), in rejecting the application of a subjective standard to measure a parent's intention to abandon a child, we stated:

> "Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well."

1. AS 47.10.080(c)(3) provides:

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

515 P.2d at 1236–37. We have followed this standard consistently. *See In re E.J.(T.)*, 557 P.2d 1128, 1131 (Alaska 1976); *In re B.J.*, 530 P.2d 747, 748–49 (Alaska 1975); *In re Adoption of V.M.C.*, 528 P.2d 788, 793 (Alaska 1974); *In re Adoption of A.J.N.*, 525 P.2d 520, 523 (Alaska 1974); *D.M. v. State*, 515 P.2d 1234, 1236–37 (Alaska 1973). We agree with the state's view that the court properly found the existence of a physical abandonment under the objective standard.

[1, 2] The test for abandonment has two prongs: (1) has the parent's conduct evidenced a disregard for his or her parental obligations, and (2) has that disregard led to the destruction of the parent-child relationship. *Adoption of V.M.C.*, 528 P.2d 788, 793 (Alaska 1974). A review of the record indicates that the court had before it sufficient objective evidence to satisfy the first prong of the abandonment test. The testimony about how Nada had fled from Fairbanks leaving O.A. with a babysitter provides sufficient objective evidence indicating disregard of parental obligations. In addition, at the hearing, the trial judge specifically referred to the eight month period of separation during which Nada lived in Anchorage as "for all practical purposes destr[oying] the parent/child relationship." Therefore, the trial court properly applied the legal standard and its finding of abandonment should not be reversed.

Nada also argues that the trial court erred by considering her incarceration as abandonment. She contends that in order to constitute abandonment, the acts of the parent must be willful. Yet, incarceration was beyond her control and, she claims, actually resulted from her attempt to protect O.A. from his father.

[3, 4] We have said that "[i]n order to constitute abandonment, the acts of the parent must be willful." *In re B.J.*, 530 P.2d 747, 750 n. 12 (Alaska 1975). The trial judge did orally state that he considered involuntary incarceration to constitute abandonment, but the written findings of fact, which were submitted by the state and signed by the court, referred to the voluntary absence from October of 1980 to June of 1981 as the relevant conscious disregard of parental obligations.[2] Consequently, we find no reversible error.

II. BEST INTERESTS OF THE CHILD

Nada argues that the trial court misinterpreted our previous decisions and incorrectly used the best interests of the child as the sole criterion for its decision to terminate her parental rights. She claims that the best interests of the child should be considered only after it has been shown that there is sufficient parental misconduct to justify termination.

[5] The state argues that the best interests of the child are a significant, but not dispositive, consideration at each step in determining whether to terminate parental rights.[3] It claims that the trial court's actions were consistent with the approach we have repeatedly espoused that the best interests of the child are to be considered *only* after a finding of parental unfitness or a determination that the first prong of the abandonment test has been satisfied. *See, e.g., In re Adoption of K.S.*, 543 P.2d 1191, 1195 (Alaska 1975); *In re Adoption of V.M.C.*, 528 P.2d 788, 793 (Alaska 1974); *In re Adoption of A.J.N.*, 525 P.2d 520, 523 (Alaska 1974). While the best interests of the child become relevant at some point, there first must be a showing of parental

2. When written findings of fact conflict with an oral statement made by a judge, the written findings are controlling. *Ronne v. Ronne*, 568 P.2d 1021, 1023 n. 5 (Alaska 1977). *See also Williams v. City of Valdez*, 603 P.2d 483, 492 n. 30 (Alaska 1979).

3. AS 47.10.082 reads:
"In making its dispositional order under AS 47.10.080(b) the court shall consider the best interests of the child and public, and in making its dispositional order under AS 47.10.060(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 his best interests under AS 47.10.010–47.10.142."

conduct sufficient to justify termination. *Id.* The trial court's findings clearly show that it was aware that several factors in addition to best interest enter into a termination order. In deciding to terminate Nada's parental rights, the trial court followed the correct procedure. It did not merely compare the merits of the home to be provided by Nada with that of the L. family.

III. TRIAL COURT'S FINDINGS

Nada argues that the court's finding that her disregard of her parental obligation was likely to continue in the future was clearly erroneous.

AS 47.10.080(c)(3) requires as prerequisites to termination of parental rights that first, the child is a child in need of aid "as a result of parental conduct," and second, clear and convincing evidence that "the parental conduct is likely to continue to exist." The parental conduct relied on by the trial judge in determining that O.A. was a child in need of aid was:

> "That on October 15, 1981, N.A. left her child, O.A., with a babysitter and did not return, thereby exhibiting a conscious disregard for the needs and welfare of her child and of her parental obligations to O.A."

[6] According to our reading of the statute, there must then be a showing by clear and convincing evidence that this same conduct is likely to continue. The findings below are deficient in this regard. The only relevant finding is:

> "That N.A. is likely to continue to demonstrate a conscious disregard of the obligation owed by a parent to a child even after her release from incarceration because she suffers from an impulsive personality disorder."

The only testimony upon which the court could have relied in making this finding was rendered by Dr. Rothrock, a psychiatrist who had interviewed Nada only once for one hour, admitted he knew nothing about her parenting abilities and qualified his prognosis with the statement that he could "only answer that question in generalities, because ... [he had] not had any extended contact with [Nada A.]."

Dr. Rothrock's opinion was not shared by Robert Dunn, a psychological counselor, who offered opposing expert testimony that N.A. had a high probability of success in controlling her problem, nor by the social workers and others who knew Nada well and felt that she had made considerable progress through counseling. Evidence favorable to Nada also included her own testimony as to her willingness to accept help in dealing with her personal problems and in learning to be a better mother.

[7] The impulsive personality disorder itself is not conduct and thus, not a ground for termination.

[8] Although Nada did abandon O.A. once before, that action was taken under very stressful and unique circumstances. It would, therefore, be unjustified to infer a likelihood of future abandonment from this isolated incident.

In view of the high standard of "clear and convincing evidence" required on the issue of the likelihood that past conduct will continue, we are left "with a definite and firm conviction on the entire record that a mistake has been made, although there may be evidence to support the finding." *In re S.D., Jr. et al,* 549 P.2d 1190, 1195 n. 10 (Alaska 1976).[4]

4. Nada also argues that the trial court erred by not considering the effect of the actions of the DFYS on Nada's exercise of her parental rights. She argues that the DFYS frustrated her efforts to communicate with O.A. while it encouraged the foster parents to adopt him, and thus, failed in its obligation to "make reasonable attempts, whenever possible, to preserve and strengthen the family ties." *E.A. v. State,* 623 P.2d 1210, 1213 (Alaska 1981) (footnote omitted), before terminating her parental rights. Nada's argument is without merit because it focuses on the wrong time frame. Nada was receiving a wide range of social services at the time she abandoned O.A. There is little the DFYS could have added to these services. During the relevant period prior to filing a petition to have Nada's rights terminated, the state did try unsuccessfully to locate her, but could do little to strengthen her family ties while she was gone.

IV. CROSS-APPEAL

[9–11] In its cross-appeal, the state challenges the trial court's giving Nada leave to seek reconsideration of its termination order until the entry of a final adoption decree. It claims that this order represents a violation of O.A.'s equal protection rights. The state claims that the issuance of a termination order overcomes the statutory presumption in favor of a natural parent's fitness and urges that *Rita T. v. State*, 623 P.2d 344 (Alaska 1981), which undermines finality by resurrecting this preference, be modified or overruled so that the best interests of the child (as determined in a neutral adoption process), rather than parental rehabilitation alone, will be the relevant criterion.[5] In *Rita T.*, we interpreted AS 47.10.080(f) to permit any natural parent to stay adoption proceedings upon a showing of good cause. "Good cause" was defined as a showing that "it would be in the best interests of the child to resume living with [the parents] because they have sufficiently rehabilitated themselves so that they can provide proper guidance and care for the child." 623 P.2d at 347. We adhere to this position. Termination of parental rights is a drastic measure resulting in severance of all legal ties between the child and parent. The revocability of termination orders up until the time of adoption is a necessary compromise between the desire for finality and the desire to avoid unnecessary interference by the state in the natural parent-child relationship. *Rita T.* recognizes, and seeks to accommodate, the inherent potential for fallibility in judicial determinations based upon predictions of human behavior with respect to the likelihood of continued parental misconduct. The subsequent review of termination orders permitted by that decision cannot be said to deny equal protection to O.A. and to other children similarly situated who are awaiting adoption.

In conclusion, we find, first, that the record contains insufficient evidence to support the termination of Nada A.'s parental rights. Second, the preservation of her right to obtain reconsideration upon a showing of good cause prior to the adoption of O.A., challenged in the cross-appeal, was proper.

The decision below is REVERSED.

COMPTON, Justice, concurring.

I concur in the disposition of this appeal, but write separately to express my opinion that the legislature should amend AS 47.10.080(c)(3) so that a parent's incarceration may be considered when determining whether to terminate parental rights.

AS 47.10.080(c)(3) specifies that parental rights may be terminated only if there is a showing "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." It seems obvious to me that a child may be in need of aid when the only custodial parent engages in conduct that results in incarceration. I would therefore conclude that AS 47.10.080(c)(3) permits the superior court to consider the parent's incarceration when determining whether the child is in need of aid; *e.g.*, whether the parent has abandoned the child.

AS 47.10.080(c)(3) also requires, however, a showing "by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights." Although incarceration may well be likely to continue for a substantial period of time, and the child will

After she returned, the agency merely implemented its sound desire to avoid disruptive contacts while a judicial resolution of the matter was pending. The cases of agency misconduct cited by Nada are inapposite because in each of those situations the location of the parent was known. We also find Nada's claim of discriminatory enforcement of the termination statute to be without merit.

5. The state bases its constitutional argument on O.A.'s right to a permanent, adequate home. *See, In re S.D., Jr.*, 549 P.2d 1190, 1201 (Alaska 1976). Since this right has not been recognized as "fundamental", any difference between the treatment of children in O.A.'s position whose natural parents seek reconsideration and that of other children whose parents' rights have been terminated need only satisfy a reasonable basis test.

therefore continue to be in need of aid, involuntary incarceration is not willful "parental conduct." I therefore conclude that AS 47.10.080(c)(3), by its express terms, does not permit the superior court to consider the custodial parent's incarceration when determining whether to terminate parental rights.

The situation is easily imaginable in which the only parent with custody of a child commits a crime and is sentenced to a lengthy imprisonment term when the child is quite young. This may effectively destroy the parent-child relationship. Under these circumstances, the child should be permitted to establish a bond with other persons, rather than spend his or her minority in a succession of foster homes or other temporary placements. AS 47.10.080(c)(3), as presently written, however, does not permit the termination of parental rights in this situation. I urge the legislature to consider the effect of the statute's wording and amend it so that this result is not necessary.

In this case, the superior court indicated in its oral findings of fact that it considered Nada's incarceration to constitute an abandonment of O.A. Nada contends that her incarceration is beyond her control and therefore may not be considered as the "willful conduct" necessary to constitute abandonment in accordance with our holding in *In re B.J.*, 530 P.2d 747, 750 n. 12 (Alaska 1975). This court impliedly agrees with Nada by holding that the superior court did not commit reversible error on this issue because Nada's incarceration was not relied upon in the written findings of fact, which are controlling. 660 P.2d at 439 & n. 2. I disagree with this court's implied holding.

Very few people are voluntarily incarcerated. It is also true, however, that very few people are incarcerated for involuntary acts. It should be entirely foreseeable to a parent that commission of a crime will result in incarceration and separation from the parent's child. Whether this amounts to an abandonment of the child may depend upon whether the parent is able to and does make adequate provisions for the child's care during the length of the parent's incarceration. *See, e.g., Diernfeld v. People*, 137 Colo. 238, 323 P.2d 628 (Colo.1958); Annot., 79 A.L.R.3d 417 (1977) ("Parent's Involuntary Confinement ... as Evincing Neglect ... in Dependency or Divestiture Proceeding").

Nada did not make any provisions for the care of O.A. before her incarceration. She left O.A. with a babysitter, even though her stepmother lived in Fairbanks and had earlier taken care of her and O.A. Nada's incarceration may have been beyond her control, but her conduct in killing her husband was within her control, according to the superior court that found her guilty of manslaughter and sentenced her to a term of imprisonment. Furthermore, her failure to make any provisions for the care of O.A. during her incarceration was also within her control. I believe that these facts constitute clear and convincing evidence that Nada abandoned O.A.

As indicated, however, Nada's incarceration is not "parental conduct" that is "likely to continue to exist if there is no termination of parental rights." AS 47.10.080(c)(3). Thus, under the statute, her incarceration cannot justify the termination of her parental rights. I agree with this court that the evidence of Nada's impulsive personality disorder is not in itself grounds for terminating her parental rights. I also agree with this court that clear and convincing evidence was not presented that Nada is likely to abandon O.A. again after she is released from prison. Thus, I find I must concur with the court that it is necessary to reverse the superior court's order terminating Nada's parental rights. Again, however, I urge the legislature to amend AS 47.10.080(c)(3) so that parental rights may be terminated where a parent severs the parent-child relationship by willfully committing a crime and failing to make adequate provisions for the care of the child during a period of incarceration. Under some circumstances, only in this fashion may the child be permitted to form a bond with other persons and avoid a succession of

foster home placements or other unsatisfactory temporary placements during the entire duration of the child's minority.

823 SQUARE FEET, MORE OR LESS:
A. Lee Goodman and Joan Goodman, Appellants,

v.

STATE of Alaska, Appellee.

No. 5746.

Supreme Court of Alaska.

March 4, 1983.

State brought eminent domain action claiming 50–foot right-of-way on either side of road. The Superior Court, Third Judicial District, Anchorage, granted summary judgment in favor of property owners on liability issues, and State appealed. The Supreme Court, 586 P.2d 595, reversed and remanded in part. On remand, the Superior Court, J. Justin Ripley, J., found that surveying, staking, stripping, and clearing entire 100 feet were sufficient acts of appropriation to create 50–foot right-of-way on lot, and appeal was taken. The Supreme Court held that physical acts indicated unmistakably that property on which they took place had been taken for road right-of-way purposes.

Affirmed.

Burke, C.J., filed an opinion concurring in the result.

Eminent Domain ⇐63

Although roadway itself was only 24-feet-wide with drainage ditches extending another 12 feet on each side of roadway, the surveying, staking, stripping and clearing of entire 100 feet were sufficient acts of appropriation to create 50–foot right-of-way on the lot; the physical acts indicated unmistakably that property on which they took place had been taken for road right-of-way purposes.

Michael Price and David A. Devine, Groh, Eggers, Robinson, Price & Johnson, Anchorage, for appellants.

Eugene F. Wiles, Stephen M. Ellis and Marc D. Bond, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for appellee.

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

OPINION

PER CURIAM.

On remand from our decision in *State, Department of Highways v. Green*, 586 P.2d 595 (Alaska 1978) the trial court found, on cross-motions for summary judgment, that a 100 foot right-of-way for Tudor Road consisting of 50 feet on each side of the section line was planned, surveyed, and staked, and that the land was stripped and cleared prior to the date on which the lot in question was leased. Although the roadway itself was only 24 feet wide with drainage ditches extending another 12 feet on each side of the roadway, the court found that surveying, staking, stripping, and clearing the entire 100 feet were sufficient acts of appropriation to create a 50 foot right-of-way on the lot. We agree. The physical acts here would indicate unmistakably that the property on which they took place had been taken for road right-of-way purposes. *See* 44 Pub.Lands Dec. 513, 515 (1916); 43 C.F.R. § 2800.0–1(b) (1979), *revised* 45 Fed.Reg. 44,526 (1980).

The judgment is AFFIRMED.

CONNOR, J., not participating.

BURKE, Chief Justice, concurring in the result.

I am not satisfied that public land can be appropriated, for purposes of a roadway easement, by physical appropriation alone,

ME —

THE SUPREME COURT OF THE STATE OF ALASKA

A.M., Appellant, v. STATE OF ALASKA, Appellee.	Supreme Court No. S-5836 Superior Court No. 1JU-S90-75/76B CP O P I N I O N [No. 4177 - March 10, 1995]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Walter L. Carpeneti, Judge.

Appearances: Donna J. McCready, Assistant Public Defender, Juneau, and John B. Salemi, Public Defender, for Appellant. Jan A. Rutherdale, Assistant Attorney General, Juneau, and Charles E. Cole, Attorney General, Juneau, for Appellee.

Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton, Justices, and Bryner, Justice pro tem.*

BRYNER, Justice, pro tem.
COMPTON, Justice, with whom RABINOWITZ, Justice, joins, concurring.

A.M. appeals the termination of his parental rights to his two children, M.M. and S.M. We conclude that the superior court erred in finding that termination of A.M.'s parental rights was warranted by his physical abandonment of the children.

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* Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

I. FACTS AND PROCEEDINGS

This appeal arises from the termination of A.M.'s parental rights to his minor son, M.M., and his minor daughter, S.M. The children were born in 1987 and 1989 to A.M. and his wife, S.L.S. The children are Indian children within the meaning of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-23, 1951 (1988).

In 1990, A.M. was charged with, and later convicted of, sexually abusing S.S., a child of S.L.S. by a prior relationship who lived with A.M. and S.L.S. at the time. In March 1990, after the abuse was reported, the Division of Family and Youth Services (DFYS) arranged for S.L.S. and her three children to live in a women's shelter. Upon finding that S.L.S. had left the shelter and was not keeping S.S. from A.M., DFYS took emergency custody of S.S. S.L.S. entered an alcohol treatment program shortly thereafter; A.M. took custody of M.M. and S.M., with DFYS monitoring their situation.

In September 1990, A.M. was formally charged with sexually abusing S.S. M.M. and S.M. were taken from A.M. upon his arrest and were temporarily placed in the home of a maternal great aunt in Juneau with whom S.L.S. was staying. Not long thereafter, S.L.S. left the children with a baby sitter and failed to return. On October 23, 1990, DFYS petitioned for adjudication of S.M. and M.M. as children in need of aid (CINA), alleging that "[t]he children having no one to care for them are in imminent danger of physical harm or damage." A.M. and S.L.S. both stipulated that the children were in need of aid and that DFYS should assume custody

for up to two years. A.M. was subsequently convicted of sexually abusing S.S. and was eventually sentenced to serve a total of ten years in prison, with one year suspended.

In June 1992, seventeen months after A.M. stipulated that M.M. and S.M. were children in need of aid, DFYS petitioned for termination of A.M.'s parental rights.[1] Superior Court Judge Walter L. Carpeneti conducted a consolidated hearing on the adjudicative and dispositional aspects of the State's petition to terminate. On August 6, 1993, Judge Carpeneti entered an order terminating A.M.'s parental rights.[2] A.M. then filed this appeal, challenging the termination order on numerous substantive and procedural grounds.

II. TERMINATION OF PARENTAL RIGHTS BASED ON CINA STATUS UNDER AS 47.10.010(a)(2)(A)

A. Statutory Framework and Standard of Review

The State petitioned to terminate A.M.'s parental rights based on the allegation that S.M. and M.M. were children in need of aid.[3] Under AS 47.10.080(c)(3), the court is authorized to

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[1] DFYS did not seek to terminate S.L.S.'s parental rights at that time.

[2] Although the State petitioned only to terminate A.M.'s parental rights and did not request termination of S.L.S.'s parental rights, Judge Carpeneti's August 6, 1993, order purported to terminate the parental rights of both parents. S.L.S. did not contest Judge Carpeneti's order and, on November 23, 1993, executed a voluntary relinquishment of her parental rights. Hence, the propriety of the court's order with respect to S.L.S. is now moot.

[3] In alleging that M.M. and S.M. were children in need of aid for purposes of termination, the State did not attempt to rely on A.M.'s stipulation to the original, October 23, 1990, CINA petition.

terminate parental rights

> upon a showing . . . 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 . . . by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights . . . .

See also CINA Rule 15(c). In order to terminate parental rights under this statute, the court must initially find grounds sufficient to warrant a CINA adjudication. Nada A. v. State, 650 P.2d 436, 439-40 (Alaska 1983). The court must then undertake a two-step inquiry: first, whether the child is a child in need of aid "as a result of parental conduct;" second, whether that conduct "is likely to continue to exist." Id. at 440 (quoting AS 47.10.080(c)(3)).

Alaska Statute 47.10.010(a)(2) specifies various substantive grounds for a CINA adjudication. Here, the State alleged that A.M.'s children were in need of aid on the alternative grounds specified in AS 47.10.010(a)(2)(A), (C), (D), and (F).[4]

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[4] Alaska Statute 47.10.010(a)(2) specifies that the court may order the State to assume custody of a minor who is found to be a child in need of aid as a result of

> (A) the child . . . having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment by
>
> (i) both parents[;]
>
> . . . .
>
> (C) the child having suffered substantial physical harm or if there is an imminent and

(continued...)

The only theory actively argued by the State at the termination trial, however, was abandonment under AS 47.10.010(a)(2)(A). Subsection (a)(2)(A) allows a CINA adjudication as to any "child . . . having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment . . . ."

In the context of the abandonment provision, "conduct" means the willful act of a parent. Nada A., 660 P.2d at 439; In re B.J., 530 P.2d 747, 750 n.12 (Alaska 1975). "Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well." D.M. v. State, 515 P.2d 1234, 1236-37 (Alaska 1973).

For purposes of termination, the State has the burden of proving both the CINA status of the child and the existence of grounds for termination by clear and convincing evidence. AS

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4 (...continued)
substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by the child's parent . . . or the failure of the parent . . . adequately to supervise the child;

(D) the child having been, or being in imminent and substantial danger of being, sexually abused . . . by the child's parent . . .;

. . . .

(F) the child having suffered substantial physical abuse or neglect as a result of conditions created by the child's parent . . . .

47.10.080(c)(3); CINA Rule 15(c). In reviewing the trial court's factual findings on the issue of termination, we apply the "clearly erroneous" standard of review. E.J.S. v. State, 754 P.2d 749, 750 n.2 (Alaska 1988). However, we must always bear in mind that "terminating parental rights [is] a drastic measure. The private interest of a parent whose parental rights may be terminated is of the highest order." In the Matter of J.L.F. and K.W.F., 828 P.2d 166, 170 (Alaska 1992).

B. Abandonment

On appeal, A.M. argues that the superior court erred in finding conduct constituting physical abandonment under AS 47.10.010(a)(2)(A). The test for abandonment under subsection (a)(2)(A) is two-pronged: the superior court must find (1) that the parent's conduct implied a conscious disregard for parental obligations; and (2) that the parent's conscious disregard led to the destruction of the relationship between the parent and the parent's children. E.g., E.J.S. 754 P.2d at 751. The superior court addressed both prongs of this test in its findings and conclusions. A.M. challenges the adequacy of the court's findings as to both prongs.

1. Conscious Disregard for Parental Duties

"The first prong of the abandonment test focuses on the objective conduct of the parents in discharging their parental responsibility. Thus, abandonment is not determined by the parent's subjective intent or on the 'parent's wishful thoughts and hopes for the child.'" Id. (quoting D.M., 515 P.2d at 1237).

One's parental duty is "an 'affirmative duty . . . which requires [a] continuing interest in the child and a genuine effort to maintain communication and association with the child.'" E.J.S., 754 P.2d at 751 (alterations in original) (quoting In re Burns, 379 A.2d 535, 540 (Pa. 1977)).

In reaching the conclusion that A.M. had consciously disregarded his parental obligations to M.M. and S.M., the court focused on A.M.'s pre-incarceration conduct, which included

> his long history of severe drug and alcohol abuse, his long history of committing crimes (including sexual abuse of his stepdaughter), his inability to provide consistent support and nurture for his children, his constant moving of the children, his long history of physical attacks upon their mother, and numerous episodes of leaving the children for substantial periods.

The superior court found that this conduct "evidence[d] . . . [A.M.'s] disregard for his parental obligations to care for his children, that is, his obligation to provide for their physical, emotional, mental and social needs."

The record demonstrates that the superior court considered the totality of A.M.'s conduct prior to his incarceration. Although that conduct included the acts for which he was ultimately imprisoned, the court did not rely on the mere fact of A.M.'s incarceration in finding that he had consciously disregarded his parental duties. This accords with existing law.[5]

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[5] We have previously suggested that incarceration cannot in itself constitute physical abandonment because it does not involve willful conduct. See Nada A., 660 P.2d at 439; see also E.J.S., 754 P.2d at 752 n.4; In re B.J., 530 P.2d at 750 n.12. However, (continued...)

The State argues that the superior court was not clearly erroneous in finding that A.M.'s pre-incarceration conduct, including the acts of sexual abuse for which he was imprisoned, evidenced a conscious disregard for his parental duties. We agree. Ample evidence supports the superior court's finding that, objectively viewed, A.M.'s shiftless lifestyle, frequent absences from home, drug and alcohol abuse, physically assaultive conduct, and sexually abusive acts toward his stepdaughter manifested a disregard for his obligations as a parent. The superior court's finding of conscious disregard was not clearly erroneous.

2. Destruction of the Parent-Child Relationship

The second prong of the abandonment test requires the State to show that the parent's disregard has caused a destruction of the parent-child relationship. In re B.J., 530 P.2d at 749.

To support its claim that the parent-child relationship was destroyed, the State relied below, as it does here, on the testimony of Kathryn Donely Ziegler, an expert in child welfare placement work who had extensive experience in the placement of special needs children. Ziegler's testimony addressed the concept of a "psychological parent." Ziegler explained:

> There can be the parents who gave you birth, the parents who gave you early care, the parents who help you grow up and grow and develop and . . . are, in fact, in a

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[5] (...continued)
we have never suggested that willful conduct that results in incarceration cannot be considered in determining disregard of parental obligations in the abandonment context. See E.G.S., 754 P.2d at 752 n.4; Nada A., 660 P.2d at 441 (Compton, J., concurring).

> relationship with you in an ongoing sort of way. The distinction I would always make with kids who are in an adoption or foster care status is over here are the parents who are responsible for you, for producing you . . . , but that is not always the same person who [is], in fact, going to help you get grown, who is going to stay connected with you through the rest of your life; and it's that parent, it's that, so to speak, that psychological parent that we really have to search out for kids and make sure that person is available to the kids.

Ziegler went on to state her opinion that the current foster mother of A.M.'s children appeared to have become the children's psychological parent:

> I think [the children] have this fix on their present foster parent as being the significant and psychological parent in their lives because she's been there. I mean when these kids are sick in the middle of the night she's there. When these kids are crying, worried about something, she's the one that they turn to, you see, so she becomes the psychological parent and, of course, even [M.M.] was very young when he came to her as a small child still suffering what he had experienced in life. So -- but I don't mean to diminish the role of the father in this case, he's important to these children, he will be important in their life span. I mean because people have these feelings about, well, that's my dad . . . . But as far as being the psychological parent I think it's pretty clear . . . that [the foster mother] . . . is, indeed, the psychological parent of both of these kids.

The superior court found Ziegler's testimony compelling and relied on it in concluding that A.M.'s conscious disregard of his parental duties had resulted in the destruction of the parent-child relationship. Specifically, the court determined that A.M. was no longer the psychological parent of his children, a role

that, in the court's view, had been taken on since A.M.'s incarceration by the children's foster mother. The court believed the surviving relationship between A.M. and his children to be "akin to the relationship between a child and an uncle the child sees only occasionally: love and respect, but not a parental relationship."

The State concedes that "[A.M.] was very much a part of his children's lives before he was incarcerated, and while incarcerated has continued to take an active interest in them." The State nevertheless contends that, even though A.M. did not abandon M.M. and S.M. "in the normal sense of the term," abandonment was established. We find this argument problematic in two respects.

a. Psychological Parenthood as the Equivalent of an Adequate Parent-Child Relationship

The superior court found that, despite the "love and affection" between A.M. and his children, A.M.'s parent-child relationship had been destroyed because the children's foster mother had become their psychological parent. This finding necessarily suggests that a complete destruction of the parent-child relationship need not be proved to establish abandonment. Instead, a qualitative diminution of the original parent-child relationship will suffice under certain circumstances -- those circumstances being defined by the concept of psychological parenthood.

However, use of the concept of psychological parenthood in this manner has troubling implications. For example, Ziegler's

testimony, when applied in the context of a typical divorce, would seem to indicate that a parent who is awarded primary custody of the children will almost certainly assume the role of psychological parent, whereas the non-custodial parent, lacking the ability to "be there," will be relegated to some lesser form of bond. If, as the superior court appears to have found, being a psychological parent is a necessary ingredient for an adequate parent-child relationship, then termination might routinely be justified for the non-custodial parent in a divorce.

This, of course, is not the law. As illustrated by the foregoing example, the absence of a "psychological parent" bond cannot, standing alone, be equated to the destruction of a parent-child relationship. This is not to say that the concept of psychological parenthood is invalid. However, concepts developed and applied within the spheres of social science do not always mesh neatly with rules traditionally applied within the spheres of the law -- legal rules developed for the regulation of individual rights. It is one thing to say that psychological parenthood is a legitimate and useful concept in the placement of special needs foster children; it is quite another to conclude, as rigid legal doctrine, that psychological parenthood is the sole legal determinant of a viable parent-child relationship in termination of parental rights cases. Our own decisions have never ascribed to the latter proposition.[6] The State cites no authority -- legal

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[6] By way of illustration, the present case stands in sharp contrast to the circumstances in which we recently found destruc- (continued...)

or scientific -- to support such a view, and we are aware of none.

b. Disregard of Parental Obligations and Destruction of the Parent-Child Relationship

The superior court's reliance on the foster mother's psychological parent role in finding the destruction of the parent-child relationship between A.M. and his children is problematic for another reason. As we have already indicated, under the second prong of the abandonment test, the court must determine that the parent's "conscious disregard . . . led to the destruction of the parent-child relationship." E.J.S., 754 P.2d at 751 (emphasis added). An integral part of this requirement is the existence of a causal connection between the parental disregard found under the first prong of the test and the destruction of the parent-child relationship found under the second.

Thus, under the second prong of the abandonment test, it is insufficient to find parental disregard coupled with a destruction of the parent-child relationship brought about by some other cause. The destruction must be brought about by the acts of the parent, and in order to constitute abandonment, the acts of the parent must be willful. In re B.J., 530 P.2d at 750 n.12; see also Nada A., 660 P.2d at 439.

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6 (...continued)
tion of the parent-child relationship in E.J.S., 754 P.2d at 751. There, testimony showed that the child, L.M ~., had virtually no exposure to her natural father since infancy; that she considered her stepfather to be her natural father; that L.M.S had only recently discovered that her stepfather was not her real father; that even then L.M.S. never asked for detail about her natural father; and that no psychological bond or familial relationship at all existed between L.M.S. and her natural father.

Here, the parental disregard relied on by the superior court in finding abandonment consisted of A.M.'s pre-incarceration conduct. Yet the court's conclusion that A.M.'s parent-child relationship had been destroyed was based on the existence of a psychological parent relationship between the children and their current foster mother, and the consequent absence of such a relationship between A.M. and his children.

From the record, it seems clear that the relative distancing of A.M.'s relationship with his children and their formation of a close relationship with their foster mother resulted not from A.M.'s pre-incarceration conduct, but rather from the fact of his incarceration. Ziegler did express the opinion that A.M. was not a psychological parent to his children. However, Ziegler's opinion was based on the amount of time that had elapsed since the children had been removed from A.M.'s custody, not on the nature or effect of A.M.'s conduct toward the children prior to his arrest. When asked whether A.M. was the psychological parent, Ziegler replied:

> Well, I couldn't believe that to be the case given the ages of the children at the last full parenting contacts that they've had. I'm sure that they recognize -- certainly [M.M.] does recognize him as his dad, I'm sure of that. I'm not clear that [M.M.] understands what all of that means. I think he and [S.M.] have this fix on their present foster mother as being the significant and psychological parent in their lives because she's been there.[7]

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[7] In this regard, the Findings and Conclusions entered by the superior court are somewhat ambiguous. As a conclusion of law, (continued...)

The superior court made extensive and detailed findings concerning the harm that A.M.'s criminal and anti-social conduct caused to his children. These findings are supported by the record. Nevertheless, the State did not attempt to prove, and the court did not purport to determine, the nature of the parent-child relationship that existed at the time A.M. was arrested and his children were removed from his custody. Despite the evidence indicating that A.M.'s disregard of his parental responsibilities had harmed his children, the superior court did not find that A.M.'s conduct had already destroyed the parent-child relationship when he was arrested and incarcerated for his current offenses; nor did the court find that A.M.'s anti-social conduct, rather than his post-arrest separation, was directly responsible for destroying the

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[7] (...continued)
the court stated that "[t]he disregard shown by [A.M.] for [his] parental obligations has led to the destruction of the parent-child relationship . . . ." In reaching this conclusion, the court, recognizing the decision in Nada A., indicated that it had considered "all of the past conduct" of A.M., but not the "mere fact of his incarceration . . . ." This legal conclusion suggests a predicate factual determination that A.M.'s pre-arrest conduct caused the destruction of the parent-child relationship.

However, the superior court's findings of fact do not draw any specific connection between A.M.'s pre-incarceration conduct and the destruction of his parent-child relationship. On this issue, the findings of fact merely state that A.M. is not the psychological parent of M.M and S.M. and that their current foster mother "fills the role in their lives of psychological foster parent. Accordingly, the parent-child relationship between [A.M.] and [M.M.] and between [A.M.] and [S.M.] has been destroyed." This finding suggests that, in the court's view, it was A.M.'s replacement by the foster parent rather than his pre-incarceration disregard of parental obligations that destroyed the parent-child relationship. As we have pointed out in the text of this opinion, this latter theory of destruction is the only one that finds substantial support in the evidence.

parent-child bond.

In sum, to the extent the record supports the conclusion that A.M.'s parent-child relationship has been destroyed, that destruction appears to have resulted from the fact of his incarceration. However, A.M.'s incarceration could not serve as the proper basis for a finding of destruction of the parent-child relationship, since it was not the conduct upon which the court relied in finding that A.M. had consciously disregarded his parental obligations.[8] Conversely, the conduct involved in A.M.'s conscious disregard of his parental obligations was not the conduct that "led to the destruction of the parent-child relationship."

The superior court's conclusion that A.M.'s disregard of his parental responsibilities led to the destruction of his parent-

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[8] Indeed, A.M.'s incarceration is not the type of willful act upon which abandonment may be based. Nada A., 660 P.2d at 439. The State nevertheless invites us to hold that A.M. was incarcerated as a result of his voluntary acts, that his incarceration was a foreseeable consequence of his misconduct, that the inability to provide for his children resulting from A.M.'s incarceration is therefore a result of his voluntary conduct, and that, in this sense, A.M.'s parent-child relationship has been destroyed by his pre-incarceration disregard of his parental duties. In support of this theory, the State cites a number of cases that liken voluntary criminal acts to acts of abandonment. See, e.g., Huston v. Haggard, 475 S.W.2d 330, 333 (Tex. App. 1971); In re Dobbs, 531 P.2d 303 (Wash. App. 1975).

The State's theory is essentially the same theory addressed by Justice Compton's concurrence in Nada A., 660 P.2d at 441. The gist of Justice Compton's Nada A. concurrence, however, was that termination of parental rights under this theory was impermissible under the statutory framework then in existence. Justice Compton urged the legislature to amend Alaska law to allow termination under this theory. Id. The statutory framework in existence when Nada A. was decided remains essentially unchanged, despite the concurring opinion. We decline the State's invitation to adopt this theory in the absence of a statutory change.

child relationship is not supported by substantial evidence and is therefore clearly erroneous.

C. Inability to Provide Care

The State alternatively contends that the superior court's order terminating A.M.'s parental rights based on the CINA status of his children can be affirmed even if the court's finding of abandonment cannot be sustained. The State points out that, given A.M.'s disregard of his parental responsibilities, he clearly lacked the ability to provide his children with care. The State argues that, for this reason, A.M.'s children could properly be adjudicated children in need of aid under AS 47.10.010(a)(2)(A), regardless of whether A.M.'s conduct amounted to abandonment.

The State's argument is to a certain extent plausible. Abandonment is but one way of establishing CINA status under AS 47.10.010(a)(2)(A) for purposes of terminating parental rights. Subsection (a)(2)(A) also applies when no parent, guardian, custodian, or relative is willing and able to provide care. See In the Matter of J.L.F., 828 P.2d at 170. Unlike abandonment, proof of parental inability to provide care does not require a showing that the parent-child relationship has been destroyed.

The superior court found that, in disregarding his parental responsibilities to his children, A.M., in effect, failed in "his obligation to provide for their physical, emotional, mental and social needs." This finding is arguably tantamount to a finding of A.M.'s inability to care for his children, since "care" has been defined as providing "for the physical, emotional, mental,

and social needs of the child." AS 47.10.990(1); In the Matter of J.L.F., 828 P.2d at 169. As we have indicated in discussing the issue of parental disregard, there is substantial evidence in the record to support this finding.[9]

Nevertheless, the superior court did not expressly conclude that A.M.'s children were in need of aid under AS 47.10.010(a)(2)(A) due to A.M.'s inability to provide for their care. Instead, the court based its finding of CINA status on the conclusion that A.M. had abandoned the children, a conclusion we have found to be clearly erroneous. More significantly, we have made it clear that, "[w]hile a finding of inability to care would be grounds for jurisdiction under subsection (a)(2)(A), that finding must also extend to any relatives who are in fact caring for or willing to assume care." In the Matter of J.L.F., 828 P.2d at 170. Here, even if we were to construe the finding of parental disregard that the superior court made in connection with the abandonment issue as an implied finding of inability to provide care, the superior court failed to enter findings on a material element of inability: the lack of any relatives caring or willing

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[9] The conduct that led the court to find parental disregard -- and, arguably, by extension, inability to provide care -- consisted of A.M.'s substance abuse, violence, excessive mobility, and criminal acts, including A.M.'s sexual abuse of his stepdaughter. Notably, in A.H. v. State, 779 P.2d 1229, 1232 (Alaska 1989), this court indicated that a continuation of CINA status could in part be justified by the children's unwillingness and inability to live with a parent who was imprisoned for sexual abuse.

to provide care.[10] See id. at 170 & n.11.

We accordingly conclude that the superior court's finding of CINA status cannot be affirmed on the alternative ground of inability to provide care. We therefore find it necessary to vacate the disputed termination order and to remand this case for further consideration of the issue of inability to provide care.

D. Remaining Substantive Issues

Although the challenged termination order must be vacated, we think it necessary to address the remaining substantive issues raised by A.M. in order to clarify the posture of the case on remand.

1. The Likelihood of A.M.'s Conduct Continuing

To justify termination of parental rights following a child's CINA adjudication, the State must prove by clear and convincing evidence that the child is a child in need of aid "as a result of parental conduct" and that the conduct "is likely to continue to exist." AS 47.10.080(c)(3); see also CINA Rule 18(c)(1); Nada A., 660 P.2d at 440.

In the present case, after concluding that M.M. and S.M. were children in need of aid as a result of A.M.'s conduct, the superior court found that

> [A.M.] is highly likely to continue to

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[10] It is the State's burden to prove that there are no suitable relatives. In the Matter of J.L.F., 828 P.2d at 170 n.11. We note that the superior court's finding of abandonment and its order terminating A.M.'s parental rights also extended to S.L.S., the mother of the children. Hence, any implicit finding of inability to provide care obviously extended to S.L.S., who has not contested the court's ruling.

> abuse drugs and alcohol, to commit crimes (especially assaultive crimes in the context of domestic disputes and sexual offenses against children, but also property crimes given his extensive criminal record, his lack of success in substance abuse treatment, his poor prognosis for sexual offender treatment, his failure even to obtain anger management counseling, and his characterological problems).

These express findings are supported by evidence in the record. Although A.M. points to contrary evidence that he presented, it is not this court's job to reweigh the evidence when the record provides clear support for the superior court's ruling. Our review of the record convinces us that the superior court's ruling is not clearly erroneous.

We emphasize that just as incarceration is not conduct under a physical abandonment theory, see supra note 5, neither is incarceration itself "parental conduct" within the meaning of AS 47.10.080(c)(3). Thus, while long-term incarceration of a parent can result in a child becoming a child in need of aid under AS 47.10.010(a)(2)(A) under an inability to provide care theory, such incarceration is not a sufficient basis to justify termination of parental rights under AS 47.10.080(c)(3). In this case we understand that the trial court did not rely on A.M.'s long-term incarceration, but on his continuing serious criminal and anti-social conduct.

2. Likelihood of Physical and Emotional Harm if A.M.'s Rights are Not Terminated

As a prerequisite to termination of parental rights under ICWA § 102(f), 25 U.S.C. § 1912(f) (1988), and Alaska Child in Need

of Aid Rule 18(c)(2), the State must prove beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

a. Physical Harm

The superior court specifically found, beyond a reasonable doubt, that A.M.'s daughter was likely to suffer sexual abuse if placed in his custody; that both children were likely to suffer physical abuse resulting from A.M.'s domestic violence; and that both were likely to suffer physical deprivation due to A.M.'s inability to meet their needs on a consistent, ongoing basis.

A.M. argues that the State failed to allege the likelihood of future physical harm and that the evidence it presented failed to prove such harm beyond a reasonable doubt.

A.M.'s first argument is mistaken. The State's petition expressly alleged that the children would be "at risk of sexual abuse, physical harm, neglect or abandonment due to substance abuse or criminal behavior leading to further incarceration" unless A.M. completed a long-term treatment program for sexual offenders and reversed his long-standing personality traits and behavioral trends.

A.M.'s second argument is unpersuasive. The superior court's findings on the issue of future physical harm are amply supported by the record.

b. Emotional Harm

A.M. claims that it was error for the superior court to consider, in assessing the likelihood of emotional harm in the

event of a return of custody to him, factors such as the prolonged separation that would inevitably occur before the restoration of custody and the need, in the interim, to assure the stability of the bonds the children had formed with their "psychological parent." A.M. contends that these considerations are irrelevant to whether the children would suffer emotional damage if they returned to him.

It is true that mere evidence that a willing custodian other than the parent would do a better job than the parent does not in itself suffice to support a finding of likely emotional harm. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Bureau of Indian Affairs, Dep't of the Interior 1979). But the close ties the children enjoyed to their foster mother and the effects A.M.'s prolonged separation would likely have on their mental health if eventually returned could properly be considered as relevant evidence bearing on the issue of likely emotional harm. Three expert witnesses addressed this subject and their testimony supports the court's findings. The superior court was not clearly erroneous in finding that continued custody by A.M. would likely cause the children serious emotional harm.

3. Active Remedial Efforts by the State

Under ICWA § 102(d), before parental rights may be terminated, the State has the burden of showing by a preponderance of the evidence that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent

the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (1988); see also CINA Rule 18(c)(2); K.N. v. State, 856 P.2d 468, 476 (Alaska 1993).

The superior court found that DFYS had "made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of this family but those efforts have proved unsuccessful . . . ." In the superior court's view, the State had done everything "feasible given [A.M.'s] incarceration status . . . ."[11] In reaching this conclusion, the court observed that "[A.M.] has expressed a willingness and desire to undergo sex offender treatment while incarcerated, but substantial doubt on the motivation of that expressed willingness was raised by the State's expert witnesses. The court concludes that Mr. [A.M.] is not sincerely interested in changing his deviant sexual behavior . . . ."

The extent of active efforts the State must make on behalf of a parent whose access to remedial assistance is hampered by incarceration is an issue that remains largely unresolved.[12]

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[11] The court's findings enumerate DFYS's efforts. These included monitoring A.M.'s care of the children before he was incarcerated; facilitating monthly visits at jail (under the court's order); facilitating daily telephone contacts at first, eventually dropping to weekly telephone contacts; and promulgating a reunification plan in October 1991, while A.M. was imprisoned, which was "centered around completing whatever sex offender treatment was needed (and obtaining an in-depth psychological evaluation to determine appropriate treatment) and completing appropriate alcohol/drug abuse treatment."

[12] The "active efforts" required by ICWA have not been defined. According to one authority, "[t]he distinguishing word in the remedial services and rehabilitative programs' section is (continued...)

The State does not deny that the "reunification plan" it formulated for A.M. could not realistically be attained given his imprisonment and that DFYS personnel generally failed to intervene actively on A.M.'s behalf to assure that prison officials enrolled A.M. in suitable institutional programs. The State simply claims that, by preparing a reunification plan and encouraging A.M. to seek services available within the institution, it fulfilled its duty of making active efforts to provide remedial services.

To the extent the State's argument suggests that this court create an exception to ICWA's requirement of active remedial efforts for cases in which rehabilitation is doubtful and in which active remedial efforts would be "unreasonably" costly or time-consuming, the suggestion seems unjustified. We have held that no

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[12] (...continued)
the word 'active.'" Craig J. Dorsay, The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual 157 (1984). Dorsay quotes one of ICWA's drafters, who distinguishes between active and passive rehabilitative and remedial efforts:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.

Id. at 157-58.

judicial exception to ICWA can be created. A.B.M. v. M.H., 651 P.2d 1170, 1173 (Alaska 1982). Neither incarceration nor doubtful prospects for rehabilitation will relieve the State of its duty under ICWA to make active remedial efforts.

This does not mean that a parent's incarceration is wholly irrelevant to the scope of active remedial efforts the State is required to undertake. The circumstances surrounding a parent's incarceration may have a direct bearing on what active remedial efforts are possible. In the present case, for example, it would be difficult to conclude that the practical obstacles posed by A.M.'s incarceration -- the difficulty of providing resources to inmates generally, the unavailability of specific resources in A.M.'s case, and the length of time A.M. will remain incarcerated -- are factors that the superior court was barred from considering when it decided whether the State had made active remedial efforts.

Likewise, we have recently noted that, for purposes of determining the sufficiency of the State's remedial efforts, the superior court may properly consider a parent's demonstrated lack of willingness to participate in treatment. See K.N., 856 P.2d at 477. Case law in other jurisdictions appears to be in accord with this general view. See Matter of Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245, 1254 (Ariz. App. 1991); Matter of M.E.M., 679 P.2d 1241, 1244 (Mont. 1984); State ex rel. Juvenile Dep't of Multnomah County v. Woodruff, 816 P.2d 623, 626 (Or. App. 1991).

In this regard, however, a note of caution is necessary.

The foregoing cases involve parents who actively refused to participate in or cooperate with treatment efforts; these cases support the general proposition that, once active remedial efforts have been undertaken, a parent's actual resistance to or rejection of assistance may properly be considered in determining whether additional efforts were required. We have never suggested that the scope of the State's duty to make active remedial efforts should be affected by a parent's motivation or prognosis before remedial efforts have commenced. To vary the scope of the State's ICWA duty based on subjective, pre-intervention criteria such as a parent's motivation or treatment prognosis might defeat the purpose of the active remedial effort requirement, for it would enable the State to argue, in all doubtful and difficult cases, that it had no duty to make active remedial efforts.

In the present case, the superior court's finding of compliance with the ICWA requirement presents a close question, particularly because the court's assessment of the active efforts that the State should have made was apparently influenced by its perception that, despite his avowed willingness to participate in treatment, A.M. had made no genuine commitment to rehabilitation and his prospects for rehabilitation were poor. Since we must in any event remand this case for reconsideration on the issue of inability to provide care, we believe it appropriate to require that the superior court also reconsider the issue of ICWA compliance in light of the factors outlined in this opinion. In addressing the issue on remand, the court should allow the parties

to present updated information concerning any treatment A.M. may have received since the court's initial ruling.

III. PROCEDURAL ISSUES

In addition to his substantive arguments, A.M. raises two procedural issues that call for only brief discussion.

A. Denial of Bifurcation

Prior to his hearing, A.M. moved for bifurcation, seeking to have the adjudicative phase, in which the court determines whether the children are in need of aid under AS 47.10.010, heard before the dispositional phase, in which the court determines whether the requirements for termination have been met under AS 47.10.080(c). The superior court denied this motion. A.M. contends that the failure to bifurcate amounted to an abuse of discretion and violated his right to due process.

We find no merit to this argument. Although the adjudicative and dispositional phases of children's proceedings are typically heard separately, CINA Rule 18(b) expressly makes joinder of the two phases a matter of discretion for the superior court:

> Upon a showing of good cause and with adequate notice to the parties, an adjudication hearing and a termination hearing may be consolidated.

Here, a significant amount of the evidence presented below was relevant to, and could have been admitted at, both phases of the termination proceeding. Because A.M.'s children had been in foster care for a lengthy period of time prior to the filing of the petition for termination, the evidence on the issue of disposition was well developed prior to the CINA adjudication, and

A.M. received ample notice of the State's claims. A.M. has failed to point to any specific circumstances indicating an abuse of discretion by the superior court. He has also failed to cite any authority supporting the proposition that bifurcation is per se necessary to satisfy the requirements of procedural due process. Finally, A.M. has failed to make a convincing showing of prejudice. The superior court did not abuse its discretion in failing to bifurcate the termination trial.

B. Absence of the Guardian Ad Litem

A.M. additionally claims error because the children's guardian ad litem did not attend the termination trial. A.M. failed to raise this issue below; consequently, we review only for plain error. Plain error exists when an error affects substantial rights and is obviously prejudicial. R.C. v. State, 760 P.2d 501, 505 n.14 (Alaska 1988). Because the report of the guardian ad litem favored termination of parental rights and because the guardian's absence enabled A.M. to ensure that the report would not be admitted as evidence, there appears to be a strong possibility that A.M.'s failure to object below amounted to a sound tactical choice. In any event, given the guardian's position favoring termination, the guardian's absence cannot be characterized as "obviously prejudicial." Id. The record discloses no plain error.

IV. CONCLUSION

The superior court's finding of abandonment was clearly erroneous; this error requires that the order of August 6, 1993,

terminating A.M.'s parental rights be vacated. A remand is necessary, however, for further proceedings to determine whether A.M.'s children should be adjudicated CINA due to A.M.'s inability to provide care and, if so, whether termination of parental rights is warranted under that theory. On remand, the superior court should also reconsider whether the State has complied with ICWA's requirement of active remedial efforts.

Accordingly, the order terminating A.M.'s parental rights is VACATED, and this case is REMANDED for further proceedings consistent herewith.

COMPTON, Justice, with whom RABINOWITZ, Justice, joins, concurring.

Once again the textual fabric of AS 47.10.080 confines us to an uncomfortable fit. See Nada A. v. State, 660 P.2d 436, 441-43 (Alaska 1983) (Compton, J., concurring). A.M. is serving a prison term of almost ten years for sexually abusing his stepdaughter. However, we are unable to affirm the termination of his parental rights. I agree with our disposition of the legal issues in this case because I do not believe the wording of the statutes give us any choice. Further, the doctrine of stare decisis commands that we follow statutory interpretation established by precedent. I write separately to express my continuing belief that a legislative response to this issue is appropriate, and also that it is now long overdue.

When we, as a society, terminate parental rights, we sever the fundamentally important relationship between parent and child. In our society this relationship is highly valued, yet at times it must be severed. We sever it only when the health and safety of the child mandate that we do so. The balancing of the parental relationship against the health and safety of the child is a complex decision replete with social policy choices. However, the task of determining desirable social policy in the sphere of preservation or termination of the parent-child relationship is a task which courts are not equipped to undertake. It is not a sphere in which the judiciary should engage in social engineering.

In Nada A., I urged the Alaska Legislature to define more

clearly the effect of incarceration on parental rights. Id. at 441. I do so again. What is needed is an informed social policy. The fact that difficult social policy choices must be made is not a justification for ignoring the issues from which the difficulties have sprung. I think it unfortunate that the legislature continues to ignore the effect of a parent's incarceration on a child and on the continuation of the parent-child relationship.

In this case, it would have been preferable for the court to re-instruct the jury. Its failure to do so, however, did not so prejudice Drott as to constitute reversible error. Therefore, we affirm the superior court's ruling on the offered instruction.

F. Test Performed by Yukon

[13] Shortly before trial, Rahloff (Yukon's mechanic), Sundborg (Yukon's expert mechanic) and Yukon's attorney conducted experiments on the brake system of the same crane involved in Gordon's accident. Drott attempted to introduce evidence of the experiments at trial. The trial court determined that the evidence was relevant, but that it was inadmissible because it was cumulative.

Drott argues that the evidence should have been admitted. The purpose of the proffered testimony was not to have the jury draw conclusions about the particular crane, but to show the capabilities of Drott 250 cranes in general. According to Drott, the results of the experiments showed that the brake system, if properly maintained, was not defective. Drott argues that having an adverse party perform the tests merely made the results dramatic and probative.

> Alaska Rule of Evidence 403 provides, "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As Gordon argues, there was a danger of unfair prejudice from the brake test evidence because the testing procedure was slipshod and no written records were kept. Because the tests were performed on the same crane that was involved in Gordon's accident, there was also a danger that the issues would be confused, or the jury would be misled by the test results. Further, as the trial court found, the evidence was cumulative. In light of these considerations, we hold that the trial court did not abuse its discretion in deciding that the probative value of Yukon's experiment results was outweighed by the possibility of resulting jury prejudice and undue trial delay.

The judgment below is AFFIRMED.

NADA A., Appellant and Cross-Appellee,

v.

STATE of Alaska, Appellee and Cross-Appellant.

Nos. 6546, 6693.

Supreme Court of Alaska.

Feb. 25, 1983.

Natural mother appealed from order of the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., which terminated parental rights and stayed cross appeal. The Supreme Court, Connor, J., held that: (1) evidence sustained finding of abandonment; (2) trial court applied proper test defining abandonment; but (3) evidence did not support finding that the act of abandonment was likely to continue or be repeated, and (4) there was no denial of equal protection to child in permitting mother to seek reconsideration of termination order prior to final adoption decree.

Reversed.

Compton, J., filed a concurring opinion.

1. Infants ⇨157

Test for abandonment involves consideration of whether the parent's conduct has evidenced a disregard for the parental obligations and whether that disregard has led to a destruction of the parent-child relationship.

2. Infants ⇨180

Evidence that mother had fled from city, leaving child with a babysitter, and evidence of eight-month period during which mother lived in a different city than the child sustained finding of abandonment.

3. Infants ⇨210

Record demonstrated that court did not consider incarceration of mother in determining issue of abandonment of child by mother.

4. Motions ⇨62

When written findings of fact conflict with an oral statement made by judge, written findings are controlling.

5. Infants ⇨210

Record demonstrated that trial court considered many facts, in addition to best interests of the child, in determining to terminate parental rights.

6. Infants ⇨210

Trial court's finding that mother was likely to continue to demonstrate a conscious disregard of the obligation owed by parent to a child even after her release from incarceration because she suffered from an impulsive personality disorder was insufficient to support finding, required for termination of parental rights, that the parental conduct warranting termination was likely to continue. AS 47.10.080(c)(3).

7. Infants ⇨155

Mother's impulsive personality disorder was not, itself, conduct and thus not a ground for termination of parental rights. AS 47.10.080(c)(3).

8. Infants ⇨157

Where mother's abandonment of child was taken under stressful and unique circumstances, involving her imminent incarceration for killing the child's father, it would be unjustified to infer likely future abandonment from that incident. AS 47.10.080(c)(3).

9. Constitutional Law ⇨82(10)

Child's right to a permanent, adequate home is not fundamental and any difference between treatment of children whose natural parents seek reconsideration of termination order and treatment of other children whose parents' rights have been terminated need only satisfy reasonable basis test.

10. Action ⇨68

Good cause required for natural parent to stay adoption proceedings pending reconsideration or order terminating parental rights is a showing that it would be in the best interests of the child to resume living with the natural parents because they have sufficiently rehabilitated themselves to provide proper guidance and care for the child.

11. Constitutional Law ⇨225.1

Review of termination orders by parents who assert that they can now take care of the child properly does not deny equal protection to children awaiting adoption.

John Hagey, Asst. Public Defender, Fairbanks, Dana Fabe, Public Defender, Anchorage, for appellant and cross-appellee.

D. Rebecca Snow, Asst. Atty. Gen., Fairbanks, Wilson L. Condon, Atty. Gen., Juneau, for appellee and cross-appellant.

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

OPINION

CONNOR, Justice.

Nada A. appeals the termination of her parental rights to her son, O.A. At the conclusion of the termination hearing in superior court, the judge found that O.A. was a child in need of aid and that his mother's disregard of her parental obligations was likely to continue. The court ordered the termination of her parental rights, but further ordered that in the event of a change in circumstances, Nada could apply for a reconsideration of the termination at any time before O.A. is adopted. The state cross-appeals this order permitting a reconsideration of the termination

Nada gave birth to O.A. on June 29, 1978. Her husband, Mohammed, repeatedly battered both his wife and child. In January, 1979, shortly after one of these incidents, Nada shot and killed Mohammed. She was then 17 years old. After the shooting, Nada left Fairbanks with O.A. and went to stay with her sister, Marie Gee, in Washington State. A few days after her arrival, Nada was arrested and charged with first degree murder. She was then incarcerated in a juvenile facility in Washington until she reached age 18. With the exception of a few months spent in temporary foster care, O.A. lived with Marie while Nada was incarcerated. Marie brought O.A. to the prison facility twice weekly for visits with Nada.

After entering a negotiated plea to the charge of manslaughter in Fairbanks, Nada was sentenced in July of 1980. Marie brought O.A. with her to Alaska for the sentencing. After sentencing, Nada was released on appellate bond and O.A. rejoined her.

On October 15, 1980, Nada took O.A. to the babysitter's, packed a few clothes and went to Anchorage to escape mounting personal pressures. Nada did not return to Fairbanks because she feared that she would be put in jail and would be unable to get O.A. back.

Emergency custody of O.A. was assumed by the Division of Family and Youth Services (DFYS) on October 16, 1980. From the last week in October of 1980 until the present, O.A. has remained in the foster care of the L. family.

Nada remained in Anchorage until June 27, 1981, when she voluntarily turned herself in to the authorities. After she was transported back to Fairbanks, Nada tried to make contact with O.A. through the DFYS. Her request was refused, because the DFYS had decided to seek termination of her parental rights. On July 1, 1981, a petition for termination of parental rights was filed by the state. The court found O.A. to be a child in need of aid as a result of physical abandonment under AS 47.10.-010(a)(2)(A). It then had authority under AS 47.10.080(c)(3) to terminate Nada's parental rights upon a showing, by clear and convincing evidence, that parental conduct leading to the "child in need of aid" determination was likely to continue.[1] The order terminating Nada A.'s parental rights was signed on January 11, 1982. This appeal followed. Adoption proceedings have been stayed pending disposition of the appeal.

I. ABANDONMENT

Nada argues that the trial court erred in its finding of "physical abandonment." She claims that the trial court applied an incorrect legal standard in reaching this determination. Specifically, Nada alleges that the court relied on the subjective viewpoint of the child rather than on an objective standard. She contends that a proper application of the abandonment test would result in a finding that her conduct did not evidence a disregard of her parental obligations.

In *D.M. v. State*, 515 P.2d 1234 (Alaska 1973), in rejecting the application of a subjective standard to measure a parent's intention to abandon a child, we stated:

> "Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well."

515 P.2d at 1236-37. We have followed this standard consistently. *See In re E.J.(T.)*, 557 P.2d 1128, 1131 (Alaska 1976); *In re B.J.*, 530 P.2d 747, 748-49 (Alaska 1975); *In re Adoption of V.M.C.*, 528 P.2d 788, 793 (Alaska 1974); *In re Adoption of A.J.N.*, 525 P.2d 520, 521 (Alaska 1974); *D.M. v. State*, 515 P.2d 1234, 1236-37 (Alaska 1973). We agree with the state's view that the court properly found the existence of a physical abandonment under the objective standard.

[1, 2] The test for abandonment has two prongs: (1) has the parent's conduct evidenced a disregard for his or her parental obligations, and (2) has that disregard led to the destruction of the parent-child relationship. *Adoption of V.M.C.*, 528 P.2d 788, 793 (Alaska 1974). A review of the record indicates that the court had before it sufficient objective evidence to satisfy the first prong of the abandonment test. The testimony about how Nada had fled from Fairbanks leaving O.A. with a babysitter provides sufficient objective evidence indicating disregard of parental obligations. In addition, at the hearing, the trial judge specifically referred to the eight month period of separation during which Nada lived in Anchorage as "for all practical purposes destroy[ing] the parent/child relationship." Therefore, the trial court properly applied the legal standard and its finding of abandonment should not be reversed.

Nada also argues that the trial court erred by considering her incarceration as abandonment. She contends that in order to constitute abandonment, the acts of the parent must be willful. Yet, incarceration was beyond her control and, she claims, actually resulted from her attempt to protect O.A. from his father.

[3, 4] We have said that "[i]n order to constitute abandonment, the acts of the parent must be willful." *In re B.J.*, 530 P.2d 747, 750 n. 12 (Alaska 1975). The trial judge did orally state that he considered involuntary incarceration to constitute abandonment, but the written findings of fact, which were submitted by the state and signed by the court, referred to the voluntary absence from October of 1980 to June of 1981 as the relevant conscious disregard of parental obligations.[2] Consequently, we find no reversible error.

II. BEST INTERESTS OF THE CHILD

Nada argues that the trial court misinterpreted our previous decisions and incorrectly used the best interests of the child as the sole criterion for its decision to terminate her parental rights. She claims that the best interests of the child should be considered only after it has been shown that there is sufficient parental misconduct to justify termination.

[5] The state argues that the best interests of the child are a significant, but not dispositive, consideration at each step in determining whether to terminate parental rights.[3] It claims that the trial court's actions were consistent with the approach we have repeatedly espoused that the best interests of the child are to be considered *only* after a finding of parental unfitness or a determination that the first prong of the abandonment test has been satisfied. *See, e.g., In re Adoption of K.S.*, 543 P.2d 1191, 1195 (Alaska 1975); *In re Adoption of V.M.C.*, 528 P.2d 788, 793 (Alaska 1974); *In re Adoption of A.J.N.*, 525 P.2d 520, 521 (Alaska 1974). While the best interests of the child become relevant at some point, there first must be a showing of parental

1. AS 47.10.080(c)(3) provides

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

2. When written findings of fact conflict with an oral statement made by a judge, the written findings are controlling. *Rominger v. Rominger*, 568 P.2d 1021, 1024 n. 5 (Alaska 1977). *See also Williams v. City of Valdez*, 601 P.2d 181, 192 n. 30 (Alaska 1979).

3. AS 47.10.082 reads

> "In making its dispositional order under AS 47.10.080(c) the court shall consider the best interests of the child and 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 his best interests under AS 47.10.010-47.10.142."

conduct sufficient to justify termination. *Id.* The trial court's findings clearly show that it was aware that several factors in addition to best interest enter into a termination order. In deciding to terminate Nada's parental rights, the trial court followed the correct procedure. It did not merely compare the merits of the home to be provided by Nada with that of the L. family.

III. TRIAL COURT'S FINDINGS

Nada argues that the court's finding that her disregard of her parental obligation was likely to continue in the future was clearly erroneous.

AS 47.10.080(c)(3) requires as prerequisites to termination of parental rights that first, the child is a child in need of aid "as a result of parental conduct," and second, clear and convincing evidence that "the parental conduct is likely to continue to exist." The parental conduct relied on by the trial judge in determining that O.A. was a child in need of aid was:

> "That on October 15, 1981, N.A. left her child, O.A., with a babysitter and did not return, thereby exhibiting a conscious disregard for the needs and welfare of her child and of her parental obligations to O.A."

[6] According to our reading of the statute, there must then be a showing by clear and convincing evidence that this same conduct is likely to continue. The findings below are deficient in this regard. The only relevant finding is:

> "That N.A. is likely to continue to demonstrate a conscious disregard of the obligation owed by a parent to a child even after her release from incarceration because she suffers from an impulsive personality disorder."

The only testimony upon which the court could have relied in making this finding was rendered by Dr. Rothrock, a psychiatrist who had interviewed Nada only once for one hour, admitted he knew nothing about her parenting abilities and qualified his prognosis with the statement that he could "only answer that question in generalities, because . . . [he had] not had any extended contact with [Nada A.]."

Dr. Rothrock's opinion was not shared by Robert Dunn, a psychological counselor, who offered opposing expert testimony that N.A. had a high probability of success in controlling her problem, nor by the social workers and others who knew Nada well and felt that she had made considerable progress through counseling. Evidence favorable to Nada also included her own testimony as to her willingness to accept help in dealing with her personal problems and in learning to be a better mother.

[7] The impulsive personality disorder itself is not conduct and thus, not a ground for termination.

[8] Although Nada did abandon O.A. once before, that action was taken under very stressful and unique circumstances. It would, therefore, be unjustified to infer a likelihood of future abandonment from this isolated incident.

In view of the high standard of "clear and convincing evidence" required on the issue of the likelihood that past conduct will continue, we are left "with a definite and firm conviction on the entire record that a mistake has been made, although there may be evidence to support the finding." *In re S.D., Jr. et al*, 549 P.2d 1190, 1195 n. 10 (Alaska 1976).[4]

4. Nada also argues that the trial court erred by not considering the effect of the actions of the DFYS on Nada's exercise of her parental rights. She argues that the DFYS frustrated her efforts to communicate with O.A. while it encouraged the foster parents to adopt him, and thus, failed in its obligation to "make reasonable attempts, whenever possible, to preserve and strengthen the family ties." *E.A. v. State*, 623 P.2d 1210, 1213 (Alaska 1981) (footnote omitted), before terminating her parental rights. Nada's argument is without merit because it focuses on the wrong time frame. Nada was receiving a wide range of social services at the time she abandoned O.A. There is little the DFYS could have added to these services. During the relevant period prior to filing a petition to have Nada's rights terminated, the state did try unsuccessfully to locate her, but could do little to strengthen her family ties while she was gone. After she returned, the agency merely implemented its sound desire to avoid disruptive contacts while a judicial resolution of the matter was pending. The cases of agency misconduct cited by Nada are inapposite because in each of those situations the location of the parent was known. We also find Nada's claim of discriminatory enforcement of the termination statute to be without merit.

IV. CROSS-APPEAL

[9-11] In its cross-appeal, the state challenges the trial court's giving Nada leave to seek reconsideration of its termination order until the entry of a final adoption decree. It claims that this order represents a violation of O.A.'s equal protection rights. The state claims that the issuance of a termination order overcomes the statutory presumption in favor of a natural parent's fitness and urges that *Rita T. v. State*, 623 P.2d 344 (Alaska 1981), which undermines finality by resurrecting this preference, be modified or overruled so that the best interests of the child (as determined in a neutral adoption process), rather than parental rehabilitation alone, will be the relevant criterion.[5] In *Rita T.*, we interpreted AS 47.10.080(f) to permit any natural parent to stay adoption proceedings upon a showing of good cause. "Good cause" was defined as a showing that "it would be in the best interests of the child to resume living with [the parents] because they have sufficiently rehabilitated themselves so that they can provide proper guidance and care for the child." 623 P.2d at 347. We adhere to this position. Termination of parental rights is a drastic measure resulting in severance of all legal ties between the child and parent. The revocability of termination orders up until the time of adoption is a necessary compromise between the desire for finality and the desire to avoid unnecessary interference by the state in the natural parent-child relationship. *Rita T.* recognizes, and seeks to accommodate, the inherent potential for fallibility in judicial determinations based upon predictions of human behavior with respect to the likelihood of continued parental misconduct. The subsequent review of termination orders permitted by that decision cannot be said to deny equal protection to O.A. and to other children similarly situated who are awaiting adoption.

In conclusion, we find, first, that the record contains insufficient evidence to support the termination of Nada A.'s parental rights. Second, the preservation of her right to obtain reconsideration upon a showing of good cause prior to the adoption of O.A., challenged in the cross-appeal, was proper.

The decision below is REVERSED.

COMPTON, Justice, concurring.

I concur in the disposition of this appeal, but write separately to express my opinion that the legislature should amend AS 47.10.080(c)(3) so that a parent's incarceration may be considered when determining whether to terminate parental rights.

AS 47.10.080(c)(3) specifies that parental rights may be terminated only if there is a showing "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." It seems obvious to me that a child may be in need of aid when the only custodial parent engages in conduct that results in incarceration. I would therefore conclude that AS 47.10.080(c)(3) permits the superior court to consider the parent's incarceration when determining whether the child is in need of aid; *e.g.*, whether the parent has abandoned the child.

AS 47.10.080(c)(3) also requires, however, a showing "by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights." Although incarceration may well be likely to continue for a substantial period of time, and the child will

5. The state bases its constitutional argument on O.A.'s right to a permanent, adequate home. *See, In re S.D., Jr.*, 549 P.2d 1190, 1201 (Alaska 1976). Since this right has not been recognized as "fundamental", any difference between the treatment of children in O.A.'s position whose natural parents seek reconsideration and that of other children whose parents' rights have been terminated need only satisfy a reasonable basis test.

therefore continue to be in need of aid, involuntary incarceration is not willful "parental conduct." I therefore conclude that AS 47.10.080(c)(3), by its express terms, does not permit the superior court to consider the custodial parent's incarceration when determining whether to terminate parental rights.

The situation is easily imaginable in which the only parent with custody of a child commits a crime and is sentenced to a lengthy imprisonment term when the child is quite young. This may effectively destroy the parent-child relationship. Under these circumstances, the child should be permitted to establish a bond with other persons, rather than spend his or her minority in a succession of foster homes or other temporary placements. AS 47.10.080(c)(3), as presently written, however, does not permit the termination of parental rights in this situation. I urge the legislature to consider the effect of the statute's wording and amend it so that this result is not necessary.

In this case, the superior court indicated in its oral findings of fact that it considered Nada's incarceration to constitute an abandonment of O.A. Nada contends that her incarceration is beyond her control and therefore may not be considered as the "willful conduct" necessary to constitute abandonment in accordance with our holding in *In re R.J.*, 530 P.2d 747, 750 n. 12 (Alaska 1975). This court impliedly agrees with Nada by holding that the superior court did not commit reversible error on this issue because Nada's incarceration was not relied upon in the written findings of fact, which are controlling. 660 P.2d at 439 & n. 2. I disagree with this court's implied holding.

Very few people are voluntarily incarcerated. It is also true, however, that very few people are incarcerated for involuntary acts. It should be entirely foreseeable to a parent that commission of a crime will result in incarceration and separation from the parent's child. Whether this amounts to an abandonment of the child may depend upon whether the parent is able to and does make adequate provisions for the child's care during the length of the parent's incarceration. *See, e.g., Diernfeld v. People*, 137 Colo. 238, 323 P.2d 628 (Colo.1958); Annot., 79 A.L.R.3d 417 (1977) ("Parent's Involuntary Confinement as Evincing Neglect in Dependency or Divestiture Proceeding").

Nada did not make any provisions for the care of O.A. before her incarceration. She left O.A. with a babysitter, even though her stepmother lived in Fairbanks and had earlier taken care of her and O.A. Nada's incarceration may have been beyond her control, but her conduct in killing her husband was within her control, according to the superior court that found her guilty of manslaughter and sentenced her to a term of imprisonment. Furthermore, her failure to make any provisions for the care of O.A. during her incarceration was also within her control. I believe that these facts constitute clear and convincing evidence that Nada abandoned O.A.

As indicated, however, Nada's incarceration is not "parental *conduct*" that is "likely to continue to exist if there is no termination of parental rights." AS 47.10.080(c)(3). Thus, under the statute, her incarceration cannot justify the termination of her parental rights. I agree with this court that the evidence of Nada's impulsive personality disorder is not in itself grounds for terminating her parental rights. I also agree with this court that clear and convincing evidence was not presented that Nada is likely to abandon O.A. again after she is released from prison. Thus, I find I must concur with the court that it is necessary to reverse the superior court's order terminating Nada's parental rights. Again, however, I urge the legislature to amend AS 47.10.080(c)(3) so that parental rights may be terminated when a parent destroys the parent-child relationship by willfully committing a crime and failing to make adequate provisions for the care of the child during a period of incarceration. Under some circumstances, only in this fashion may the child be permitted to form a bond with other persons and avoid a succession of foster home placements or other unsatisfactory temporary placements during the entire duration of the child's minority.

823 SQUARE FEET, MORE OR LESS; A. Lee Goodman and Joan Goodman, Appellants,

v.

STATE of Alaska, Appellee.

No. 5746.

Supreme Court of Alaska.

March 4, 1983.

State brought eminent domain action claiming 50 foot right-of-way on either side of road. The Superior Court, Third Judicial District, Anchorage, granted summary judgment in favor of property owners on liability issues, and State appealed. The Supreme Court, 586 P.2d 595, reversed and remanded in part. On remand, the Superior Court, J. Justin Ripley, J., found that surveying, staking, stripping, and clearing entire 100 feet were sufficient acts of appropriation to create 50 foot right-of-way on lot, and appeal was taken. The Supreme Court held that physical acts indicated unmistakably that property on which they took place had been taken for road right-of-way purposes.

Affirmed.

Burke, C.J., filed an opinion concurring in the result.

Eminent Domain ⇐63

Although roadway itself was only 24-feet-wide with drainage ditches extending another 12 feet on each side of roadway, the surveying, staking, stripping and clearing of entire 100 feet were sufficient acts of appropriation to create 50 foot right-of-way on the lot, the physical acts indicated unmistakably that property on which they took place had been taken for road right-of-way purposes.

Michael Price and David A. Devine, Groh, Eggers, Robinson, Price & Johnson, Anchorage, for appellants.

Eugene F. Wiles, Stephen M. Ellis and Marc D. Bond, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for appellee.

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

OPINION

PER CURIAM.

On remand from our decision in *State, Department of Highways v. Green*, 586 P.2d 595 (Alaska 1978) the trial court found, on cross-motions for summary judgment, that a 100 foot right-of-way for Tudor Road consisting of 50 feet on each side of the section line was planned, surveyed, and staked, and that the land was stripped and cleared prior to the date on which the lot in question was leased. Although the roadway itself was only 24 feet wide with drainage ditches extending another 12 feet on each side of the roadway, the court found that surveying, staking, stripping, and clearing the entire 100 feet were sufficient acts of appropriation to create a 50 foot right-of-way on the lot. We agree. The physical acts here would indicate unmistakably that the property on which they took place had been taken for road right-of-way purposes. *See* 44 Pub.Lands Dec. 513, 515 (1916); 43 C.F.R. § 2800.0-1(b) (1979), *revised* 45 Fed.Reg. 44,526 (1980).

The judgment is AFFIRMED.

CONNOR, J., not participating.

BURKE, Chief Justice, concurring in the result.

I am not satisfied that public land can be appropriated, for purposes of a roadway easement, by physical appropriation alone.