

HB

354

ALASKA STATE HOUSE OF REPRESENTATIVES

**Contact:**

Interim Address:

3340 Badger Road
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4271

Session

(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 204

REPRESENTATIVE JOHN COGHILL

HB 354 OCS Revisions

SPONSOR STATEMENT

This legislation was introduced at the request of Department of Law and the Office of Children's Services to address three issues of concern.

First the bill transfers to the department authority to adopt regulations to set the amount and length of time that a subsidy for a hard-to-place child may be granted. Currently that decision is made by the commissioner of HSS without clear guidelines to be consistent with eligibility. Also, with current statutory language the department could be determined to be required to give a subsidy for children from birth to three years old, even when the department determines there would not be a need for a subsidy.

Second, the bill clarifies that an employee can be charged with a misdemeanor for disclosing confidential or privileged information when that confidential information has been disclosed to them under AS 47.10.092(f), Disclosure to certain public officials and employees.

Third, Secs. 3 and 4 allow OCS could obtain child support orders for minors in state custody under CINA and delinquent minor statutes through administrative support orders by the Child Support Services Division.

The HESS Committee Substitute adds two provisions to the bill. First, it eliminates a contradiction in statutes dealing with the requirement of notification of parents when an eighteen-year-old wished to be adopted. Under current law, even if the biological had abandoned the 18-year-old eighteen years ago, the 18-year-old would have to attempt to locate the parent and give parental notice.

It also incorporates a provision from HIB 377 holding the state civilly liable for actions of employee's acting in an official capacity for the department that result in the injury or death of a child.

~~the amendments~~
but the immunity
has been

(b) Nothing in this section shall be construed to prohibit a civil action for common law negligence or an action under AS 29.55.580 on behalf of a child who is injured or dies while in the custody of the state.

Insert:

Delete all material

Page 4, lines 17 - 19

Amendment #1 to "c" Version

James Feldman

From: Rep. Les Gara
Sent: Wednesday, February 20, 2008 5:44 PM
To: msimonian@friedmanrubinwhite.com
Cc: James Feldman
Subject: RE: Duty of care - Foster Care

-----Original Message-----

From: msimonian@friedmanrubinwhite.com [mailto:msimonian@friedmanrubinwhite.com]
Sent: Wednesday, February 20, 2008 12:39 PM
To: Rep. Les Gara
Subject: Re: Duty of care - Foster Care

Hi Les. We could get the hearing transcribed. But, I'm not sure how you have a common law cause of action if AS 47 expressly precludes civil liability. A common law duty is derived from either statute, regulation, contract, undertaking, or the parties pre-existing special relationship. I suppose a plaintiff under the new statute could argue that the undertaking and pre-existing special relationship create a common law duty. But, that will be a tough argument in the face of the statutory language. The state will argue that the special relationship and undertaking are created by statute and those statutes preclude liability.

You should look at McGrew v. DFYS, as it illustrates the problem with arguing a duty in the face of statutory language precluding a duty. I've cut and pasted the relevant part of the decision below.

I don't think there is a supreme court decision that finds a common law duty in the face of statutory immunity, and that is essentially the position we are in now. The common law duty that was created by prior case law preceded these changes to the statutory language. As in McGrew, I think the court would find not common law duty with the sort of language that now exists.

In the McGrew decision, the supreme court stated that the bar relating to a standard and duty of care in the previous version of AS 47 meant that the statutes could not be relied upon to

In deciding whether a defendant owes a plaintiff a duty of reasonable care, we first determine whether a duty is imposed by statute, regulation, contract, undertaking, the parties' preexisting relationship, or existing case law.FN9 If these sources do not resolve the issue, we apply the multi-factor approach discussed in D.S.W. v. Fairbanks North Star Borough School DistrictFN10 to determine whether an actionable duty of care exists.FN11

FN9. In *Karen L. v. State, Department of Health & Social Services, Division of Family & Youth Services* we stated: "[T]ypical theoretical sources of actionable duties are statutes, regulations, certain contracts, express undertakings, or fiduciary relationships.... If one of those duty sources applied, it would not be necessary to consider the D.S.W. [v. Fairbanks North Star Borough School District] factors." 953 P.2d 871, 875 n. 9 (Alaska 1998) (internal citations omitted). See also *Wongittilin v. State*, 36 P.3d 678, 681 (Alaska 2001); *Waskey v. Municipality of Anchorage*, 909 P.2d 342, 343-44 (Alaska 1996) (finding it "unnecessary to resort to the D.S.W. approach" where we had decided other cases "more closely related" to the subject duty dispute); *Estate of Day v. Willis*, 897 P.2d 78, 81 n. 7 (Alaska 1995) (holding internal administrative and training manual did not impose duty of care toward fleeing suspects).

FN10. D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 555 (Alaska 1981).

FN11. Wongittilin, 36 P.3d at 681. The D.S.W. factors include foreseeability of harm; degree of certainty plaintiff suffered injury; closeness of connection between defendant's conduct and injury; moral blame attached to defendant's conduct; policy of preventing future harm; extent of burden to defendant and availability; cost and prevalence of insurance for the risk involved. D.S.W., 628 P.2d at 555.

The McGrews argue that an actionable duty is imposed by AS 47.14.240, which specifies the responsibilities of the local review boards which review DFYS's placement decisions. It requires a review board to allow the child's relatives to participate. FN12 But another statute, AS 47.10.960, states that "[n]othing in this title creates a duty or standard of care for services to children and their families being served under AS 47.10." Lucy was a child being served under AS 47.10.? Section .960 therefore precludes the McGrews from contending in a tort suit that AS 47.14.240 can be the basis of an actionable duty.

FN12. AS 47.14.240(d)(2).

The McGrews also assert that other statutes are sources of an actionable duty: *323 AS 47.10.142(a), (e), and (h); FN13 AS 47.10.020(a); FN14 AS 47.10.080(1) and (1)(2)(B); FN15 and AS 47.05.060. FN16 Any claim based on these statutes is likewise barred by AS 47.10.960.

FN13. AS 47.10.142(a) allows the Department of Health and Social Services to take emergency custody of a child in certain circumstances. Subsection .142(e) provides that when a temporary custody hearing is held, a court shall then determine "whether probable cause exists for believing the child to be a child in need of aid." Subsection .142(h) provides that "[w]ithin 12 months after a child is committed to the department under this section, the court shall review the placement plan and actual placement of the child under AS 47.10.080(1).?"

FN14. AS 47.10.020(a) provides in pertinent part:

Whenever circumstances subject a child to the jurisdiction of the court under AS 47.10.005-47.10.142, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the best interests of the child require that further action be taken. If, under this subsection, the court appoints a person or agency to make a preliminary inquiry and to report to it, then, upon the receipt of the report, the court may ... (3) authorize the person or agency having knowledge of the facts of the case to file with the court a petition setting out the facts.

FN15. AS 47.10.080(1) provides in pertinent part:

Within 12 months after the date a child enters foster care as calculated under AS 47.10.088(f), the court shall hold a permanency hearing. The hearing and permanent plan developed in the hearing are governed by the following provisions ... (2) when establishing the permanent plan for the child, the court shall make appropriate written findings, including findings related to whether ... (B) the child should be placed for adoption or legal guardianship and whether a petition for termination of parental rights should be filed by the department....

FN16. AS 47.05.060 provides in pertinent part:

The purpose of this title as it relates to children is ... to preserve and strengthen the

child's family ties unless efforts to preserve and strengthen the ties are likely to result in physical or emotional damage to the child ... and ... to secure for the child adequate custody and care and adequate planning for permanent placement of the child.

In *Karen L. v. State, Department of Health & Social Services, Division of Family & Youth Services*, we considered whether a mother could assert tort claims arising from CINA proceedings addressing placement of a child in DFYS custody.FN17 The superior court there granted summary judgment to the state, DFYS, state social workers, and the child's guardians ad litem, dismissing all of the mother's claims, including her negligence claims. FN18 We held that the state and the social workers did not owe the mother an actionable duty of care.FN19 The mother therefore could not maintain negligence claims against the state or its agencies and employees.

FN17. *Karen L. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Serv.*, 953 P.2d 871, 876 (Alaska 1998) (declining to impose duty of care on state and social workers because it was not reasonably foreseeable that their conduct would cause Karen L. ? actionable emotional harm?).

FN18. *Id.* at 873.

FN19. *Id.* at 876, 878.

We recognize here, as we did in *Karen L.*, that ?it is to be expected that any litigation, and certainly a CINA proceeding in which the child is taken from its [relatives] ... will cause the [relatives] some distress. That does not mean that the distress should be actionable.? FN20 *Karen L.* establishes that DFYS does not owe a parent an actionable duty of reasonable care in a CINA proceeding.FN21 *Karen L.* therefore precludes the grandparents' negligence claim in this case.

FN20. *Id.* at 876.

FN21. *Id.* at 878.

The McGrews attempt to distinguish *Karen L.* on the theory there was no claim in that case that the state had bad motives. They assert that DFYS here engaged in intentional deceit and ?affirmatively misled? them by making false statements about its placement plan for the child. That distinction is potentially pertinent only to the McGrews' claims alleging intentional misconduct. As to the McGrews' negligence claim, *Karen L.* controls.

The McGrews also argue that their case is distinguishable from *Karen L.* because DFYS failed to comply with the statutory requirements of AS 47.14.240, denying them their right to be ?meaningfully heard in a timely fashion.? They therefore argue that ?324 *Karen L.* does not apply to them because the court there held that there was no statute that imposed an actionable tort duty.

But as we saw above, AS 47.10.960 establishes that DFYS owes the McGrews no actionable duty arising out of any provision in Title 47. Therefore, *Karen L.* cannot be distinguished on a theory the McGrews were owed a statutory duty not addressed in *Karen L.*

Quoting "Rep. Les Gara" <Representative_Les_Gara@legis.state.ak.us>:

> Hi James and Meg - thanks for the briefing. It still doesn't provide
> me what I'm looking for.
>
> The State brief is careful to say that AS 47 doesn't create a standard
> or duty of care. I still need an express statement -either a
> transcript from a hearing, or otherwise in writing, where the state
> takes the express position that there is no common law negligence
> liability by the state to foster kids. The brief doesn't expressly
> state that there is no common law liability.
>
> Is there anything else you have in writing Meg? Or any transcript
> position by the state?
>
> I think we can get an amendment adopted, but we have to show the
> state's express position on the common law issue.
>
> Thanks. Les
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>
> Representative Les Gara
>
> Alaska State Legislature
>
> 716 W. 4th Avenue, Suite 310
>
> Anchorage, Alaska 99501
>
> Phone: 907-269-0106
>
> Fax: 907-269-0109
>
> www.akdemocrats.org
>
>