HB

339

DFYS supports Indian Child Welfare Act. Small # children impacted. Does not impact

CS FOR HOUSE BILL NO. 339(JUD) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Amended: 4/9/96
Offered: 3/21/96

Sponsor(s): REPRESENTATIVES ROKEBERG, Mulder, Robinson, B.Davis

A BILL

FOR AN ACT ENTITLED

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

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

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

* Sec. 2. AS 47.10.080 is amended by adding a new subsection to read:

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

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

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

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

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS

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LABOR & COMMERCE, VICE CHAIRMAN
ADMINISTRATIVE REGULATION REVIEW, VICE CHAIRMAN
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JUNEAU, AK 99801-1182
PHONE (907) 465-4958
FAX (907) 465-2040

Representative Norman Rokeberg

Visit + Mother
mark 4 (now 10)
Samantha (now
Peggy Thomas
Foster Mother
465-3620

CSHB339(JUD)am
Sponsor Statement

I first got involved with this bill when an attorney brought to my attention that there was a glitch or loophole in the law regarding termination of parental rights.

When terminating parental rights, the court must determine whether the child is a child in need of aid "as a result of parental conduct;" and second, whether that conduct "is likely to continue to exist." There are a number of situations stipulated in the law that can lead to a C.I.N.A. adjudication, including sexual abuse, physical abuse or neglect, the child committing delinquent acts and physical abandonment by the parent.

The effect of a parent being in prison cannot even be considered under current law because incarceration does not constitute *willful* abandonment. Hence, the courts are unable to terminate parental rights in order to place the child in a permanent home, even in situations involving longterm incarceration. The child is left to linger in foster homes for years, without any sense of permanency.

More than a decade ago in Nada A. v. State. Alaska Supreme Court Justice Compton wrote an opinion requesting some relief in situations involving a child whose parent is in prison. Judge Compton wrote, "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." Last year, he again re-iterated his request for legislative relief in A.M. v. State of Alaska. In both cases, the court does not have the authority to consider parental incarceration as a form of willful abandonment.

The court has asked the legislature to provide the policy direction in custody cases involving a parent who is serving time in prison. This bill allows the courts to determine that incarceration of the parent is sufficient grounds for making a Child In Need of Aid determination, if the period of incarceration is significant, considering the child's age and need for adult care and if the parent has failed to make adequate provisions for care of the child during the period of incarceration.

I urge your support on this bill.

[redacted]

SPONSOR STATEMENT

.o. 2

FISCAL NOTE

Bill Version: CSHB 339(HES)
(H) Publish Date: 2/23/96

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Revision Date:
Title: "An Act relating to children-in-need-of-aid proceedings..."
Sponsor: Representative Rokeberg
Requester: House State Affairs

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services
COMPONENT SERIAL NO. 2087

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)

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

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.

Richard L. Pegues

Prepared by: Richard L. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 2/21/96

Approved by Commissioner: Bruce M. Botelho, Attorney General (for) Richard L. Pegues — Date: 2/21/96
Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

No. 1
Bill Version: CSHB 339(HES)
(H) Publish Date: 2/19/96

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

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

Expenditures/Revenues: (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY97	FY98	FY99	FY00	FY01	FY02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1008 GF/MHTIA						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

POSITIONS	FY97	FY98	FY99	FY00	FY01	FY02
FULL-TIME						
PART-TIME						
TEMPORARY						

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

ANALYSIS: (Attach a separate page if necessary)

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

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

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

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(Rev 11/95/96 ... /CAS_DHSS

Margaret Thomas
9208 Long Run Drive
Juneau, Alaska 99801
March 30, 1995

The Honorable Caren Robinson
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Robinson:

On March 10, 1994, the Alaska Supreme Court issued its opinion in *A.M. v. State*, ___ P.2d ___ (Op. No. 4177, March 10, 1995). In this case, the court was once again called upon to interpret AS 47.10.080, relating to the termination of parental rights. Once again, a concurring opinion was written specifically inviting the legislature to amend the statute to address an existing problem. This is to bring that problem to your attention and ask you to sponsor legislation that would solve the problem.

AS 47.10.080 governs the termination of parental rights. It requires a court to find that a parent's continuing conduct that causes the child to be in need of aid is "willful." *See Nada A v. State*, 660 P.2d 436, 441-42 (Alaska 1983) (Compton, J., concurring). The problem arises when a child is in need of aid because the parent is incarcerated for a significant felony offense, such as sexual abuse of a minor. As Justice Compton stated:

> Although incarceration may well be likely to continue for a substantial period of time, and the child will therefore continue to be in need of aid, involuntary incarceration is not willful "parental conduct." . . . .
>
> . . . . 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.

660 P.2d at 442 (Compton, J., concurring).

In *A.M. v. State*, Op. No. 4177 at 29, Justice Compton reiterated his belief "that a legislative response to this issue is appropriate," and further opined that it is "now long overdue." The legislature should amend the statute to make it possible for a court to terminate parental rights "when a parent destroys the parent-child relationship by willfully committing a crime and failing to make adequate provision for the care of the child during a period of incarceration." *Nada A. v. State*, 600 P.2d at 442.

I urge you to sponsor a bill that would correct this oversight. Alteratively, perhaps there is an existing bill that could be amended to include a solution to this problem. I am enclosing copies of *Nada A.* and *A.M. v. State* for your reference. If you have any questions about this matter, I would be glad to try to answer them for you.

Sincerely,

Peggy Thomas

Margaret (Peggy) Thomas

cc: The Honorable Lyda Green, Chair
The Honorable Johnny Ellis
The Honorable Judith Salo
The Honorable Cynthia Toohey, Co-Chair
The Honorable Con Bunde, Co-Chair
The Honorable Brian Porter, Chair

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

PHONE: (907) 276-4445 FAX (907) 279-6603

JAN 30 1996

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, S[redacted] and M[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.

M[redacted] and S[redacted] were taken into custody at age 3 and 18 months, respectively, because their father, A[redacted] M[redacted], was arrested for Theft in the Second Degree and Sexual Abuse of a Minor in the Second Degree. Mr. M[redacted] 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.

SUPPORT

Mr. Mancini's parental rights were terminated by Judge Carpeneti. Mr. M[redacted] 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. M[redacted] 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

DI..SION OF LEGAL SERVICE..
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
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. See, e.g., Huston v. Haggard, 475 S.W.2d 330, 333 (Tex. App. 1971); In re Dobbs, 531 P.2d 303 (Wash. App. 1975).

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

Excerpt from [illegible]

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.

LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM April 3, 1996

SUBJECT: Termination of Parental Rights (CSHB 339(JUD))

TO: Representative Norm Rokeberg
Attn: Mia

FROM: Terri Lauterbach
Legislative Counsel

You have asked for a short statement as to whether CSHB 339(JUD) will affect cases decided under the Indian Child Welfare Act (ICWA).

CSHB 339(JUD) does not affect ICWA cases. The standards of federal law in ICWA will continue to apply to cases involving the termination of parental rights of children who are covered by ICWA.

Please let me know if I can be of further assistance.

TML:glc
96-207.glc

STATE OF

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO

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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 Rutherdale
Jan A. Rutherdale
Assistant Attorney General

JAR:pao

Enclosures

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

DHCSLH

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.

In this case, it would have been preferable for the court to 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, Robloff (Yukon's mechanic), Sundberg (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 persuasive.

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 unusual 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 deeming that the probative value of Yukon's experiment results was outweighed by the possibility of resulting jury prejudice and undue trial delay.

The judgment below is AFFIRMED.

NADA A., Appellant and Cross-Appellee,

v.

STATE of Alaska, Appellee and Cross-Appellant.

Nos. 6546, 6693.

Supreme Court of Alaska.

Feb. 25, 1983.

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

Reversed.

Compton, J., filed a concurring opinion.

1. Infants ⇐157

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

2. Infants ⇐188

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 continuous disregard of the obligations 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(b)(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(b)(c)(3).

8. Infants ⇐157

Where mother's abandonment of child was taken under stressful and unique circumstances, meriting her imminent incarceration for killing the child's father, it would be unjustified to infer likely future abandonment from that incident. AS 47.10(b)(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 of order terminating parental rights is a showing that it would be in the best interests of the child to resume living with the natural parent because they have sufficiently rehabilitated themselves to provide proper guidance and care for the child.

11. Constitutional Law ⇐223.1

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

John Hedges, 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 that order permitting a reconsideration of the termination

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

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

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

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

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

I. ABANDONMENT

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

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

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

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

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

. . . .

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

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

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

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

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

II. BEST INTERESTS OF THE CHILD

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

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

2. When written findings of fact conflict with an oral statement made by a judge, the written findings are controlling. [illegible] P.2d 1021, 1023 n. [illegible] (Alaska 1977). *See also* [illegible] (Alaska 1979).

3. AS 47.10.082 reads:

"In making its dispositional order under AS 47.10.080 the court shall consider the best [illegible]

[illegible] interests of the child and public, and in making its dispositional order under AS 47.10.080 the court shall consider the best [illegible] 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.[illegible]

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

III TRIAL COURT'S FINDINGS

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

AS 47 10 080(c)(3) requires as prerequisites to termination of parental rights that first, the child is a child in need of aid "as a result of parental conduct," and second, clear and convincing evidence that "the parental conduct is likely to continue to exist" The parental conduct relied on by the trial judge in determining that O A was a child in need of aid was

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

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

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

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

Dr. Rothrock's opinion was not shared by Robert Dunn, a psychological counselor, who offered opposing expert testimony that N A had a high probability of success in controlling her problem, not 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)[6]

6. 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, wherever possible, to preserve and strengthen the family ties." *E.A. v. State*, 623 P.2d 1210, 1213 (Alaska 1981) (footnote omitted), before terminating her parental rights Nada's argument is without merit because it focuses on the wrong time frame Nada was receiving a wide range of social services at the time she abandoned O A There is little the DFYS could have added to these services During the relevant period prior to filing a petition to have Nada's rights terminated, the state did try unsuccessfully to locate her, but could do little to strengthen her family ties while she was gone After she returned, the agency merely implemented its sound desire to avoid disruptive contacts while a judicial evaluation of the matter was pending The cases of agency misconduct cited by Nada are inapposite because in each of those situations the location of the parent was known We also find Nada's claim of discriminatory enforcement of the termination statute to be without merit

IV CROSS-APPEAL

[9-11] In its cross-appeal, the state challenges the trial court's giving Nada leave to seek reconsideration of its termination order until the entry of a final adoption decree It claims that this order represents a violation of O A 's equal protection rights The state claims that the issuance of a termination order overcomes the statutory presumption in favor of a natural parent's fitness and urges that *Rita T. v. State*, 623 P.2d 344 (Alaska 1981), which undermines finality by resurrecting this preference, be modified or overruled so that the best interests of the child (as determined in a neutral adoption process), rather than parental rehabilitation alone, will be the relevant criterion[8] In *Rita T.*, we interpreted AS 47 10 080(f) to permit any natural parent to stay adoption proceedings upon a showing of good cause "Good cause" was defined as a showing that "it would be in the best interests of the child to resume living with [the parents] because they have sufficiently rehabilitated themselves so that they can provide proper guidance and care for the child" 623 P.2d at 347 We adhere to this position Termination of parental rights is a drastic measure resulting in severance of all legal ties between the child and parent The revocability of termination orders up until the time of adoption is a necessary compromise between the desire for finality and the desire to avoid unnecessary interference by the state in the natural parent-child relationship *Rita T.* recognizes, and seeks to accommodate, the inherent potential for fallibility in judicial determinations based upon predictions of human behavior with respect to the likelihood of continued parental misconduct The subsequent review of termination orders permitted by that decision cannot be said to deny equal protection to O A and to other children similarly situated who are awaiting adoption

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

The decision below is REVERSED

COMPTON, Justice, concurring

I concur in the disposition of this appeal, but write separately to express my opinion that the legislature should amend AS 47 10 080(c)(3) so that a parent's incarceration may be considered when determining whether to terminate parental rights

AS 47 10 080(c)(3) specifies that parental rights may be terminated only if there is a showing "by clear and convincing evidence that there is a child in need of aid under AS 47 10 011(11)(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

8. The state bases its constitutional arguments 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 Naola's incarceration to constitute an abandonment of O.A. Naola 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 Naola by holding that the superior court did not commit reversible error on this issue because Naola'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., Dierenfeld 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").

Naola 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. Naola'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 Naola abandoned O.A.

As indicated, however, Naola'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 existence of Naola'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 Naola 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 Naola's parental rights. Again, however, I urge the legislature to amend AS 47.10.080(c)(3) so that parental rights may be terminated when a parent destroys the parent-child relationship by willfully committing a crime and failing to make adequate provisions for the care of the child during a period of incarceration. Under some circumstances, only in this fashion may the child be permitted to form a bond with other persons and avoid a succession of foster home placements or other unsatisfactory temporary placements during the entire duration of the child's minority.

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

v.

STATE of Alaska, Appellee.

No. 5766.

Supreme Court of Alaska.

March 4, 1983.

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

Affirmed.

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

Eminent Domain ⇐63

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

Michael Price and David A. Devine, Groh, Eggers, Rulamun, 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. § 2000.0-1(b) (1979), *revised* 45 Fed.Reg. 44528 (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.

THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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

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

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

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

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

I. FACTS AND PROCEEDINGS

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

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

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

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

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

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

A. Statutory Framework and Standard of Review

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

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

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

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

terminate parental rights

> upon a showing . . . by clear and convincing evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct and upon a showing . . . by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights . . . .

See also CINA Rule 15(c). In order to terminate parental rights under this statute, the court must initially find grounds sufficient to warrant a CINA adjudication. Nada A. v. State, 660 P.2d 436, 439-40 (Alaska 1983). The court must then undertake a two-step inquiry: first, whether the child is a child in need of aid "as a result of parental conduct;" second, whether that conduct "is likely to continue to exist." Id. at 440 (quoting AS 47.10.080(c)(3)).

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

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

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

(continued...)

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

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

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

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

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

. . . .

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

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

B. Abandonment

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

1. Conscious Disregard for Parental Duties

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

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

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

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

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

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

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

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

2. Destruction of the Parent-Child Relationship

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

parent-child bond.

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

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

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

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

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

C. Inability to Provide Care

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

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

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

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

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

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

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

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

D. Remaining Substantive Issues

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

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

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

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

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

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

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

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

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

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

As a prerequisite to termination of parental rights under ICWA § 102(f), 25 U.S.C. § 1912(f) (1986), and Alaska Child in Need

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

a. Physical Harm

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

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

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

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

b. Emotional Harm

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

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

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

3. Active Remedial Efforts by the State

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

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

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

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

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

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

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

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

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

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

Id. at 157-58.

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

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

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

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

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

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

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

III. PROCEDURAL ISSUES

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

A. Denial of Bifurcation

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

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

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

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

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

B. Absence of the Guardian Ad Litem

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

IV. CONCLUSION

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

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

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

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

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

When we, as a society, terminate parental rights, we sever the fundamentally important relationship between parent and child. In our society this relationship is highly valued, yet at times it must be severed. We sever it only when the health and safety of th 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.

House bill strikes jailed parents' rights

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The Associated Press

JUNEAU — The House has passed a bill that would give state judges the power in extreme cases to eliminate parental rights when jailed parents have failed to provide for the care of their children.

The bill is sponsored by Rep. Norman Rokeberg, R-Anchorage. Rokeberg said it was prompted by Alaska Supreme Court decisions asking the Legislature to put such provisions into statute.

The bill passed on Tuesday after being amended by Rep. Kay Brown, D-Anchorage. Brown's amendment boiled Rokeberg's bill down to two conditions that must be met before the rights of parents serving a jail sentence could be ended.

One condition is that the inmate had not made adequate provisions for a youngster's care. The other is that the jail term would be lengthy and come at a time in a child's life when the child needed adult care.

"I think it's a difficult issue to balance because we want to protect the children, but we don't want to unduly penalize parents, particularly if their crime did not harm the child," Brown said.

Rokeberg agreed to the amendment and it passed without objection.

Rokeberg said that under current law, courts considering whether parental rights should be terminated cannot take into consideration that the parent is serving a lengthy prison sentence.

"It may not affect a large number of children," Rokeberg said, "but for those it does affect it will have a major impact."

The bill passed the House 29-4. Its next stop is the state Senate.