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

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

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

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

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

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

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

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

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

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Jan Rutherdale
Jan A. Rutherdale
Assistant Attorney General

JAR:pao

Enclosure

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501; (907) 264-0607.

THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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

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

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

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

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[6] (...continued)
tion of the parent-child relationship in E.J.S., 754 P.2d at 751. There, testimony showed that the child, L.M.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

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

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

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

D. Remaining Substantive Issues

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

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

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

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

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

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

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

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

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

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

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

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

a. Physical Harm

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

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

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

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

b. Emotional Harm

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

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

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

3. Active Remedial Efforts by the State

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

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

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

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

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

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

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

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

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

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

Id. at 157-58.

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

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

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

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

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

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

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

III. PROCEDURAL ISSUES

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

A. Denial of Bifurcation

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

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

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

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

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

B. Absence of the Guardian Ad Litem

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

IV. CONCLUSION

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

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

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

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

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

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

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

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

THE SUPREME COURT OF THE STATE OF ALASKA

IN THE MATTER OF:

S.A.
DOB: 8/4/89

D.A.
DOB: 7/18/90

Minors under the Age of Eighteen (18) Years.

N.A.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Supreme Court No. S-6619

Superior Court No. 4FA-91-100 CP

O P I N I O N

[No. 4314 - January 26, 1996]

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

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

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

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

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

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

I. FACTS AND PROCEEDINGS

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

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

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

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

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

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

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

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

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

II. STANDARD OF REVIEW

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

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

III. IMMINENT AND SUBSTANTIAL RISK OF SUBSTANTIAL PHYSICAL HARM

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

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

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

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

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

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

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

(continued...)

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

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

(Emphasis added.)

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

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

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

IV. ABILITY TO CARE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 825. These findings would support CINA adjudications under subsections (D), (C), and (F), respectively.

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

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

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

V. CONCLUSION

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

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

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

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

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

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

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

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[1] AS 47.10.010 provides in pertinent part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HB

345

9-LS1179\C
Bannister
3/25/96

CS FOR HOUSE BILL NO. 345( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES FOSTER, Ivan

A BILL

FOR AN ACT ENTITLED

"An Act relating to the procurement of investment and brokerage services by the Alaska State Pension Investment Board."

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

* Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) the existence of a strong and healthy free enterprise system is directly related to the well-being and competitive strength of businesses in the state and to the opportunity for businesses in the state to grow and expand;

(2) the state needs to examine its purchasing practices in order to ensure that state agencies support businesses in the state by making every reasonable effort to identify services available in the state and to foster bidding by local and resident businesses.

(b) The legislature declares that the purpose of this Act is to foster a procurement process where businesses in the state obtain a fair proportion of the state's total procurement contracts.

* Sec. 2. AS 37.10.220(a) is amended to read:

(a) The board shall

(1) hold regular and special meetings at the call of the chair or of at least four members;

(2) establish investment policies for the funds for which it is responsible after reviewing recommendations from the investment advisory council and the Department of Revenue;

(3) submit long-range and quarterly investment reports to the Legislative Budget and Audit Committee;

(4) report to the governor and employers participating in the retirement systems by the first day of each regular legislative session concerning the investment of funds for which the board is responsible, including financial and investment policies established by the board, and enclose a summary of the most recent performance evaluations of the funds managed by the board; the board shall notify the legislature that the report is available;

(5) contract with external performance evaluators to review the performance of each fund for which the board is responsible and report each year on the fund's condition to the board of trustees and to the other appropriate boards;

(6) engage independent certified public accountants to perform an annual audit of each of the funds for which the board is responsible and to report to the board with the results of the audit;

(7) review the actuarial earnings assumption for each fund for which the board is responsible every two years and report its findings and recommendations to the appropriate board or agency;

(8) after reviewing the recommendations from the Department of Revenue and the advisory council, select and retain the external investment managers and custodians for the funds managed by the board;

(9) develop an annual operating budget plan and present it to the Department of Revenue and the office of management and budget; the board shall notify the legislature that the plan is available;

(10) increase the board's utilization of brokerage and investment services provided by persons located in the state to at least seven percent of the up to

investment services that the board procures by contract, and seven percent of the brokerage services utilized by the board or its designee, unless the board makes a written finding that the board is unable to meet this goal because there is an insufficient number of persons with the requisite skill in the state to perform the investment or brokerage services.

Sponsor Statement
Representative Richard Foster

HB 345; An Act Relating to the Procurement of Investment and Brokerage Services by the Alaska State Pension Investment Board.

House Bill 345 simply requires that the Alaska Pension Investment Board **"increase the utilization of brokerage and investment services provided by persons located in the state to at least seven percent of the brokerage services procured by the board."** Additionally, there is a provision to allow the board to "opt" out upon a written finding that the seven percent goal is unattainable.

In support of the bill, I would merely reiterate the findings section of the legislation wherein the case is made for a healthy, competitive private sector; the need to review state procurement practices and support a local procurement process; and most importantly, the need for all state agencies and state resources to be directed toward improving the statewide economy.

For the record, it is not the intent of the sponsor to jeopardize in any way the integrity of these investment funds.

Dynamic Capital Management, Inc.

March 20, 1996

Chairperson and Committee Members
House State Affairs Committee

Dear Members of the Committee:

My name is David Gottstein. I am the president of Dynamic Capital Management, an Alaskan based Investment Advisory firm specializing in large capitalization equities. I am in the market to manage other peoples' money for a fee. This includes government pension assets. On the surface, because I might gain materially from its passage, you might assume that I would favor HB 345 as it is currently written. You would be very wrong. I am also a life-long Alaskan, and I do not think the bill as written serves the residents of Alaska or would accomplish the goals intended.

Even though the intent of the proposed legislation should gain wide approval within the state, the mechanism used is fundamentally flawed on a number of issues. With more focused analysis, a much better formula could be devised.

As members of the legislature, you are charged with the difficult task of balancing your fiduciary obligations to grow and to protect the pension and other assets of state government with your obligations, as citizens charged with the general welfare of your constituencies, to seek the growth of employment opportunities for Alaska's residents. I believe the solution would be to adopt a legitimate prejudice to hire firms that can show that the bulk of their human resources, wherever possible, are located in Alaska, and that services are provided without materially sacrificing competency, performance, or competitiveness in the area of fees, charges or commissions. There are several reasons why a quota system would not establish a system of checks and balances to accomplish the goal of having a legitimate prejudice to hire such Alaskan firms. For example:

1. The legislation, currently written establishing a quota system, could result in disaster. It is important that the decision makers assigning contracts feel ownership in the outcome and performance of their decisions. By focusing the decision making process on a mandate to hire Alaskans, state decision makers are forced to abdicate their primary responsibility as fund protectors to become job creators. If a bad performance ensues from one of the marginally qualified Alaskan contractors, fiduciaries cannot be held accountable, because they were forced by statute to select from a limited pool. It would be better for all if competency did not have to take a back seat in the decision-making process. Can you imagine a standard so low that one is required to hire someone unless they are determined to be unqualified? Do you know what one calls the person who graduates last in his or her medical class? He or she is called Doctor. This path is laced with potential mines.

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2. The second flaw lies within the language, not the intent. The language in part says "services provided by persons located in the state...". The potential problem here is that legally a "person" can mean a human or an entity. A company with an office in Alaska, with only an order taker, might qualify, even though personnel in other states were actually getting paid for the services. Brokerage services might appear to go through an Anchorage or Fairbanks office, but actually be credited to an institutional New York broker when determining commission income and bonuses.

3. There is also a human factor. It is obvious from the way the legislation is written that the drafters have given up on the state bureaucracy's ability to contract services without a prejudice *against* local hire. They have no incentive to do so. They would rather go to Phoenix to check up on a money manager than Anchorage. Attempting to beat them into submission by expecting them to adopt a new agenda and to perform it appropriately and with enthusiasm is, quite frankly, naive. Perhaps a better approach would be to convince the procurement officers that Alaskan employment "will" be a secondary, but a legitimate criteria in the selection process. Rather than cramming a process down their throats that they don't believe in, getting input from them on how to accomplish both goals simultaneously would yield better results.

4. I believe the main challenge here is to devise a method whereby the state does not suffer from using local hire but rather supports and fosters growth in an immature but potentially significant industry. Current requirements sometimes preclude the state from nurturing a promising financial services industry. Therefore, in part, we may have deal with certain regulatory or policy issues that act to discriminate against local hire because of company size and age, or amount of assets under management. Nascent industries need help most in their early stages of development. They often don't need much business to help them significantly. Let me next suggest two different approaches that may work better than a quota system.

Instead of quota standards that set a minimum percentage as a goal, a peer review qualification test could be maintained that requires, at a minimum, above average competency. This could be done by inserting the language I used previously such as " to institute a legitimate prejudice policy to hire firms who can show that the bulk of the human resources engaged in providing purchased services are located in Alaska, and that services are provided without materially sacrificing competency, performance, or cost." This does not require Alaskan companies to be the best or the cheapest, but they would have to be competitive. Fiduciaries could then be required to manage the execution of the policy.

Another approach, not dissimilar from that which other institutions use as a matter of course, would be to craft a farm team program for investment managers with a relatively modest dollar commitment. This would require the trustees to engage local hire farm or test teams under guidelines they deem appropriate. The quota system recommendation came as a result of frustration within the industry. A better approach would be to tell fiduciaries that they must engage in an affirmative action plan without dictating to them how to do it. A quota system could result in significant performance issues with a marginally-performing service provider, discrediting the whole intent of the legislation.

These are just a few words on what might be a delicate subject. I would be happy to answer questions from the committee members.

David Gottstein

President
Dynamic Capital Management, Inc.

CITY OF FAIRBANKS
James C. Hayes, Mayor
~~410~~ 800 CUSHMAN STREET
FAIRBANKS, ALASKA 99701-4683
OFFICE: 907-459-6793
HOME OFFICE: 907-456-8637

March 20, 1996

The Honorable Jeanette James
State Capitol, Room 102
Juneau, Alaska 99801-1182

Delivered by Fax No. (907) 465-2381

Re: HB No. 345

Dear Representative James:

I am writing to you in support of moving HB No. 345 on to the House Finance Committee. This bill can and will have a very beneficial impact on the private sector in Fairbanks and the rest of Alaska. Private sector financing stimulated by partnership with state government will force financial markets outside Alaska to allow the state realistic interest rates. It is critical to the long term grown of this city and the state as a whole to reconnect Alaska to the financial markets of Wall Street. The impact of reducing interest rates from Prime + 3, to a fixed interest rate tied to the 30 year T Bond, will stimulate business by lowering the cost of occupancy through a reduction in debt service.

Please study this program and appreciate that while Alaskans should be encouraged to buy Alaska, Alaskans should also be encouraged to invest in Alaska. The best way for this to happen is for the State of Alaska to lead the way with an investment of a portion of its 30 billion dollar investment funds. Alaskans need to help themselves before outside financial markets are going to invest in Alaska. The State needs show leadership.

Sincerely,

CITY OF FAIRBANKS

James C. Hayes
Mayor

JCH:bss

Apartment Financing Comparison

Project Cost	$ 1,000,000	$ 1,000,000	$ 1,000,000
Number of Units	30	30	30
Cost Per Unit	$ 33,333	$ 33,333	$ 33,333
Loan Amount	$ 800,000	$ 800,000	$ 800,000
Loan Terms:			
Interest Type	Floating	Fixed	Fixed
Interest Rate	10%	8%	8%
Amortization Period, Years	15	30	30
Loan Call, Years	10	30	30
Monthly Loan Amortization	$8,597	$5,870	$5,870
Average rent per unit	$ 600	$ 600	$ 515
Percentage Decrease in Rent			14.2%
Operating expenses per unit	240	240	240
Monthly cash flow per unit before debt service	$ 360	$ 360	$ 275
Total annual project cash flow before debt service	$ 129,600	$ 129,600	$ 99,000
Total annual project cash flow after debt service	$ 26,438	$ 59,159	$ 28,559
Rate of Return on Cash Invested	10.6%	23.7%	11.4%

A. Existing SIB Portfolio Considerations

1. *Allocation to Real Estate*

The SIB real estate portfolio totals approximately $665 million as of December 31, 1993. The total allocation to the asset class of real estate based on recent Board action is 0% to 5% of the market value of total SIB retirement fund assets. SIB Staff and Townsend have developed an Investment Plan intended to enable the SIB to achieve the full real estate allocation if desired. While this Investment Plan is designed to achieve the full real estate allocation, obtaining this objective will be subject to the advisors generating investment opportunities consistent with the SIB Policy and the Investment Plan and SIB approving specific investments. For purposes of developing the Investment Plan, The Townsend Group was directed by the SIB Staff to utilize a portfolio growth rate equivalent to the SIB actuarial growth rate assumption of 7.5% per year.

Based upon the foregoing assumptions, the total plan assets available for equity and debt real estate investments over the next three year period of 1994 through 1996 is set forth in the table below.

Total Plan Assets 1994	$19.7 billion
Actuarial Growth Rate	7.5%
Projected 1996 Total Plan Assets	$24.5 billion
Maximum Allocation to Real Estate %	5%
Maximum Allocation to Real Estate $	$1.225 billion

Reducing the total allocation of $1.225 billion by $625 million, the projected amount invested in equity and debt real estate in 1996, results in approximately $600 million available for additional investment through 1996.

The SIB Policy will be amended to provide a target of up to 100% of the portfolio may be invested in equity real estate, and from 0% to up to 50% of the portfolio may be invested in commercial mortgages. The Investment Plan allocates all available capital in equity real estate investments. Townsend has been instructed that the existing commercial

mortgage investments will be transferred to the fixed income portfolio for purposes of planning and measuring SIB real estate portfolio diversification and compliance with the Policy diversification guidelines. Accordingly, this Investment Plan does not allocate any portion of the $600 million available to new commercial mortgage investments, which Townsend has been instructed will be funded from the SIB fixed income allocation.

2. *Diversification Guidelines*

The following table sets forth current portfolio property type diversification for equity real estate portfolio based on current investments, the Repositioned Portfolio[1] and grown to 1996 Plan assets, and the diversification targets established by the Policy. As noted above, the Investment Plan takes into consideration the Repositioned Portfolio as one of the parameters guiding SIB Staff and Townsend.

Property Type	Current Equity Portfolio Diversification	Repositioned Portfolio Diversification	Policy Diversification
Office	41%	25%	10% - 40%
Retail	14%	8%	5% - 30%
Warehouse	13%	7%	10% - 40%
R&D Office	10%	5%	0% - 15%
Apartment	13%	1%	5% - 30%
Other	9%	6%	0% - 20%
TOTAL	100%	52%*	N/A

* Based on total 1996 Plan assets; remaining amount to invest to reach total allocation of 5% represents other 48%.

The following table sets forth the maximum distribution targets by location for real estate investments, based upon the eight subregions of the NCREIF Index. The table also sets forth the current portfolio

[1] As noted, the Repositioned Portfolio was prepared by the SIB Staff, based upon input from The Townsend Group, Jones Lang Wootton and other SIB advisors. Assumptions were made on divestiture and growth and declines in the existing portfolio.

diversification based upon current dollars, the Repositioned Portfolio based on 1996 plan assets and the diversification established in the Policy.

Location	Current Equity Portfolio Diversification Based on Current $	Repositioned Portfolio Diversification Based on 1996 Plan Assets	Policy Diversification
Northeast	3%	2%	5% - 15%
Mideast	3%	1%	5% - 15%
East North Central	1%	1%	5% - 15%
West North Central	1%	1%	0% - 5%
Southeast	4%	1%	3% - 7%
Southwest	2%	1%	3% - 7%
Pacific	78%	44%	40% - 60%
Mountain	8%	1%	3% - 7%
TOTAL	100%	52%*	N/A

*Rounded; based on total 1996 Plan assets; remaining amount to invest to reach total allocation of 5% represents other 48%.

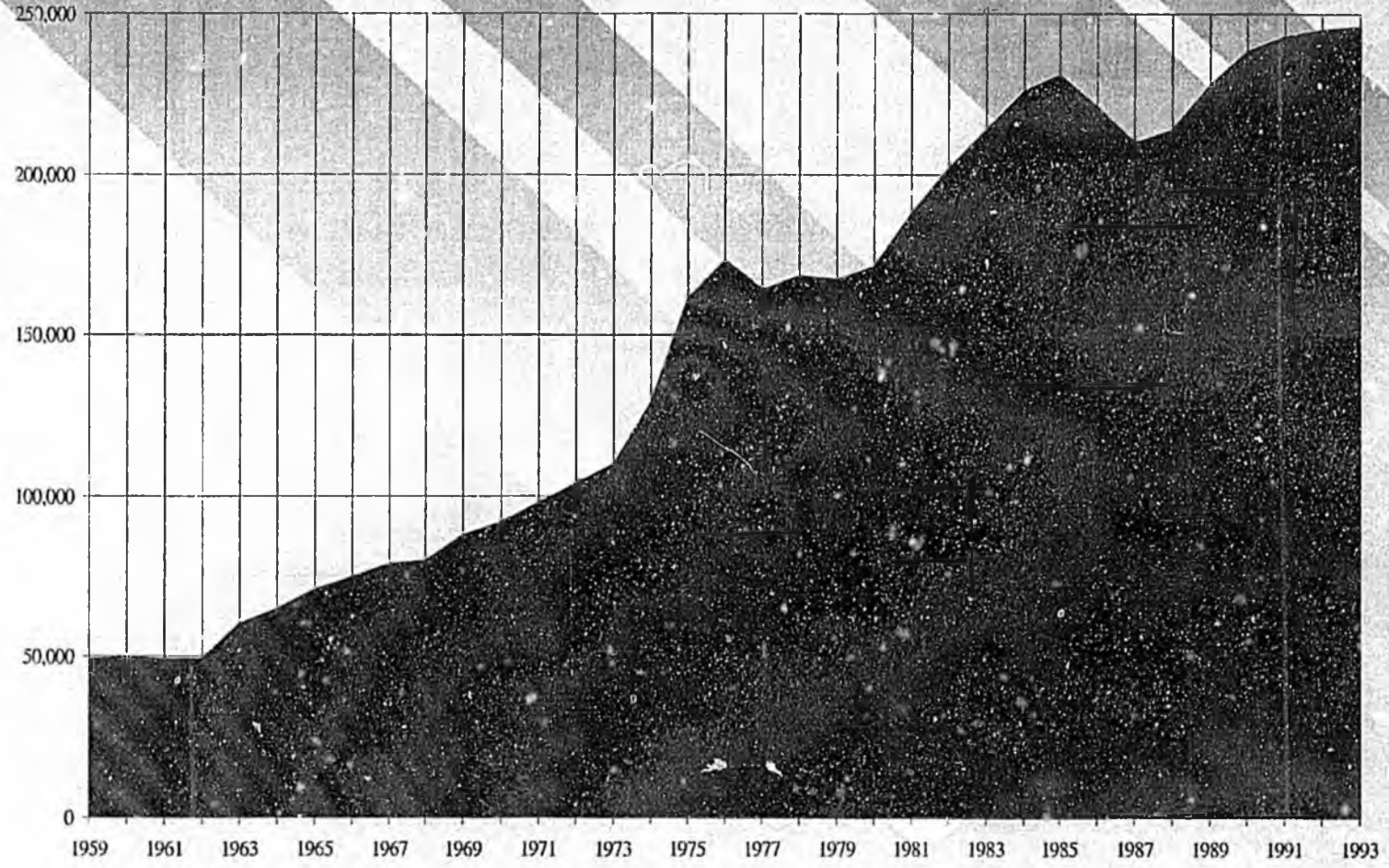
B. SIB Policy Guidelines

SIB Policy provides guidance with respect to major policy issues which have been factored into the development of the Investment Plan. The Policy directives utilized in the planning process include the following:

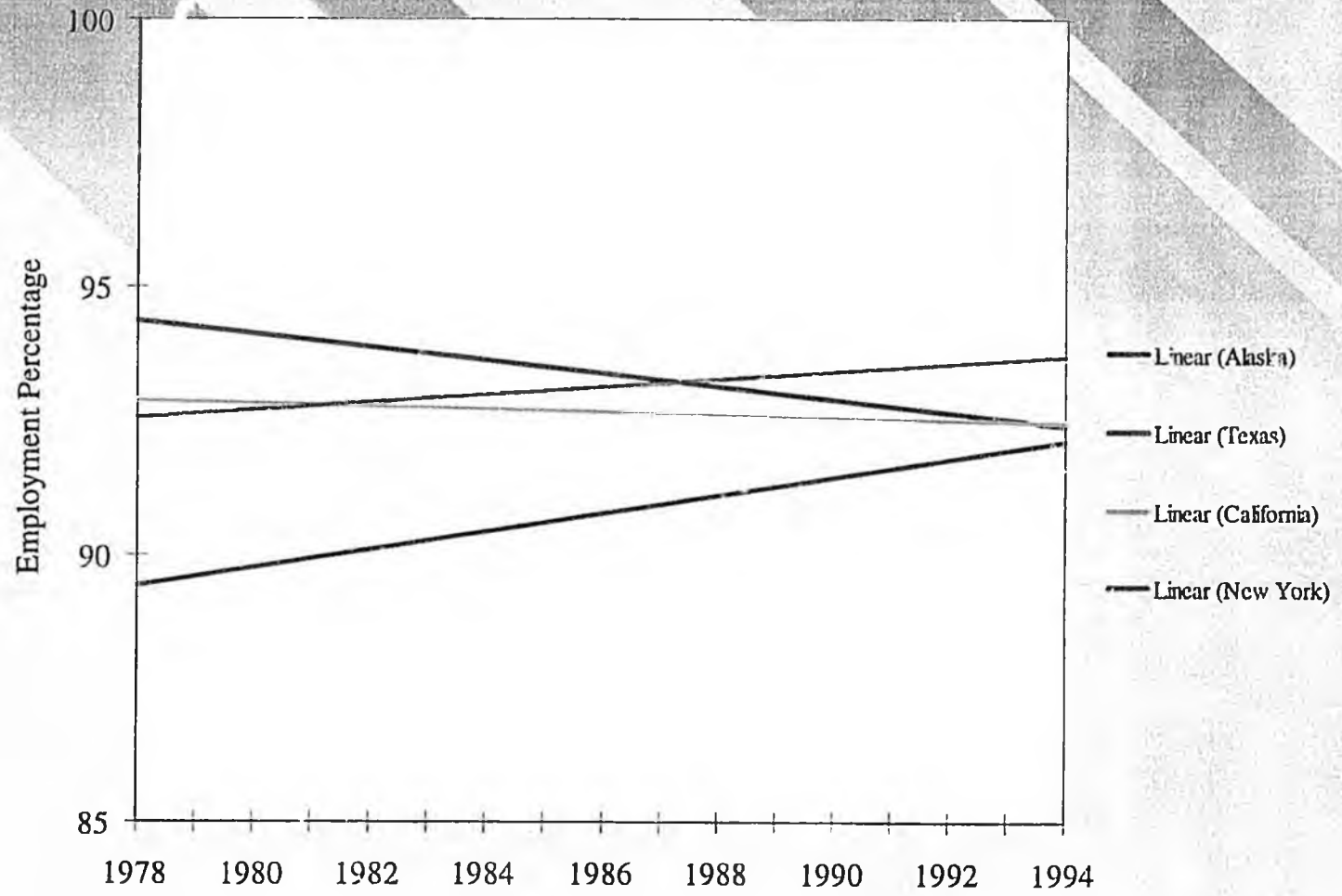
- Minimum and maximum ranges for property type diversification are set forth in the Policy and noted above.
- Minimum and maximum ranges for regional diversification are also noted above.
- The Policy specifies a preference be given to transactions with greater cash yield components.
- The Policy specifies a major focus in the real estate investment program will be on substantially leased operating properties.

Alaska's Economy since Statehood

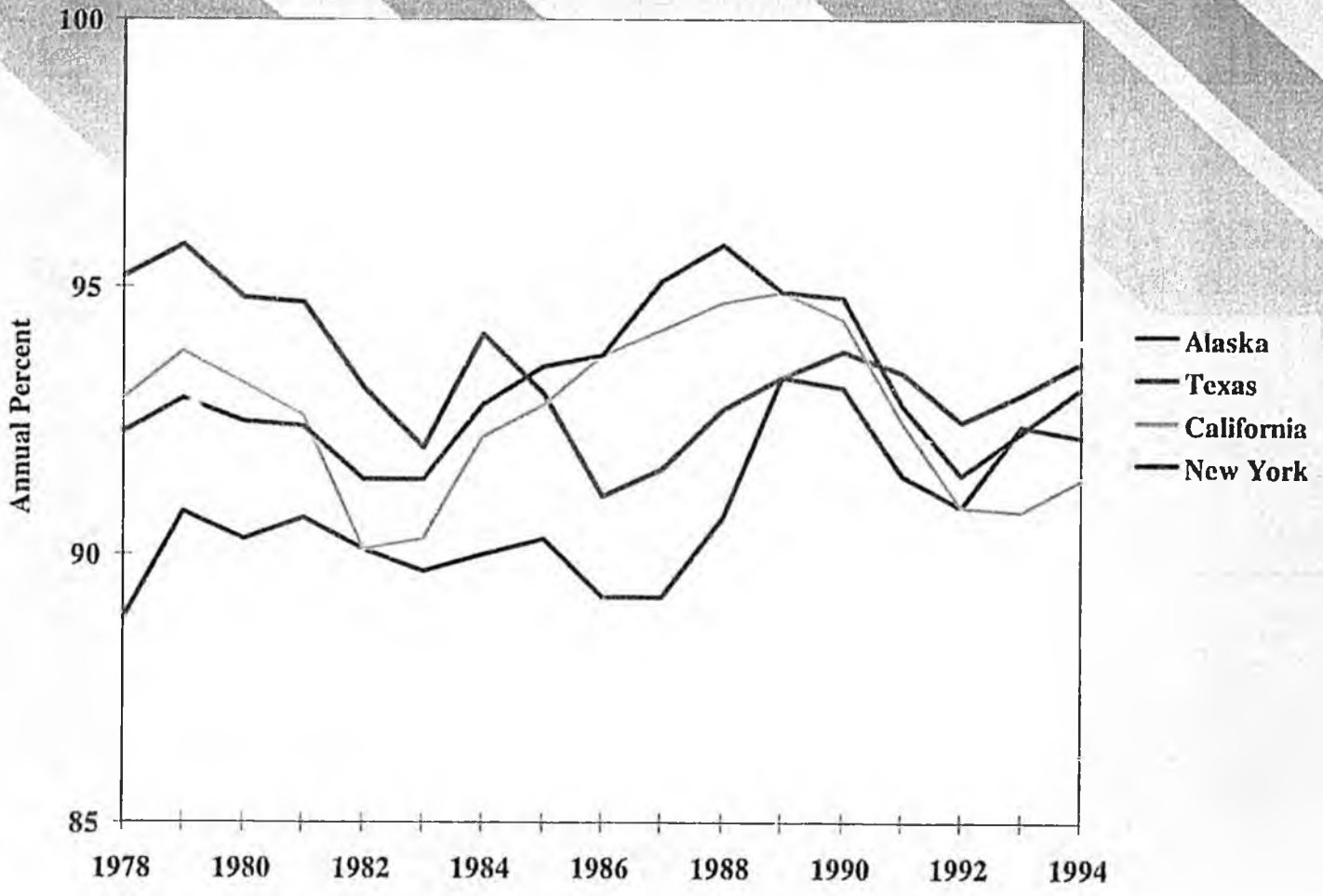
Employment



Employment - Trendlines: 1978 - 1994
Alaska, Texas, California and New York



Employment - Actual: 1978 - 1994
Alaska, Texas, California and New York



Housing - Trendlines: 1985 - 1994
Anchorage, Dallas, Los Angeles & New York