

HB

339

Martha Stevens
515 N. Franklin
Juneau, Alaska 99801
March 10, 1996

Representative Brian Porter, JUD Chair
Alaska State Legislature

Dear Mr. Porter,

I am writing concerning HB339. I attended the Judiciary Committee meeting on March 6 and want to urge you to put it on the calendar for this week. I am aware that if changes must be made to Section 2 before it can be passed out of Judiciary it will be too late for the bill to pass during the current session.

If it impossible to make the changes the Judiciary Committee feels are necessary to Section 2, I urge you to support the changes in Section 3 and pass the bill to Rules.

The proposed changes in Section 3 regarding termination of parental rights are appropriate. I heard no objection to them. If the bill is calendared for this week, it would still have a chance to pass this session.

I am the Court appointed Guardian ad Litem for two children who have lived with the same foster mom for five years because their father is incarcerated for sexual abuse of their half-sister.

These children have been told their father will be released in May of this year. The older child, now nine years old is increasingly anxious. This child wonders more and more about what will happen to him, who will keep him safe, will he be allowed to stay with his foster mom in the only home he remembers. At this point no one can give him any answers.

According to the psychologist who has treated him since his placement five years ago, this child is likely to suffer real and lasting psychological damage unless he gets some reassurance that he will be safe and have some control over his father's right to see him or take him away from his foster mother.

The passage of this bill will be too late to help the afore mentioned child but is needed to protect any children who in future may be placed in this position.

As to the objection to the change in Section 2, I am puzzled by the testimony of the gentlemen from the Public Defender's Office. I would like some clarification of their (and your) objections to the change in wording from "caring and willing" to "willing and able".

In an effort to understand the exact meaning of the words, I first consulted an Attorney to ask if these words have a different meaning in legal terminology from the Webster Dictionary definitions. The Attorney said the meanings were identical as far as she knew.

Webster defines ABLE: "1. Having sufficient power, skill or resources of any kind to accomplish an object; competent; qualified". Webster defines CARE (verb): "1. To have, feel or exercise care. 2. To have a wish or inclination (to) or affection (for). In the interests of reasonable brevity, I include only those quotations from Webster that have any bearing on the use of the words in HB339.

My concern is that "caring and willing" addresses the parents' needs to maintain parental control. It does not address the childrens' rights to grow up in a healthy safe environment. It is certainly a demonstrated fact that many parents who say they want to take care of their children cannot, for a variety of reasons, do so.

In my experiences as a GAL, I have seen the long term damage a well-meaning but dysfunctional parent inflicts upon his/her children.

Children should have the right to grow up in a consistently safe and healthy environment. Their rights should not be placed second to parental rights if in the exercise of these rights they jeopardize their children.

Thank you,

Martha Stevens

Martha Stevens

cc. Rep. Joe Green
Rep. Con Bunde
Rep. Cynthia Toohey
Rep. Bettye Davis
Rep. David Finkelstein
Rep. Al Vezey
Rep. Norman Rokeberg
Jan Rutherford, AG's Office

AMENDMENT

by Representative Finkelstein

OFFERED IN HOUSE JUDICIARY
TO: CSHB 339(JUD)

Page 3, line 4:

Insert subsection:

"(A) If parental rights are terminated under this section due to incarceration, the court shall also make a specific finding concerning what residual parental rights are in the best interests of the child and should be retained by the parent whose rights are terminated."

F. Ailed

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

1 "An Act relating to children-in-need-of-aid proceedings; allowing termination of
2 parental rights with respect to a child in need of aid as a result of parental
3 conduct or parental incarceration if the conduct or incarceration is likely to
4 continue to exist sufficiently long to seriously damage the parent and child
5 relationship or to cause serious emotional or physical harm to the child; and
6 providing for an effective date."

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

8 * Section 1. PURPOSE. The purpose of this Act is to respond to the Alaska Supreme
9 Court's invitation in A.M. v. State of Alaska, 891 P.2d 815 (Alaska 1995) and Nada A. v. State
10 of Alaska, 660 P.2d 436 (Alaska 1983) to create a statutory basis for making incarceration a
11 factor that can be considered in termination proceedings concerning children in need of aid.

12 * Sec. 2. AS 47.10.080(c) is amended to read:

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

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

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

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

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

26 (3) by order, upon a showing in the adjudication by clear and convincing
27 evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of
28 parental conduct or incarceration, and upon a showing in the disposition by clear and
29 convincing evidence that the parental conduct or the period of incarceration is likely
30 to continue to exist sufficiently long to seriously damage the parent and child
31 relationship or to cause serious emotional or physical harm to the child if there is
32 no termination of parental rights, terminate parental rights and responsibilities of one or

1 both parents and commit the child to the department or to a legally appointed guardian
2 of the person of the child, and the department or guardian shall report annually to the
3 court on efforts being made to find a permanent placement for the child.

4 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).



Chambers of:
Allen T. Compton
Chief Justice

303 K Street
Anchorage, Alaska
99501-2083

(907) 264-0601
FAX (907) 278-5808

Alaska Supreme Court

February 26, 1996

Representative Norman Rokeberg
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99801-1182

Re: House Bill No. 339

Dear Representative Rokeberg:

Thank you for your recent transmittal of Committee Substitute for House Bill No. 339 (HES). Its stated purpose is to overrule a recent decision of the Alaska Supreme Court in In re: S.A. and D.A., Op. No. 4314 (Alaska January 26, 1996), and address the difficult subject raised in A.M. v. State, 891 P.2d 815 (Alaska 1995), and Nada A. v. State, 660 P.2d 436 (Alaska 1983), in both of which I urged a legislative response to the issue of termination of parental rights of an incarcerated person.

I am not in a position to pass along any legal judgment I might have regarding these amendments. However, they respond clearly to the separate position I took in In re S.A. and D.A., as well as the plea I made in A.M. and Nada A. The wisdom of these amendments is obviously for the legislature to determine. It is encouraging to know that our words, whether written in separate opinions or in an opinion for the court, do not fall on deaf ears. One could say that the issue of incarceration took long in germinating, but the legislature is certainly the appropriate forum to debate that issue.

Thank you for informing me. I appreciated the opportunity to speak with you about this when I was in Juneau Wednesday.

Sincerely,

Allen T. Compton
Chief Justice

MAR 11 1996

Martha Stevens
515 N. Franklin
Juneau, Alaska 99801
March 10, 1996

Att. Rep. Porter
Representative Brian Porter, JUD Chair
Alaska State Legislature

Dear Mr. Porter,

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I am the Court appointed Guardian ad Litem for two children who have lived with the same foster mom for five years because their father is incarcerated for sexual abuse of their half-sister.

These children have been told their father will be released in May of this year. The older child, now nine years old is increasingly anxious. This child wonders more and more about what will happen to him, who will keep him safe, will he be allowed to stay with his foster mom in the only home he remembers. At this point no one can give him any answers.

According to the psychologist who has treated him since his placement five years ago, this child is likely to suffer real and lasting psychological damage unless he gets some reassurance that he will be safe and have some control over his father's right to see him or take him away from his foster mother.

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Thank you,

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cc. Rep. Joe Green
Rep. Con Bunde
Rep. Cynthia Toohey
Rep. Bettye Davis
Rep. David Finkelstein
Rep. Al Vezey
Rep. Norman Rokeberg

9-LS1124M ✓
Lauterbach
2/19/96

Rep. Rokeberg

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

1 "An Act amending a statute governing children-in-need-of-aid proceedings to clarify
2 that a person is not considered an effective caretaker for a child unless the
3 person is both willing and able to care for the child; allowing termination of
4 parental rights with respect to a child in need of aid as a result of parental
5 conduct or parental incarceration if the conduct or incarceration is likely to
6 continue to exist sufficiently long to seriously damage the parent and child
7 relationship or to cause serious emotional or physical harm to the child; and
8 providing for an effective date."

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

10 * Section 1. PURPOSE. (a) The purpose of sec. 2 of this Act is to clarify statutes to
11 expressly recognize the Department of Health and Social Service's long-standing interpretation
12 of AS 47.10.010(a)(2)(A) that a parent cannot effectively care for a child unless the parent is
13 both willing and able to care for that child. Section 2 of this Act is expressly intended to

1 overrule the decision by the Alaska Supreme Court in In re S.A. and D.A. (Op. No. 4314,
2 January 26, 1996).

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

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

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

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

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

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

18 (i) both parents,

19 (ii) the surviving parent, or

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

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

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

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

6 (E) the child committing delinquent acts as a result of pressure,
7 guidance, or approval from the child's parents, guardian, or custodian;

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

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

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

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

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

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

1 the public; and

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

5 (3) by order, upon a showing in the adjudication by clear and convincing
6 evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of
7 parental conduct or incarceration, and upon a showing in the disposition by clear and
8 convincing evidence that the parental conduct or the period of incarceration is likely
9 to continue to exist sufficiently long to seriously damage the parent and child
10 relationship or to cause serious emotional or physical harm to the child if there is
11 no termination of parental rights, terminate parental rights and responsibilities of one or
12 both parents and commit the child to the department or to a legally appointed guardian
13 of the person of the child, and the department or guardian shall report annually to the
14 court on efforts being made to find a permanent placement for the child.

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

Alaska State Legislature



House of Representatives House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

February 29, 1996

TO: Members of House Judiciary Committee

FROM: Tom Meyer, staff

RE: HB 339 Prisoners and termination of parental rights

It is a violation of state law to disclose in a public document the names of any children who are the subject of child in need of aid proceedings. Please be advised that the names of the children who are discussed in Ms. Peggy Thomas' letter found in the backup materials for this bill are confidential under state laws. I have redacted the names in the letter. Further, the names of any such children should not be disclosed during the public hearings. If you find any public disclosure of the names of any children who are the subjects of child in need of aid proceedings, please redact them.

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS:

OIL & GAS, CHAIRMAN
LABOR & COMMERCE, VICE CHAIRMAN
ADMINISTRATIVE REGULATION REVIEW, VICE CHAIRMAN
HEALTH, EDUCATION & SOCIAL SERVICES, MEMBER
ECONOMIC DEVELOPMENT, MEMBER



INTERIM:
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ANCHORAGE, AK 99501
PHONE: (907) 258-8191
FAX: (907) 258-2918

SESSION:
STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 485-4888
FAX: (907) 485-2040

Representative Norman Rokeberg

MEMORANDUM

To: Representative Brian Porter
Chair, House Judiciary Committee

From: Representative Norman Rokeberg *NWR*

Re: CS for HB 339, "An act relating to children-in-need-of-aid proceedings, including proceedings to terminate rights of incarcerated parents; and providing for an effective date."

Date: February 22, 1996

I respectfully request that the House Judiciary Committee schedule a hearing on CS for HB 339, "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."

The bill has passed out of the House Health, Education and Social Services and State Affairs committees and has received favorable support by the departments of Law and Health and Social Services.

I am requesting that a hearing be scheduled for CS for HB 339 as soon as possible. If you have any questions about the bill, please let me know.

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS:

OIL & GAS, CHAIRMAN
LABOR & COMMERCE, VICE CHAIRMAN
ADMINISTRATIVE REGULATION REVIEW, VICE CHAIRMAN
HEALTH, EDUCATION & SOCIAL SERVICES, MEMBER
ECONOMIC DEVELOPMENT, MEMBER



INTERIM:
718 WEST 4TH AVENUE, SUITE 640
ANCHORAGE, AK 99501
PHONE: (907) 258-8191
FAX: (907) 258-2918

SESSION:
STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 485-4988
FAX: (907) 485-2040

Representative Norman Rokeberg

Sponsor Statement CS for HB 339

"An act relating to the termination of parental rights of incarcerated parents"

This bill gives the courts the authority to consider the fact that a parent is in prison when deciding whether to terminate parental rights. Under current law, the courts cannot terminate parental rights because the parent being in prison is not considered willful conduct on the part of the parent. The courts have asked the legislature on two occasions, in 1983 and 1995, to revise the statute, and this bill does that.

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

Before parental rights can be terminated, a child must be adjudicated a "Child In Need of Aid," and there must be no parent, guardian, custodian or relative willing and able to take care of the child. If there is no one, the court may terminate parental rights because of parental conduct, and that the conduct is likely to continue to exist. CS for HB 339 amends the law to allow incarceration and the length of incarceration to be added to this section of law, so that parental conduct, or incarceration, and the parental conduct or period of incarceration is likely to exist sufficiently long to seriously damage the parent and child relationship or to cause serious emotional or physical harm to the child.

HB 339 was amended in HESS to change "caring or willing" to "willing and able" in the section of law that stipulates how a child is found to be a "Child In Need of Aid." This change is in line with a long-standing interpretation by the Department of Health and Social Services and prevents the courts from allowing a child to be with a parent, guardian, custodian or relative who is willing to care for the child, but not able. An example of this situation would be someone in prison who expresses willingness to care for the child, but is not able.

I urge your support of CS for HB 339.

LAW OFFICES OF
KATHLEEN A. WEEKS
425 "G" STREET, SUITE 900
ANCHORAGE, ALASKA 99501

JAN 30 1996

PHONE: (907) 276-4445

FAX (907) 279-6603

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:

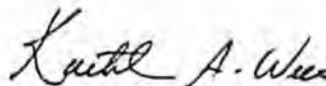
I want to thank you sincerely on behalf of the children, parents, and families that you will create through the introduction of House Bill No. 339. As an attorney who practices family law extensively, I have seen too many parents that desperately wanted to adopt a child when the child was prevented from 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

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, [REDACTED] 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.

[REDACTED] 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 he will have served five years. He is due to be released May 14th of this year.

Representative Rokeberg
January 19, 1996
Page 2

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

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
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FAIRBANKS, ALASKA 99701-4679
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P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

(FAX) 465-2539

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 12, 1996

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

Re: Termination proceeding

Dear Representative Rokeberg:

Enclosed is a description of what must be proven in a termination proceeding. I have also enclosed the relevant statutes and rules, as well as the latest draft on HB 339. In cases not involving the Indian Child Welfare Act, the state must prove the first paragraph and show that reasonable efforts have been made to reunite the family (see CINA rule 15(g), also attached). The second and third paragraphs apply only to ICWA cases.

Please let me know if you have any questions on this subject.

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:


Jan A. Rutherford
Assistant Attorney General

JAR:pao

Enclosures

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

CHILD IN NEED OF AID RULES, Alaska Rules of Court

Rule 18. Termination of Parental Rights.

(a) **Petition.** The Department may file a petition seeking termination of parental rights combined with or after the filing of a petition for adjudication for that child as a child in need of aid. The title of the petition must clearly state that termination of parental rights is sought. A petition for termination of parental rights must be served as provided by CINA Rule 7(d).

(b) **Nature of the Proceeding.** The termination hearing is a disposition hearing to the court on the question of whether the parental rights to an adjudicated child in need of aid should be terminated. Upon a showing of good cause and with adequate notice to the parties, an adjudication hearing and a termination hearing may be consolidated. CINA Rule 17 applies to termination hearings except as this rule provides otherwise.

(c) **Burden of Proof.** Before the court may terminate parental rights, the Department must prove:

(1) by clear and convincing evidence that either the parental conduct that caused the minor to be adjudicated a child in need of aid is likely to continue unless parental rights are terminated, or the requirements of AS 25.23.180(c)(2) or (3) have been met; and

(2) in the case of an Indian child, by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The court must also find by a preponderance of evidence that the party requesting the termination of parental rights to an Indian child has shown 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.

Indian Child Welfare Act
25 U.S.C. § 1912

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court 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.

(f) Parental rights termination orders: evidence; determination of damage to child

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

Rule 15.

(g) **Additional Findings.** In any case in which the court has authorized the Department to remove the child from the child's home, or continued a previous order for removal, the court shall make findings pursuant to 42 U.S.C. § 671(a)(15) as to whether, under the circumstances of the case, reasonable efforts were made to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to return to the home.

Before a court may terminate parental rights in an Indian child, DFYS must prove:

- (1) by clear and convincing evidence that the parental conduct that caused the child to be adjudicated a child in need of aid is likely to continue unless parental rights are terminated. CINA Rule 18(c)(1); *In re J.R.B.*, 715 P.2d 1170, 1172 (Alaska 1986).
- (2) by evidence beyond a reasonable doubt that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. CINA Rule 18(c)(2); 25 U.S.C. § 1912(f) (1988).
- (3) by a preponderance of the evidence that the party requesting the termination of parental rights has shown that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful. CINA Rule 18(c)(2); 25 U.S.C. § 1912(d).

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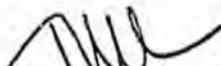
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Juneau, Alaska 99801-2105

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

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, e.g., Huston v. Haggard, 475 S.W.2d 330, 333 (Tex. App. 1971); 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.

[Excerpt from A.M. v. State (March 10, 1995)]

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.

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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."

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."

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

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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.

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

[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

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."

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

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

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

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.

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 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 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.

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.



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-foot-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-

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,

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 13, 1996

TONY KNOWLES, GOVERNOR

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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 in 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

Honorable Norman Rokeberg
Alaska State Legislature

February 13, 1996
Page 4

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.

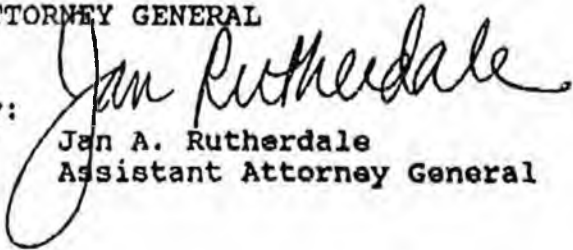
Section 4. Because of the urgent need for this bill, especially section 2 of the bill, this bill provides for an immediate effective date.

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 A. Rutherford
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.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 339 (HES)

Revision Date: _____	Dept. Affected: <u>Department of Law</u>
Title: <u>"An Act relating to children-in-need-of-aid -</u>	BRU: <u>Civil Division</u>
<u>proceedings..."</u>	Component: <u>General Legal Services</u>
Sponsor: <u>Representative Rokeberg</u>	
Requester: <u>House State Affairs</u>	COMPONENT SERIAL NO. <u>2087</u>

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
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						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

POSITIONS

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill has the effect of overriding the decision by the Alaska Supreme Court in *In re S.A. and D.A.* by clarifying in statute 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. The bill is also in response to the Alaska Supreme Court's invitation in *A.M. v. State of Alaska*, and *Nada A. v. State of Alaska* to create a statutory basis for making incarceration a factor that can be considered in termination proceedings concerning children in need of aid. The bill accomplishes both of these purposes. Approval of the bill will not have a fiscal impact for the Department of Law because it reaffirms existing practice, and it will help eliminate continuing disputes over this practice, thus freeing more time to deal with the growing number of children-in-need-of-aid proceedings in which the department is involved.

Prepared by: Richard I. Pegues, Director
 Division: Administrative Services Division
 Approved by Commissioner: Bruce M. Botelho, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: 2/21/96
 Date: 2/21/96

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THE SUPREME COURT OF THE STATE OF ALASKA

IN THE MATTER OF:)	
)	Supreme Court No. S-6619
S.A.)	
DOB: 8/4/89)	
)	Superior Court No.
D.A.)	4FA-91-100 CP
DOB: 7/18/90)	
)	<u>O P I N I O N</u>
Minors under the Age of)	
Eighteen (18) Years.)	[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.

I. 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" cannot 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

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 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,

(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

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

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

- (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[.]

(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

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

(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) 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.

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's⁵ 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

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, statutes 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

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

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 825. 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

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 subsection 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 part 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

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

(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 standards² because good intentions alone do not ensure that a child's "physical, emotional,

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 circuitry 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).

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

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

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

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) ensured 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.

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: February 23, 1996

FURTHER REFERRALS:

Date of Committee Action: 3/20/96

The JUDICIARY Committee considered:

HR 339

HOUSE BILL NO. 339

PRISON & TERMINATION OF PARENTAL RIGHTS

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

recommends it be replaced with the following committee substitute CSHB 339 (JUD) the same title 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) _____

zero fiscal note(s) _____ zero fiscal note(s) Law (2-23-96)
HSSSS (2-19-96)

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Brian Porter</i>	✓			
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			

CHAIR'S SIGNATURE *Brian Porter*

CS FOR HOUSE BILL NO. 339(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, Mulder, Robinson

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to children-in-need-of-aid proceedings; allowing termination of
 2 parental rights with respect to a child in need of aid as a result of parental
 3 conduct or parental incarceration if the conduct or incarceration is likely to
 4 continue to exist sufficiently long to seriously damage the parent and child
 5 relationship or to cause serious emotional or physical harm to the child; and
 6 providing for an effective date."

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

8 * Section 1. PURPOSE. The purpose of this Act is to respond to the Alaska Supreme
 9 Court's invitation in A.M. v. State of Alaska, 891 P.2d 815 (Alaska 1995) and Nada A. v. State
 10 of Alaska, 660 P.2d 436 (Alaska 1983) to create a statutory basis for making incarceration a
 11 factor that can be considered in termination proceedings concerning children in need of aid.

12 * Sec. 2. AS 47.10.080(c) is amended to read:

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

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

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

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

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

26 (3) by order, upon a showing in the adjudication by clear and convincing
27 evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of
28 parental conduct or incarceration, and upon a showing in the disposition by clear and
29 convincing evidence that the parental conduct or the period of incarceration is likely
30 to continue to exist sufficiently long to seriously damage the parent and child
31 relationship or to cause serious emotional or physical harm to the child if there is
32 no termination of parental rights, terminate parental rights and responsibilities of one or

1 both parents and commit the child to the department or to a legally appointed guardian
2 of the person of the child, and the department or guardian shall report annually to the
3 court on efforts being made to find a permanent placement for the child.

4 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).