



statutory and case law in [*997] the area of eavesdropping and child privacy rights, as well as with the legislative history of Title III. Specifically, the doctrine is consistent with Title III and its legislative history in that the legislative history contains evidence of congressional intent to both exempt parental eavesdropping from the law and to allow courts to interpret the consent exception in a very broad manner that would allow for an application of the doctrine. Additionally, the doctrine is consistent with the principle that children have a diminished privacy interest in life's affairs such that the child's right to privacy is not excessively or unlawfully violated when a protective and concerned parent surreptitiously intercepts one or more of a child's telephone conversations.

a. There is evidence of congressional intent to exempt parental eavesdropping from the law.

The doctrine of vicarious consent is legally viable because evidence indicates a congressional intent to exempt parental eavesdropping from Title III. On this subject, a handful of courts that have addressed the issue of vicarious consent have found that the legislative history to Title III provides evidence of such intent. In *Schieb v. Grant*, n251 for example, the Seventh Circuit Court of Appeals held that "we cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." n252 A few years later in *Campbell v. Price*, the Federal District Court for the Eastern District of Arkansas agreed, holding that "the Court is of the opinion that Congress did not intend to tread into the waters of domestic relations in situations . . . where a custodial parent is clearly acting in the good faith belief that his action furthers the best interests of his minor child." n253 In so holding, each of these courts referenced congressional testimony by one Professor Herman Schwartz, who testified before Congress that "now, we can see in certain circumstances where [the extension phone exception] makes some sense. I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." n254 In referencing this statement, these courts have "found this statement . . . reflective of the general understanding of those involved in the legislative process regarding the [*998] scope of the statute in situations involving parental eavesdropping on a minor child." n255

With respect to congressional intent and legislative history, it is important to distinguish between parent-child wiretapping and interspousal wiretapping, as they are "qualitatively different" n256 from one another. As referenced above, a number of courts have found that Title III prohibits interspousal wiretapping, or one spouse intercepting another spouse's telephone or other covered communications. n257 In doing so, these courts have referenced the legislative history of Title III and statements contained therein that refute the existence of an interspousal exception to the prohibitions of Title III. n258 That legislative history, however, seems to focus primarily on interspousal wiretapping, not parent-child wiretapping, and apart from Professor Schwartz's statement that "nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem," n259 the legislative history contains a distinct "lack of testimony concerning parental wiretapping." n260 In short, there is nothing inconsistent about prohibiting interspousal wiretapping yet allowing parent-child wiretapping.

This position — that the prohibitions of Title III prohibit interspousal but not parent-child wiretapping — is one that has been accepted by at least two federal circuits. Specifically, in *Heggy v. Heggy* n261 and *United States v. Jones*, n262 the Tenth and Sixth Circuits held that Title III covers and therefore prohibits interspousal wiretapping. n263 These same circuits, however, in the aforementioned *Thompson* and *Pollock* decisions, have also held — without overruling *Heggy* and *Jones* — that the doctrine of vicarious consent is a viable legal doctrine. n264 Other courts have recognized [*999] a distinction between interspousal and parent-child wiretapping as well. In *State v. Capell*, n265 for example, the Oregon Court of Appeals wrote the following:

Finally, the recording of conversations by a parent in the interest of a son's well-being simply is not the kind of concern that Congress had when it focused on interception of communications by private individuals. Rather, its concern was with wiretapping for purposes of commercial espionage and marital litigation. n266

In so holding, the court makes a very clear distinction between parent-child wiretapping and interspousal wiretapping done for the purpose of marital litigation, holding that Congress intended to prohibit one while allowing the other. n267 Based on these holdings, a strong argument can be made that the statements in the legislative history refuting the existence of an interspousal wiretapping exception are not inconsistent with Professor Schwartz's view of the law, referenced above, n268 and therefore that the vicarious consent doctrine is consistent with the underlying intent of Title III. In short, "applying the theory of vicarious consent in the parent-child context produces the most consistent result while respecting Congressional intent." n269

b. The consent exception to Title III is to be interpreted broadly.

Courts interpreting Title III have held that the existing one-party consent exception, which again allows an interception of a covered communication when one party to the communication consents to the interception, should be interpreted broadly. The *Thompson* court, for example, specifically held that "it is clear from case law that Congress intended the consent exception to be interpreted broadly." n270 Similarly, in *United States v. Amen*, n271 the Second Circuit Court of Appeals recognized that the consent needed to invoke the one-party consent exception can be either express or implied. n272 Specifically, the court held that "the legislative history shows that Congress intended the consent requirement to be construed broadly" and that "the Senate Report specifically says in relation to section 2511(2)(c): Consent may be expressed or implied." n273 [*1000] In so holding, these courts have recognized that Congress did not enumerate all the ways that consent could be given under the one-party consent exception. They further illustrates that it is permissible to make reference to the legislative history when interpreting the one-party consent exception as that is exactly what the *Amen* court did in referencing the aforementioned Senate Report. n274 Such a view of the consent exception is consistent with the viability of the vicarious consent doctrine because the doctrine is not specifically enumerated in the statute and those courts that have accepted the doctrine have justified doing so by referencing those portions of the legislative history that reference the ability of a parent to intercept a child's telephone and other communications. n275 In short, when the consent exception is "construed broadly" there is more than enough room for the vicarious consent doctrine.

c. The doctrine recognizes and is consistent with the long-accepted parental right to decide what is best for a child.

It is a long-standing principle of law that parents have a right to decide what is best for their children — a view supported by those situations in which the law recognizes that a child needs parental consent in order to engage in a particular activity. n276 In this vein, many have argued that the courts should recognize that right by staying out of the majority of parent-child matters and refraining from making decisions on behalf of capable and responsible parents that go to the issue of how to raise a child. As one author wrote, "deference to parental decisions about their children stands as the nearly universal exception from self-determination under the Constitution." n277 In addressing the issue of a parent's right to consent for a child, another author noted that "supporters of parental consent on behalf of the child argue that the rights associated with being a parent are fundamental and basic rights; therefore, parents should be afforded wide latitude in making decisions for children, as they are in the best position to determine their child's needs." n278

[*1001] The doctrine of vicarious consent is consistent with this long-accepted view of parental autonomy as it allows a parent to tape record a child's telephone conversations without fear of civil or criminal liability, and without the child's knowledge or approval, when the parent believes that doing so will further the child's best interest. n279 Specifically, it allows a parent to act on behalf of and make a decision for a child in consenting to an interception of a communication, and thereby shows some deference to parents in making certain decisions for their children. As one author wrote, "Congress entrusts parents with a right to decide on their children's behalf in many situations, so consenting to wiretapping of a telephone conversation seems a natural extension of those parental rights." n280 This is not to say that children do not have the ability to make choices on their own, and the doctrine does not seek to take away a child's opportunity to make his or her own choices in many areas of life. It simply recognizes the principle that "parental rights can be superior to children's rights, especially in light of the parents' responsibilities for the care and upbringing of their children." n281 In short, the vicarious consent doctrine acknowledges that in certain situations parents have a right to act on their children's behalf, even when such action goes against the child's wishes.

d. A child has a diminished privacy interest in life's affairs that is not violated by the doctrine of vicarious consent.

The doctrine of vicarious consent is legally viable because it allows parents to act without significantly violating a child's limited right to privacy. Though children have a right to privacy, that right is less significant than the right to privacy enjoyed by adults. In other words, there are areas in which children have a diminished right of privacy. The Eighth Circuit, addressing this issue, has stated that "not all constitutional rights have been made equally applicable to minors as to adults, and it is well established that the activities of children may be more highly regulated than those of adults. In particular, a state may determine that a child is not possessed of full capacity for individual choice." n282 Addressing this same issue of a child's right to privacy and the vicarious consent doctrine, one author wrote the following:

[*1002] While . . . a fictitious consent may seem violative of privacy rights, commentators believe that children, while entitled to privacy, do not generally have the same expectations that adults do. Instead, it is often assumed that a parent will act in the best interests of the child, even if this means that the child's right to privacy is violated. n283

One of the benefits of the vicarious consent doctrine is that when it is appropriately applied — in situations in which

the parent truly is acting in what he or she believes to be the child's best interest — the child's right to privacy is generally only violated when the child truly is in a dangerous or difficult situation. When applied in these circumstances, the doctrine generally does not allow parents to intercept telephone calls to find out about a child's romantic interests, plans for the weekend, or other personal issues that do not present the child with a substantial potential for harm. In other words, it does not allow a parent to engage in a wholesale recording of a child's telephone conversations. Instead the parent is only permitted to intercept the child's communications, and therefore encroach upon the child's privacy, and do so without civil or criminal liability, when there can be a showing of parental concern for the child's well-being. n284 On this topic one commentator wrote the following:

By adopting the vicarious consent doctrine [in *Pollock*] the Sixth Circuit has effectively limited the number of cases where a parent can escape liability for recording his child's conversations. Under the "extension phone" exemption, parents were released from liability without any determination into their motives behind the recording. *Pollock* instead examines these motives, calling for a case-by-case determination that a parent had an objectively reasonable concern, and was acting in the best interest of the child. If the parent did not have such a concern, then he will be subjectively liable under the Federal Wiretapping Statute. By using a "good faith, objectively reasonable basis" for determining that a parent's consent was necessary, the Sixth Circuit subjects a parent's actions to much stricter scrutiny than was previously available. n285

Such a subjection of parental actions to a stricter scrutiny is appropriate because it protects the child's right to privacy in all situations except those that present a danger to the child, thus protecting the child's physical and emotional well-being, as well as the child's right to an appropriate level of privacy. This is particularly true when the parent is required to prove to a judge or jury that he or she was truly motivated by [*1003] concern for the child. If a parent is unable to provide such proof, civil and criminal liability can attach, thus giving parents an incentive to invoke the doctrine only when its terms are truly met. In short, by permitting privacy to be compromised in only those situations in which it is necessary to protect the child, the vicarious consent doctrine allows for a more palatable and necessary invasion of privacy.

In summary, the vicarious consent doctrine is a legally viable doctrine because it recognizes and is consistent with the language and legislative history of Title III, those court decisions that have held that the consent exception should be interpreted broadly, and the long-accepted parental right to decide what is best for a child. For these reasons, courts addressing the legality of the doctrine should not hesitate to adopt it in appropriate situations.

2. The vicarious consent doctrine is a righteous or socially beneficial doctrine.

The vicarious consent doctrine is a righteous doctrine in the sense that recognition of the doctrine provides a significant benefit to society. The doctrine is beneficial to society because, in addition to assisting parents in fulfilling their obligation to promote their children's best interests, it helps to protect children against the undue influence of others. Furthermore, when parents act in an effort to further the welfare of their children, the doctrine protects them from the civil and criminal penalties that attach to violations of Title III and its state law counterparts.

a. The doctrine protects and assists parents in fulfilling their parental obligation to protect their children against the undue influence of others.

The vicarious consent doctrine is a socially beneficial doctrine because its underlying purpose is to protect children from the undue and unseemly influence of others, whether it be a parent, a sibling, or a non-family member who is seeking or would seek to negatively influence the child. Courts have recognized that there are times "when a child is under significant criminal influence by another and such criminal influence poses a genuine risk which is not recognized by a child of tender years," n286 and the doctrine aids concerned parents in protecting their children from these types of situations.

In this regard, it is a generally accepted principle of law that parents have a duty to protect their minor children. n287 This is because juveniles [*1004] "often lack the experience, perspective, and judgment to recognize and avoid the choices that could be detrimental to them." n288 This duty to protect includes, but is not limited to, the obligation to "assess the daily risks the child confronts, and to make choices regarding the most appropriate and reasonable manner to protect the child," n289 as well as a more general "obligation to protect their children by assuring that they stay out of trouble and are kept safe from harm." n290 In some jurisdictions this duty is codified or set forth in case law. In Alabama, for example, the courts have held that "parents have a common law duty to protect their minor children." n291 The United States Supreme Court has also referenced a parental obligation to promote a child's best interests. n292 Perhaps the most significant aspect of the doctrine of vicarious consent — one that supports the view that the doctrine is a righteous

and socially beneficial doctrine — is that it assists parents in fulfilling this obligation or duty to protect their children and provides them with yet another effective way to learn and understand their children's needs and life situations. On this issue one commentator wrote the following:

Life is vastly different now than it was even a decade ago. Children are falling prey to dangerous temptations such as sex, drugs, alcohol, smoking, and gangs, and juvenile violence and crime have risen over the years. "Many changes have taken place in society that challenge the original presumption that parents are able to control their children effectively." Allowing parents to wiretap their children's phone conversations can help them gain access to information that might provide their children with appropriate medical or psychological treatment. Although some critics may argue that parents can be involved in their children's lives by remaining involved and focused in their children's daily activities, this criticism ignores the fact that many children have difficulty communicating with their parents. Resorting to surveillance tactics to keep children out of danger is a measure that clearly falls within the boundaries of parental [*1005] duties, authority and care. In order for parents to exercise such authority, it is necessary that they not be subject to the risk of suit at the hands of their children. n293

As the author states, recognizing a vicarious consent exception will allow parents to monitor their children when doing so is in the children's best interest without subjecting the parent to civil and criminal liability, and will continue to do so as long as the parents' actions are based on a reasonable belief that such monitoring is necessary. n294

The facts of the cases that have adopted the principle of vicarious consent demonstrate how the doctrine achieves its aim of assisting parents in protecting their children. In *Bishop*, for example, the trial court adopted the doctrine with a view toward allowing parents to protect their children from sexual predators. n295 The same is true of the Massachusetts Appeals Court in the *Barboza* case. n296 In each of these cases, the surreptitious recording of telephone conversations, done in accordance with the principles of the vicarious consent doctrine, assisted the parents in pulling their children out of dangerous situations in which they were being both physically and emotionally victimized. n297 Had the parents in those cases been held criminally or civilly liable for recording their children's conversations with two dangerous sexual predators, their ability to protect their children would have been seriously curtailed. In other words, the principles underlying the vicarious consent doctrine assisted the parents in fulfilling their parental obligation to protect their children and promote their children's best interests without subjecting the parents to the penalties associated with violations of Title III.

Even critics of the doctrine will admit that it assists parents in protecting their children. For example, one court that flatly rejected the vicarious consent doctrine admitted that the doctrine potentially provides protection to children in need. n298 Specifically, the *Williams* court wrote that "we, too, can admittedly perceive situations where depriving a parent of the ability to vicariously consent for a child may deprive the child [*1006] of the parent's ability to protect the child." n299 By assisting parents in protecting children against sexual predators and other unseemly people, the doctrine provides a very significant benefit to society.

b. The doctrine of vicarious consent protects parents who act in an effort to help their children

The doctrine of vicarious consent is a socially beneficial and useful doctrine because it protects parents who act in an effort to protect their children. As stated above, the vicarious consent doctrine assists parents in protecting their children against dangerous people who would seek to take advantage of them. n300 Additionally, the doctrine also protects the parents as they attempt to act in a child's best interest. In the *Barboza* case, for example, the Massachusetts courts chose to apply the vicarious consent doctrine. n301 In doing so they not only assisted in protecting a vulnerable child, but also indirectly held that since the interception was not unlawful, the child's parents were not subject to any criminal or civil liability for their actions. n302 If the courts had ruled the other way, refusing to apply the doctrine and stating that the parents did not have a right to intercept their child's phone conversations with Barboza, they may very well have opened the door to a civil suit in which Barboza sought civil penalties against Tom's parents. n303 Additionally, a different ruling rejecting the vicarious consent doctrine and invoking the three types of penalties available for violations of Title III might also have made the same protective parents subject to criminal liability and might have disallowed the use of key evidence in the criminal case. n304 Had the court done so, the true winner in the whole case would have been Barboza, the perpetrator and sexual predator, and the losers would have been Tom's loving and protective parents — a clearly unfair and unfavorable result.

By ruling as it did, however, the Massachusetts court essentially ensured that Barboza's victim's parents were protected

from any civil or criminal actions based on violations of Title III, and thereby agreed with the Seventh Circuit Court of Appeals which, as referenced above, held that "we cannot attribute to Congress the intent to subject parents to [*1007] criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." n305 In short, in recognizing the doctrine, the court provided the parents some much needed protections as well as enhancing their ability to protect their young child from a dangerous sexual predator.

The doctrine of vicarious consent is both a legally viable and a socially valuable doctrine, and as such it should be accepted by all courts that have the opportunity to address a situation in which the doctrine might be of assistance to concerned and appropriately acting parents. And while the doctrine is both viable and righteous in all contexts, it is particularly so when the doctrine is applied in criminal cases. n306 For these reasons, criminal courts in particular should rush to accept the doctrine.

B. The Underlying Principles of the Doctrine of Vicarious Consent Support Its Application in Instances of Suspected Criminal Activity

As stated above, the doctrine of vicarious consent is based on a belief that parents have a right to protect their children from harm or injury, even if doing so requires them to make decisions on behalf of a child or temporarily invade a child's privacy. n307 Applying the doctrine to situations in which a parent suspects criminal activity or intent by one party to a conversation or the other is in no way inconsistent with these principles. In fact, such an application of the doctrine of vicarious consent is appropriate given that the concerns involved are very much consistent with the underlying principles of the doctrine. In this vein, the application of the doctrine of vicarious consent should be available both when a parent suspects that his or her own child is a victim of criminal activity and when a parent has reason to believe that his or her own child is planning or engaging in criminal activity. It should be available when the child is a criminal actor or is planning to become a criminal actor because criminal activity on the part of the child can be as harmful to the child as victimization by another person's criminal act.

1. The Doctrine of Vicarious Consent When the Child Is a Victim of a Crime

At the core of the doctrine of vicarious consent is a desire to protect an at-risk child and to further his or her best interests. n308 As such, the doctrine is an easy fit in those situations in which a parent suspects that a [*1008] child has been, is, or is about to become the victim of any type of crime, whether at the hands of the other parent or a third party. This is because, as stated above, recording a child's telephone conversations without a fear of criminal or civil liability may very well aid the parent in confirming that a child is in danger and discovering the source of that danger. n309 As one author wrote, "few people can deny that a child has a right to be protected from abuse, and that the best person to provide that protection is usually a parent." n310 Certainly in the *Barboza* case, referenced above, recording their son's conversations with Barboza assisted Tom's parents in putting an end to his victimization and initiated the prosecution of a dangerous man. The same is true in the *Bishop* case, referenced at the beginning of this article, and is or could be true in countless other situations.

Whether a child is being sexually abused, provided alcohol or illegal drugs, or may soon be the victim of some sort of violence, the victimization of a child can have significant negative effects on the child. These effects can be physical, mental, economic, or emotional in nature, and can affect the child in both the long and short term. n311 Any parent who has his or her child's best interests in mind will desire to spare that child any and all of these negative effects that accompany victimization by a criminal actor, and since the vicarious consent doctrine may help parents to ascertain that their child is in trouble, it is a perfect fit for these types of situations.

2. The Doctrine of Vicarious Consent When the Child Is the Criminal Actor

If a parent has a right to record a child's telephone conversations when he or she believes that doing so will assist in protecting the child from another person's criminal acts, then a parent should also be permitted to record a child's telephone conversations when the parent believes that the child is engaging in criminal activity and thereby potentially victimizing someone else. While such recording does compromise the child's privacy, parents should be permitted to do so under the doctrine of vicarious consent for a number of reasons.

First, parents have a duty to protect their children from the dangers, penalties, and stigmas associated with criminal activity, all of which will [*1009] negatively affect the child. n312 Parents also have a duty to protect society from a child's potentially harmful criminal actions. n313 When parents record a child's telephone conversations in an attempt to protect the child and the community from the negative effects of criminal activity, they are promoting the best interests of

their child and therefore the requirements of the vicarious consent doctrine will generally be met.

Furthermore, many jurisdictions make parents financially responsible for the criminal and negligent acts of their children, meaning parents have a financial interest in what their children do. n314 Allow parents to intercept a child's communications in accordance with the standards set forth in *Thompson* and *Pollock* will further assist parents in protecting against the accumulation of financial liabilities. For these reasons, when the standards of the doctrine of vicarious consent are met, parents who surreptitiously intercept a child's telephone and other covered communications should not be found to be in violation of Title III, but should be permitted to monitor and investigate their children's actions in this manner. Furthermore, when prosecutors come into possession of such recordings they should be permitted to use the recordings in the prosecution of the child.

a. Parents have a duty to protect their children from the dangers, stigmas, and penalties associated with criminal activity.

The United States Supreme Court has stated that "society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity." n315 These "consequences" come in many forms, as engaging in criminal behavior can be physically, mentally, and emotionally dangerous for young people. n316 The use of drugs, for example, can ruin a child's life both physically and mentally. n317 Additionally, buying and [*1010] selling drugs can be a dangerous game. n318 Drug debts are very often enforced with violence and intimidation, n319 and a child or the family of a child can be in serious danger if the child associates with drug dealers who are willing to engage in violence or intimidation. n320 Avoiding dangerous [*1011] situations that can arise when one commits these types of crimes is definitely in the best interest of any child. A parent who is able to ascertain that something like this is going on through recorded telephone conversations made in accordance with the principles of the doctrine of vicarious consent can then take the necessary steps to help the child—steps that otherwise might not be taken.

In addition to the dangers of drug use and interacting with drug dealers, other criminal behavior by minor children can put them in danger as well. For example, in some jurisdictions running away from home is considered a criminal offense. n321 and it is well documented that there are serious dangers that often accompany running away from home. n322 Danger can also attend property crimes, alcohol-related crimes, and violent crimes, as well as other crimes. n323

[*1012] Parents have a duty to protect their children from these types of dangers, n324 and recording telephone conversations under the guidance of the doctrine of vicarious consent assists parents in performing that duty:

As long as the guardian has a good faith basis that it is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the child. n325

If a parent has a good faith basis to believe that a child is engaging in criminal activity that can bring harm to the child, and if the parent further believes that recording the child's conversations will assist in preventing or minimizing that harm, it is reasonable that the parent should exercise that privilege without violating the federal wiretap statute or any of its state counterparts. Such an exercise should be protected by the doctrine of vicarious consent in the criminal context just as it is in the family law context.

There are also penalties associated with criminal activity, and it is arguable that any concerned parent would hope his or her child could avoid even the possibility of being subject to those penalties. Juvenile detention, while important for purposes of community safety and accountability, is not an ideal place for a child to reside. Addressing the issue of detention in the state of New York, one family court judge wrote the following:

[*1013] Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect. n326

Three United States Supreme Court justices agreed with these concerns in their dissent in *Schall v. Martin*, n327 writing that "the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably delinquent." n328

Furthermore, some crimes committed by juveniles are deemed to be so serious that they can be charged in or waived into adult court where the penalties are generally much more severe. In Idaho, for example, the crimes of murder, attempted murder, robbery, rape, certain types of arson, and delivery of a controlled substance within one thousand feet of a school, among other crimes, are considered to be auto-waiver offenses, meaning if a juvenile fourteen years of age or older commits one of those crimes the case can be filed directly in adult court. n329 Additionally, other crimes can be transferred or waived to adult court if the act was committed after the juvenile reached the age of fourteen and a juvenile judge finds that the juvenile system cannot adequately deal with the juvenile and the crime that has been committed, or a transfer to adult court is otherwise [*1014] appropriate. n330 That being the case, the juvenile bypasses the juvenile justice system and its lesser maximum penalties and becomes subject to adult penalties and incarceration in adult facilities. n331 Federal law also provides that in certain enumerated circumstances a juvenile appropriately found to be under federal jurisdiction can be proceeded against as an adult. n332

[*1015] Criminal activity by a minor can also result in the imposition of other penalties, such as the suspension of a drivers license, imposition of fines and fees, community service, limitations on movement throughout the community, temporary or long-term removal from the family home, registration as a sex offender, full or partial waiver of a minor's Fourth Amendment right against unreasonable searches and seizures, and imposition of restitution. n333 If permitted to be applied in the criminal context, the vicarious consent doctrine would protect a parent from criminal or civil liability under Title III when that parent records a child's telephone conversations under a reasonable belief that doing so will somehow allow the parent to prevent the minor from committing a crime that would subject the child to these significant penalties. As the protection of the child's best interests is the hallmark of the vicarious consent doctrine, n334 [*1016] it is clearly applicable in such a scenario. In fact, not only is it applicable, but its application can benefit both parent and child.

Finally, the stigma of a criminal conviction can significantly affect a child's life. While juvenile records are not as readily accessible as adult criminal records, they are not completely sealed in all states. n335 As such, when a potential employer or educational institution becomes aware of an applicant's criminal past, that fact might affect the child's chances at getting the job or getting into the school to which the child applies. Opportunities for military service may also be limited by a juvenile criminal record. As avoiding these consequences is in the child's best interests, criminal courts should hold that the doctrine of vicarious consent be made available to parents seeking to protect their children from these stigmas.

b. Parents have a duty to protect both their children and the community at large from the negative effects that criminal activity has on society and the victims of crimes.

Criminal activity affects more than the child who chooses to commit the crime. n336 Criminal activity also affects society in a number of different ways, and parents arguably have a duty to protect not only their child, but society as well from the negative effects of criminal acts committed by the child. n337 The effects of criminal activity on society include, among other things, increased insurance rates and premiums from insurance payouts following criminal activity, an increased need for law enforcement and other emergency services, physical and emotional injury to crime victims, costs associated with various victim services agencies, and large increases in state and local spending to prosecute and house criminals. n338 The vicarious consent doctrine will not solve all of society's ills; however, if it gives even a handful of parents the ability to protect their children from victimization and protect society from criminal acts committed by their children, it will have shown its worth as a legal principle. One commentator, addressing the role that the vicarious consent doctrine can play in these situations, wrote the following:

Many people blamed the parents of the students who committed the [Columbine High School] shootings, and were incredulous that the [*1017] parents were unaware their children were planning such an elaborate scheme in their own home. Parental wiretapping is a reasonable solution in response to society's growing concern for the increasing violence that seems to be prevalent among today's youth. The dramatic increase in schoolyard violence strongly indicates that parents need to exercise authority and monitor their children's activities without fear of liability. Parental wiretapping provides the perfect tool to assist them. n339

Allowing parents the opportunity to monitor their children's activities and telephone conversations when they believe it is necessary to promote the child's best interest will provide parents with the ability to curtail criminal activity before it injures the child and society.

c. The possibility of parental liability for a child's criminal acts gives parents a right to closely monitor their children's

activities.

In addition to the parental duty to protect the child from the dangers, penalties, and stigmas associated with criminal activity, that parents can be held responsible for their children's criminal acts gives parents a right to do some investigation into their children's actions. The doctrine of vicarious consent allows such an investigation without sacrificing the child's right to privacy any more than is reasonably necessary to protect the child.

When it comes to criminal activity, parents are often held at least partially responsible — either financially or criminally — for acts committed by their children. In some states, this assignment of financial responsibility is affixed by statute. For example, California law requires that upon conviction for certain graffiti-related crimes, "if a minor is personally unable to pay any fine levied for [the crimes] the parent or legal guardian of the minor shall be liable for payment of the fine." n340 Similarly, Idaho law states that "unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order the [offending] juvenile or his parents or both to pay restitution to or make whole any victim who suffers an economic loss as a result of the juvenile's conduct." n341 Texas is another state that has adopted a parental liability law. Texas' law reads:

A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately [*1018] caused by: (1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty; or (2) the wilful and malicious conduct of a child who is at least 10 years of age but under 18 years of age. n342

Many other jurisdictions have enacted similar laws. n343

In addition to financial liability, many jurisdictions impose criminal liability if a parent is found to have contributed to the delinquency of a child by means of neglect or otherwise. Under Kentucky law, for example, a "parent, guardian or other person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a . . . delinquent child." n344 Missouri law provides another example of parental liability:

A person commits the crime of endangering the welfare of a child in the second degree if . . . being a parent, guardian, or other person legally charged with the care or custody of a child less than seventeen years old, he recklessly fails or refuses to exercise reasonable diligence in the care or control of such child to prevent him from coming within the provisions of the state's juvenile criminal laws. n345

Oklahoma has a parental responsibility law, which legislates that any parent who "knowingly and willfully . . . causes, aids, abets, or encourages any minor to be in need of supervision . . . [or] shall by any act or omission to act have caused, encouraged, or contributed to the . . . need of supervision of the minor . . . shall be deemed guilty of a misdemeanor." n346 Oklahoma law also provides for criminal liability if a parent fails to comply with a court's order for juvenile probation. n347 These types [*1019] of parental liability laws have been in existence in the United States in various forms for more than one hundred years. n348

Because parents can be held financially and otherwise liable for criminal acts committed by their children, parents should be permitted to closely monitor their children's activities when they believe that doing so is in the child's best interest. This should include a right to record phone conversations between their child and an outside party when the principles of the vicarious consent doctrine are met. By allowing parents this type of opportunity, they will have a better chance to stop their children from engaging in criminal behavior that might ultimately affect the parent either financially or criminally, while still allowing their children to have a reasonable degree of privacy. n349

3. Applying the doctrine in the criminal context helps protect society from dangerous criminals.

One of the more significant benefits of applying the doctrine of vicarious consent in the criminal context, and thereby allowing for the use of intercepted telephone and other communications during a criminal trial, is that doing so can provide considerable protections to society. Permitting prosecutors to use recordings made in conformance with the principles of the vicarious consent doctrine would benefit society in a number of ways. Doing so will assist in protecting society from dangerous sexual predators or other criminals who would seek to take advantage of young children in one way or another. When, for whatever reason, victims do not disclose sexual abuse, as was the case in *Barboza* and *Bishop*, such abuse can be difficult to detect and properly investigate. n350 Recognizing the vicarious consent doctrine, and allowing parents to invoke it when the circumstances appropriately dictate, will assist parents in identifying those persons who are victimizing their children. Furthermore, sexual abuse cases such as *Barboza* and *Bishop* can be difficult to prosecute, and

allowing prosecutors to use these legally created recordings can only help in their efforts to take dangerous criminals off our streets — a benefit to everyone. In short, recognizing the doctrine of vicarious consent will "make . . . it easier to identify and locate the person(s) responsible for attempting to involve a child in criminal activity affecting the welfare or best interest of such child, as well as prosecute [*1020] any person(s) responsible for engaging in criminal conduct involving such child as a victim." n351 The same is true when other types of crimes — such as drug-related crimes, property crimes, and violent crimes — are involved as well. n352

Conversely, by not recognizing the doctrine of vicarious consent, courts can potentially injure those they intend to protect. There is little doubt that "the absence of a vicarious consent doctrine could endanger children whose needs for protection would go unmet without it." n353 The *Williams* court, which rejected the doctrine, said as much in its opinion, stating that "we, too, can admittedly perceive situations where depriving a parent of the ability to vicariously consent for a child may deprive the child of the parent's ability to protect the child." n354 Additionally, by not allowing prosecutors to use recorded conversations as evidence, a court would actually provide an evidentiary benefit to the criminal, whose rights were in no way violated by state or private action as the parents who made the recording were acting on their own and the recordings were intercepted lawfully. In short, there is a significant possibility that not recognizing the vicarious consent doctrine will have negative effects on society in general and children in particular in that it will provide criminals with a better chance of escaping responsibility for their crimes.

As stated above, the vicarious consent doctrine is very much consistent with the language and congressional intent of Title III, as well as those long-standing principles of law that recognize the right and duty of parents to make certain decisions for and protect their children. n355 Additionally, the doctrine is consistent with and helps further the goals of protecting children and society from criminals, criminal acts, and the devastating consequences that can result when a child is either the victim or perpetrator of a crime. n356 When all these things are considered, it becomes clear that the vicarious consent doctrine and the criminal law intermingle and compliment each other to the degree that they can work together to benefit society without unnecessarily violating a child's right to privacy. For these reasons, criminal courts in both the state and federal systems should recognize the vicarious consent doctrine and when the situation arises such that communications are intercepted in conformance [*1021] with the doctrine, permit the use of intercepted communications as evidence during the course of a criminal trial.

C. The Problems Associated with a Civil Use of the Doctrine Are Not As Significant When the Doctrine Is Applied in Criminal Cases

As referenced in Part II.C of this article, a number of criticisms have been leveled against the doctrine of vicarious consent, particularly as it has been used in civil custody disputes. While many of those criticisms have merit with respect to civil cases, they do not all carry over into the area of criminal prosecutions that are based in part upon telephone conversations surreptitiously recorded by a concerned parent. To put it another way, at least some of the criticisms or problems associated with a custody dispute or other civil use of the doctrine are not as significant when the doctrine is applied in a purely criminal case, and for that reason criminal courts should be willing to accept the vicarious consent doctrine.

1. The doctrine is subject to misuse by conniving parents.

As stated above, one of the major criticisms leveled against the doctrine of vicarious consent, particularly in the civil context, is that it is subject to misuse by conniving or self-serving parents. n357 In the case of a custody dispute following the dissolution of a marriage or other child-bearing relationship, it is easy to see how parents fighting one another for the custody or for the perceived love of a child might have hard feelings toward the other parent — feelings that would interfere with or at least play into a parent's decision to intercept a child's phone conversations with the other parent. The facts of *Thompson* and *Pollock* lend credence to this view. Both cases involved custody disputes, and there were strong feelings of contempt between the bickering parents, which resulted in accusations of wrongdoing and impure motives in regard to the recording of the conversations at issue. The *Pollock* court noted this:

According to Samuel and Laura, Sandra was not motivated by concern for Courtney when she recorded the phone conversations. Instead, they contended that Sandra was angry that Courtney had taped a conversation between herself and Sandra with Samuel and Laura's consent, and "wanted to return the favor by taping Courtney's conversations with Sam and [Laura]." Laura further contends that . . . "Sandra's predominant motive in eavesdropping on the [*1022] children's calls was to overhear Courtney's confidential, attorney-client conversations with her lawyer." n358

When proof of such motives exists, the doctrine of vicarious consent would not apply to protect the parent who is making tape recordings of a child's phone conversations. And in child custody situations, determining the real motivation behind a recording can be extremely difficult and alleging misuse of the doctrine can be extremely easy. In short, the use of the doctrine in the civil context does lend itself to the possibility of misuse by ill-motivated parents, or, at the very least, potentially harmful allegations of misuse. n359

The situation is different in those circumstances in which a parent records conversations between a child and a non-family member out of concern that the child is being victimized or is engaging or thinking about engaging in criminal behavior. In *Barboza*, for example, the minor's parents were both involved in the recording of his conversations with Barboza, and, as the court noted, "everything they did was . . . to try to figure out what was going on and what's right for their son and for their family." n360 It is apparent from the court's description of the facts and the motivations underlying the making of the recordings that there was no misuse of the doctrine by conniving or bickering parents in the *Barboza* criminal case as was alleged in the *Pollock* civil case. n361 There were no attempts by the parents to undermine one another or gather information to be used against the other spouse. n362 There was simply concern for the well-being of a child who was being abused by a sexual predator. n363 The same was true in the *Bishop* case, as that too was not a civil dispute between parents but a situation where parents were working together to protect a child. n364 In short, if a parent who suspects that a child is either a victim or an actor in the commission of a crime surreptitiously [*1023] intercepts some of that child's telephone conversations in accordance with the principles of the vicarious consent doctrine — meaning it is done in an attempt to further the child's best interest and protect the child from either victimization or the negative effects that criminal activity can have on the criminal actor — it is more likely than not that the parent will be doing so not in an attempt to misuse or abuse the doctrine and get back at the other parent, but in an attempt to find out what is going on with a child so that the child can ultimately be protected from further victimization.

Furthermore, one of the issues brought up by critics of the doctrine in regard to misuse is the difficulty of proving whether or not a parent has good or pure motives. n365 In a *Barboza*-type situation, it should be much easier for a parent to make a showing of good faith because there is no custody dispute between parents to cloud the issue. Conversely, it should also be much more difficult for an abuser to show bad faith by the parent. In the *Barboza* case, for example, it is much easier to define parental motivations than it is in the *Pollock* case. And in those cases where the child is believed to be or is found to be the criminal actor, it would also be unlikely that there existed any bad faith on the part of the parent. At the very least, when there is concern that a child is engaging in criminal behavior, a parent who seeks to learn of the behavior will rarely be doing so in an attempt to get back at the minor child's other parent, at the child, or at the person with whom the child is conversing. For this reason, an appropriate application of the doctrine in the criminal context is far less problematic with respect to the possibility of parental misuse than it might be in a civil context.

2. The doctrine fails to recognize a child's right and ability to make his or her own choices.

Some critics have argued that the doctrine of vicarious consent fails to recognize a child's right and ability to make his or her own decisions or choices. n366 This can be true in the civil context when the child is in the middle of a custody battle and choices loom regarding which parent the child should live with — a potentially life-changing decision for the child — or over which parent is more fit to care for children. This argument is not as strong in the context of criminal activity as it is in other contexts, however, as children, like adults, do not have an inherent right [*1024] to choose to engage in criminal activity. n367 For example, in situations such as those at issue in the *Bishop* or *Barboza* cases, n368 a child cannot legally choose or consent to have sexual intercourse with an adult, as the law generally recognizes that it is illegal for adults to have sexual contact with minors. n369 Similarly, the law will not recognize a minor child's right to choose to distribute illegal drugs, steal or destroy property belonging to someone else, or physically injure another person. n370 While people can lawfully go into a court of law and address custody issues and the child's views and choices with respect to that issue, they cannot do so with respect to a choice to commit criminal acts. In short, allowing a use of the vicarious consent doctrine in the criminal context — in cases in which a parent is seeking to protect a child from victimization or from the results of his or her own criminal activity — the minor child does not have any lawful choices taken away. In other words, the use of the doctrine in that context does not take away any choices that the law recognizes that the child has a right to make.

3. The doctrine may result in interfamily discord or resentment.

One legitimate criticism of the vicarious consent doctrine, addressed above, is that its application may result in interfamily discord. n371 If a child wishes to engage in criminal behavior or is consenting to victimization at the hands of a third party, it is possible that interfamily discord or resentment could be an immediate result of a parent recording a

child's telephone conversations. This, admittedly, is as true in the criminal context as the civil context. However, when the child is sufficiently removed from the dangerous situation, or as the child matures later in life and realizes the danger the he or she was in, those feelings will hopefully [*1025] change. The *Bishop* case provides an example of the change of heart that can potentially take place in these types of situations. In *Bishop*, the thirteen year-old victim initially refused to cooperate with law enforcement and "denied that she and Bishop had engaged in any illicit behavior." n372 Later on, however, after she had been removed from the situation and Bishop was no longer able to exert any influence over her, "the victim specifically testified that . . . she was glad her parents made the tapes." n373 Because recordings made in the criminal context, unlike civil contexts, generally will not involve a parent sneaking around and trying to find information about the child's views on custody or attempting to gather evidence of abuse by the other parent, it is at least possible that a child will one day have an easier time seeing that the parents have pure motives and thereby accepting their decision as a correct one. At the very least, that is the case when comparing the situations found in *Bishop* and *Pollock*.

IV. PROCEDURAL ISSUES AND THE USE OF THE VICARIOUS CONSENT DOCTRINE IN A CRIMINAL PROSECUTION

Because the taping of conversations that fit within the parameters of the doctrine of vicarious consent is legal in those jurisdictions that recognize the doctrine, prosecutors should be permitted to use those recordings in criminal proceedings, including proceedings against the child for whom the parents consented. This is because those recordings are deemed lawfully made and are not the result of inappropriate government action. n374 However, because such a recording would be presumptively illegal save for the fact that the circumstances are such that the doctrine of vicarious consent applies, n375 prosecutors should bear the burden of proving that the core elements of the doctrine are met before a recording can be deemed admissible in a trial or other hearing. Specifically, when the admissibility of the recordings is challenged, prosecutors should be required to provide the court with proof that the recordings were made by a parent because of concern for a minor child's welfare and a belief that doing so would promote the child's best interests, and not for some other inappropriate reason. n376 When prosecutors are unable to do so, courts [*1026] should appropriately refuse to allow the admission of those recordings at a criminal trial. When the prosecutor is able to do so, however, courts should recognize the fact that the recordings were not illegally made and therefore should be deemed admissible at a criminal trial.

V. CONCLUSION

In 1993, in the case of *Thompson v. Dulaney*, the United States District Court for the District of Utah held for the first time that a parent or guardian can surreptitiously record a minor child's telephone conversations without violating Title III when the parent has a good faith and objectively reasonable belief that doing so is in the best interest of the child. n377 Since that time a small handful of courts and one progressive state legislature have adopted this holding, which has become known as the doctrine of vicarious consent. n378 While the doctrine has its critics, it is a legally viable and socially beneficial doctrine that should be more widely utilized throughout the United States in both the federal and state legal systems. n379 In particular, until more states follow the lead of the Georgia Legislature and codify the doctrine of vicarious consent, n380 it should be more widely accepted by the criminal courts such that prosecutors should be permitted to use surreptitiously intercepted communications in criminal trials when the recording is obtained in accordance with the doctrine.

Criminal courts should recognize the doctrine and allow use of surreptitiously recorded conversations for a handful of reasons. First, as stated above, the doctrine is both legally viable and socially beneficial. n381 The doctrine is legally viable in the sense that its acceptance is consistent [*1027] with the legislative history to Title III and the view that the one-party consent exception contained in Title III should be interpreted broadly. n382 Additionally, the doctrine recognizes and is consistent with the long-standing principle that parents have a right to decide what is best for their children, even if it causes the children to suffer some invasion of privacy. n383 The doctrine is socially beneficial in that it provides some degree of protection to both children and parents who wish to look out for their children's best interests. n384 Second, criminal courts should recognize the doctrine of vicarious consent because it helps to further the goals of criminal law without causing an excessive violation of a child's or a defendant's privacy. n385 Specifically, the doctrine assists law enforcement and prosecutors in prosecuting dangerous criminals and, at the same time, works to protect children and society from the dangers, penalties, and other negative effects of criminal activity. n386 And because recordings that meet the standards of the doctrine are deemed lawfully obtained, the criminal's right to privacy in the original communication is in no way violated. Finally, while critics argue that the doctrine is flawed, its problems are not nearly as significant when the doctrine is applied in the criminal cases as they are in those civil cases in which the doctrine

is applicable. n387

For these reasons, until more legislatures codify the doctrine, criminal courts faced with the issue of dealing with a surreptitiously recorded telephone conversation between a minor child and another person should choose to accept the vicarious consent doctrine in such a way that parents and prosecutors can use the telephone conversations to protect both the minor child and society as a whole.

FOOTNOTES:

n1 *Bishop v. State*, 526 S.E.2d 917, 918 (Ga. Ct. App. 1999).

n2 *Id.*

n3 *Id.*

n4 *Id.*

n5 *Id.*

n6 *Id.*

n7 *Id.* at 919.

n8 *Id.*

n9 *Id.*

n10 *Id.*

n11 *Id.*

n12 *Id.* at 920.

n13 *Id.* at 919.

n14 *See infra* Part II.B.2.

n15 *Bishop*, 526 S.E.2d at 920.

n16 *See infra* Part II.B.

n17 *See infra* Part II.B.2.

n18 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510-2522 (2000)).

n19 *United States v. Giordano*, 416 U.S. 505, 515 (1974). The stated purpose of Title III, as found in its legislative history, is to "prohibit[] all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order, with exceptions provided for" in the code S. REP. No. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113.

n20 Title III was enacted, in part, because of concerns that the Federal Communications Act did not adequately protect the privacy rights of the American people. *See* S. REP. No. 1097 (1968), reprinted in 1968 U.S.C.C.A.N.

2112, 2154.

n21 The amendment was part of the Electronic Communications Privacy Act of 1986. See Shana K. Rahavy, Note, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. LAW 87, 87 (2003).

n22 See *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (holding that the overriding concern of the drafters of Title III was the protection of privacy). See also Rahavy, *supra* note 21, at 87 (writing that Title III was enacted to "better articulate a balance between the privacy rights of individuals and the legitimate needs of law enforcement").

Title III's legislative history also addresses this issue, stating that the "dual purpose" of the legislation is to "protect[] the privacy of wire and oral communications" and to "delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. In this regard, one major impetus for the passage of Title III was the concern that advances in technology had led to more widespread invasions of personal privacy. Congress addressed this concern in the legislative history:

The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. at 2154. Unlike the Fourth Amendment, which prohibits unreasonable searches and seizures by government actors, the restrictions found in Title III apply to government and private persons alike.

n23 388 U.S. 41 (1967).

n24 *Id.* at 63.

n25 S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. The Supreme Court found New York's eavesdropping statute to be unconstitutional as it was "too broad in its sweep [and] result[ed] in a trespassory intrusion into a constitutionally protected area." *Berger*, 388 U.S. at 44.

n26 389 U.S. 347 (1967).

n27 *Id.* at 353.

n28 On this issue, the legislative history specifically states that "this proposed legislation conforms to the constitutional standards set out in *Berger v. New York* and *Katz v. United States*." S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113 (citations omitted).

n29 *United States v. Giordano*, 416 U.S. 505, 507 (1974).

n30 Rahavy, *supra* note 21, at 88 (citing *Gelbard v. United States*, 408 U.S. 41, 48 (1972)).

n31 *Giordano*, 416 U.S. at 514-15.

n32 *Id.* at 515.

n33 *Id.*

n34 *Id.* at 515-16.

n35 *See id.* at 527 ("We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of the intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.").

n36 S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2156.

n37 *Id.*

n38 *Id.*

n39 18 U.S.C. § 2511(4)(a) (2000)

n40 *Id.* § 2520(a).

n41 *Id.* § 2520(b). The law provides that the complaining party can collect statutory or actual damages but not both.

In [an] action under this section [that does not involve the private viewing of an unscrambled private satellite video communication or an unscrambled radio communication] the court may assess damages whichever is the greater of — (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

Id. § 2520(c)(2).

n42 *Id.* § 2515.

n43 S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185.

n44 *Id.*

n45 *Id.*

n46 *United States v. Giordano*, 416 U.S. 505, 515 (1974).

n47 18 U.S.C. § 2511(2)(d) (2000).

n48 *Id.*

n49 *See id.*

n50 *See id.*

n51 *See id.*

n52 *See infra* Part II.B.1.

n53 Deana A. Labriola, Comment, *Parent-Child Wiretapping: Is Title III Enough?*, 50 CATH. U.L. REV. 429,430 (2001).

n54 One author summarized the positions of both sides as follows:

Despite its roots in combating organized crime, some commentators argue that Congress intended that the Act include domestic wiretapping within its purview. These commentators cite Congress's failure to make any exception for domestic wiretapping as support for this proposition. In addition, Professor Robert Blakey, widely recognized as the author of the Federal Wiretapping Statute, was concerned that the Act as first drafted was deficient in that it relied on the Commerce Clause, and would therefore fail to protect individuals from wiretapping resulting from marital litigation. Congress's subsequent revision of the Statute to include a different constitutional justification can be seen as evidence of its intent that the Act reach domestic communications, in addition to those of organized crime. Furthermore, several senators spoke of the problem of domestic wire-tapping during the debates on the Right of Privacy Act, the early version of the Statute. Senator Long, for one, stated that the three largest areas of snooping in the nongovernmental field included "(1) industrial, (2) divorce cases, and (3) politics." Other senators also spoke of the broad prohibition that the Statute placed upon wiretapping in areas such as domestic relations.

However, one can also argue that the record from hearings before the House Judiciary Committee reflects an additional intent to allow for a certain degree of parental wiretapping. For example, Professor Herman Schwartz, testifying before the House, stated that "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." Courts have since interpreted this to mean that Congress did not mean to subject parents to civil and criminal penalties for recording their children's phone calls out of concern for their child's well-being.

Julieann Karkosak Note, *Tapping into Family Affairs: Examining the Federal Wiretapping Statute As It Applies to the Home*, Pollock v. Pollock, 68 U. CIN. L. REV. 995, 999-1000 (2000) (citations omitted). See also Labriola, *supra* note 53, at 447-53.

n55 The two circuits that have found interspousal wiretapping to be outside the purview of Title III are the Second and Fifth circuits. See *Anonymous v. Anonymous*, 558 F.2d 677, 677 (2nd Cir. 1977) ("We . . . assume that nobody wants to make it a crime for a father to listen in on conversations between his wife and his eight year old daughter, from his own phone, in his own home. The fact that appellee here taped the conversations which he permissibly overheard, we find . . . to be a distinction without a difference."); *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir. 1974) ("We are of the opinion that Congress did not intend [to have Title III extend] into areas normally left to states, those of the marital home and domestic conflicts."). Those which have reached a contrary finding include the Fourth, Sixth, and Tenth circuits. See *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991) ("The district court below held that Title III . . . does apply to interspousal wire-taps. We agree with the district court, and join the majority of federal circuit courts in holding that Title III does provide a remedy for such wiretapping."); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) ("We find that Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping."); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976) ("The plain language of the section and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps.").

n56 Rahavy, *supra* note 21, at 87.

n57 Allan H. Zerman & Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating To Electronic Eavesdropping and Their Application in Matrimonial Cases*, 12 J. AM. ACAD. MATRIM. LAW 227, 228 (1994). For additional discussion on the issue of whether there exists an interspousal exception to the federal wiretap statute from the stand-point of one who believes that there is no such exception, see Scott J. Glick, *Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance*, 41 CATH. U. L. REV. 845 (1992).

n58 The state wiretap statutes are codified in the following locations: Alabama (ALA. CODE §§ 13A-11-31 to-33 (2005)); Alaska (ALASKA STAT. § 42.20.310 (Michie 2005)); Arizona (ARIZ. REV. STAT. § 13-3005 (2005)); Arkansas (ARK. CODE ANN. § 5-67-120 (Michie 2005)); California (CAL. PENAL CODE § 632 (West 2005)); Colorado (COLO. REV. STAT. § 18-9-303 (2005)); Connecticut (CONN. GEN. STAT. § 53a-189 (2005)); Delaware (DEL. CODE ANN. tit. 11, § 2402 (2005)); District of Columbia (D.C. CODE ANN. § 23-542 (2005)); Florida (FLA. STAT. ANN. 934.03 (West 2005)); Georgia (GA. CODE ANN. § 16-11-62 (2005)); Hawaii (HAW.

REV. STAT. § 803-42 (2005)); Idaho (IDAHO CODE § 18-6702 (Michie 2005)); Illinois (720 ILL. COMP. STAT. 5/14-2 (2005)); Indiana (IND. CODE § 35-33.5-5-5 (2005)); Iowa (IOWA CODE §§ 727.8, 808B.2 (2005)); Kansas (KAN. STAT. ANN. § 21-4002 (2005)); Kentucky (KY. REV. STAT. ANN. § 526.020 (Banks-Baldwin 2005)); Louisiana (LA. REV. STAT. ANN. § 15:1303 (West 2005)); Maine (ME. REV. STAT. ANN. tit. 15, § 710 (West 2005)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2005)); Massachusetts (MASS. GEN. LAWS ch. 272, § 99(c)(1) (2005)); Michigan (MICH. COMP. LAWS § 750.539c (2005)); Minnesota (MINN. STAT. § 626A.02 (2005)); Mississippi (MISS. CODE ANN. § 41-29-533 (2005)); Missouri (MO. REV. STAT. § 542-402 (West 2005)); Montana (MONT. CODE ANN. § 45-8-213 (2005)); Nebraska (NEB. REV. STAT. § 86-290 (2005)); Nevada (NEV. REV. STAT. § 200.620 (2005)); New Hampshire (N.H. REV. STAT. ANN. § 570-A:2 (2005)); New Jersey (N.J. STAT. ANN. § 2A:156A-3 (2005)); New Mexico (N.M. STAT. ANN. § 30-12-1 (Michie 2005)); New York (N.Y. PENAL LAW § 250.05 (2005)); North Carolina (N.C. GEN. STAT. § 15A-287 (2005)); North Dakota (N.D. CENT. CODE § 12.1-15-02 (2005)); Ohio (OHIO REV. CODE ANN. § 2933.52 (West 2005)); Oklahoma (OKLA. STAT. tit. 13, § 176.3 (2005)); Oregon (OR. REV. STAT. § 165.543 (2005)); Pennsylvania (18 PA. CONS. STAT. ANN. § 5703 (2005)); Rhode Island (R.I. GEN. LAWS § 11-35-21 (2005)); South Carolina (S.C. CODE ANN. § 16-17-470 (Law. Co-op. 2005)); South Dakota (S.D. CODIFIED LAWS § 23A-35A-20 (Michie 2005)); Tennessee (TENN. CODE ANN. § 39-13-601 (2005)); Texas (TEX. CODE CRIM. P. ANN. art. 18.20 (Vernon 2005)); Utah (UTAH CODE ANN. § 76-9-403 (2005)); Virginia (VA. CODE ANN. § 19.2-62 (2005)); Washington (WASH. REV. CODE § 9.73.030 (2005)); West Virginia (W. VA. CODE § 62-1D-3 (2005)); Wisconsin (WIS. STAT. § 968.31 (2005)); and Wyoming (WYO. STAT. ANN. § 7-3-702 (Michie 2005)). Vermont is the only state that has not adopted its own state wiretapping statute. There are some protections in place in that state, however, as the Vermont Supreme Court has held that the surreptitious electronic monitoring of communications within a person's home is an unlawful invasion of privacy. See generally *Vermont v. Geraw*, 795 A.2d 1219 (Vt. 2002); *Vermont v. Blow*, 602 A.2d 552 (Vt. 1991).

For more information on the various state wiretapping statutes, see generally Stacy L. Mills, Note, *He Wouldn't Listen To Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415 (1998).

n59 Specifically, those states that have adopted a one-party consent exception similar to that contained in Title III are Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. Gary L. Bostwick & Jean-Paul Jassy, *Flanagan's Wake: Newsgatherers Navigate Uncertain Waters Following Flanagan v. Flanagan*, 23 LOY. L.A. ENT. L. REV. 1, 10 n.51 (2002).

n60 OHIO REV. CODE ANN. § 2933.52(A)(1) (2005).

n61 § 2933.52(B)(4).

n62 With respect to civil damages, Ohio law provides that "[a] person whose wire, oral, or electronic communications are intercepted, disclosed, or intentionally used in violation [of Ohio law] may bring a civil action to recover from the person or entity that engaged in the violation any relief that may be appropriate." § 2933.65(A).

n63 TEX. PENAL CODE ANN. §§ 16.02(b), (c)(3)(a) (2005).

n64 See § 1602(b).

n65 *Commonwealth v. Vitello*, 327 N.E.2d 819, 834 (Mass. 1975); see also *People v. Conklin*, 522 P.2d 1049, 1057 (Cal. 1974) ("The legislative history of Title III reveals that Congress intended that the states be allowed to enact more restrictive laws designed to protect the right of privacy . . . The State statute must meet the *Minimum standards* reflected as a whole in [Title III. If it does so, then the State] would be free to adopt *More restrictive* legislation, or no legislation at all, but not less restrictive legislation. In other words, Congress left room for the states to supplement the law in certain areas, provided the regulations are not more permissive.") (italics added); *United States v. Mora*, 821 F.2d 860, 863 n.3 (1st Cir. 1987) ("Generally speaking . . . states are free to superimpose more

rigorous requirements upon those mandated by the Congress, but not to water down federally-devised safeguards.") (citations omitted). Under this standard, it is possible that evidence admissible in federal court could be excluded in state court under a more restrictive wiretap law. For a discussion of the differences among the various state wiretap statutes, see Mills, *supra* note 58, at 4129.

n66 States adopting a more stringent law include: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington. See James A. Pautler, *You Know More Than You Think*, State v. Townsend, *Imputed Knowledge and Implied Consent Under the Washington Privacy Act*, 28 SEA. U. L. REV. 209, 211 n. 18 (2004). Additionally, while Nevada's state statute does not require the consent of all parties to a conversation, the Nevada Supreme Court has held that such consent is necessary. See generally Lane v. Allstate Ins. Co., 969 P.2d 938 (Nev. 1998).

n67 CAL. PENAL CODE § 632(a) (2005) (emphasis added).

n68 See *id.*

n69 § 637.2 ("Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts: (1) Five thousand dollars (\$ 5,000). (2) Three times the amount of actual damages, if any, sustained by the plaintiff.").

n70 See *infra* Part II.B.2.a.

n71 See *supra* Part II. A.

n72 See *infra* Part II.B.2.a.

n73 See *id.*

n74 See *id.*

n75 See *id.*

n76 See *id.*

n77 See *infra* Part II.B.2.b.

n78 See *id.*

n79 See *id.*

n80 838 F. Supp. 1535 (D. Utah 1993).

n81 *Id.* at 1537.

n82 *Id.* at 1537-38.

n83 *Id.* ("[Thompson] sought several million dollars in compensatory and punitive damages" from a handful of individuals, including his ex-wife, her parents, and her attorneys for the alleged wiretap.)

n84 *Id.* at 1544.

n85 *Id.* at 1542.

n86 The opinion in which the district court developed the concept of vicarious consent was actually its second

ruling on the motion. See *Thompson v. Dulaney*, No. 2:90CV00676 (Docket) (D. Utah Aug. 15, 1990), *aff'd in part, rev'd in part, and remanded*, 970 F.2d 744 (10th Cir. 1992). In 1991, upon remand, the district court ruled that the case was outside the purview of Title III because it was purely a domestic conflict. See *Thompson*, 970 F.2d at 746. That holding was later reversed in part and Denise Dulaney was given another chance to go forward with her motion. *Id.* at 750.

n87 *Thompson*, 838 F. Supp. at 1544. In addressing the narrowness of its holding, the court emphasized more than once that its holding was very fact-specific:

It is by no means intended to establish a sweeping precedent regarding vicarious consent under any and all circumstances. The holding of this case is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father. Under these limited circumstances, the Court concludes that vicarious consent is permissible.

Id. at 1544 n.8. One important fact that the court alludes to above in reaching its holding is the age of the children whose conversations were being recorded. It wrote:

The children in this case were ages three and five. They clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent.

Id. at 1543. Based on these and other statements contained in the opinion, it is arguable that the *Thompson* court would not be as liberal in the application of the vicarious consent doctrine to other fact scenarios.

n88 *Id.* at 1544.

n89 *Id.* at 1543.

n90 *Id.*

n91 *Id.* at 1544.

n92 *Id.*

n93 *Thompson*, 838 F. Supp. at 1544.

n94 *Id.* at 1545.

n95 *Id.* On this point the court further stated that any determination of whether or not a parent or guardian "has a good faith basis . . . for believing that it is necessary to consent on behalf of [a] minor [child]" is a question of fact that can only be decided after the presentation of evidence on the issue. *Id.*

n96 *Id.* at 1545, 1548.

n97 680 So.2d 368 (Ala. Civ. App. 1996).

n98 *Id.* at 369.

n99 *Id.* at 370-71.

n100 *Id.* at 371-72.

n101 *Id.* at 371.

n102 See *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

n103 154F.3d601 (6th Cir. 1998).

n104 *Id.* at 603.

n105 *Id.*

n106 *Id.* at 604.

n107 *Id.*

n108 *Id.* at 605.

n109 *Id.*

n110 *Pollock, 154 F.3d at 605.*

n111 *Id.*

n112 *Id. at 610.*

n113 *Id.* (citations omitted).

n114 *Id.*

n115 *Id.*

n116 *Id. at 608.*

n117 *Id.* at 604.

n118 *Id.* at 608 (quoting *Thompson v. Dulaney, 838 F. Supp. 1535, 1543 (D. Utah 1993)*) (alteration in original).

n119 *Id.* (citing *Pollock v. Pollock, 975 F. Supp. 974, 978 n.2 (W.D. Ky. 1997)*).

n120 *Id.* at 610.

n121 *See id.*

n122 *Id.*

n123 *Id.* In addition to *Thompson, Silas, and Pollock*, a handful of other courts have accepted the doctrine of vicarious consent. Other civil cases include *Campbell v. Price, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998)* ("To be entitled to summary judgment, Mr. Price's intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child.") and *Kroh v. Kroh, 567 S.E.2d 760, 764 (N.C. Ct. App. 2002)* ("While our courts have not addressed this issue, federal courts construing the Omnibus Act have considered and adopted the vicarious consent doctrine. . . . As we find the reasoning of these cases persuasive, we adopt the vicarious consent doctrine with respect to our Electronic Surveillance Act . . . as long as the parent: has a good faith, objectively reasonable belief that the interception of [the] conversations is necessary for the best interest of the child[.]") (citations omitted). *See also Stinson v. Larson, 893 So. 2d 462 (Ala. Civ. App. 2004)* (holding a mother's recording of a minor child's telephone conversations with father as proper under the Electronic Communications Privacy Act).

n124 *See, e.g., Commonwealth v. Barboza, 763 N.E.2d 547 (Mass. App. Ct. 2002)* and cases cited *infra* note 155.

n125 *See, e.g., Barboza, 763 N.E.2d at 547; State v. Morrison, 56 P.3d 63, 65 (Ariz. Ct. App. 2002).*

n126 *763 N.E.2d at 547.*

n127 *Id. at 550.*

n128 *Id.*

n129 *Id.*

n130 *Id.*

n131 *Id.*

n132 *Id.*

n133 *Id.*

n134 *Barboza, 763 N.E.2d at 550.*

n135 *Id.*

n136 *Id.*

n137 *Id.*

n138 *Id.*

n139 *Id.*

n140 *Id. at 550-51.*

n141 *Id. at 549-50* In addition to the taped evidence, Tom, the victim, also testified and told the jury about "numerous acts of indecent touching, and oral and anal sex committed by [Barboza]." *Id.*

n142 *Id. at 551.*

n143 *Barboza, 763 N.E.2d at 551.*

n144 *Id.*

n145 *Id. at 550.*

n146 *Id. at 551-53.*

n147 *Id. at 553-55.*

n148 *Id. at 551.*

n149 *See id.*

n150 *Id. at 552-53.*

n151 *Id. at 552* (quoting *Commonwealth v. Santoro, 548 N.E.2d 862, 864 (Mass. 1990)*).

n152 *Id.* at 552-53.

n153 *Barboza*, 763 N.E.2d at 553-54. Prior to analyzing the issue, the court briefly mentioned the interplay between the federal and state wiretap laws:

"Although a State [wiretap] statute may adopt standards more stringent than the requirements of Federal law, thus excluding from State courts evidence that would be admissible in Federal courts, a State may not adopt standards that are less restrictive" and would thereby allow evidence in State court that would be inadmissible in Federal court.

Id. at 553 (quoting *Commonwealth v. Vitello*, 327 N.E.2d 819, 833 (Mass. 1975)).

n154 *Id.* at 554.

n155 *Id.* at 553-54. The court also relied, in part, on another line of cases that approves of this type of eavesdropping under the extension telephone exemption found in 18 U.S.C. § 2510(5)(a)(i). *Id.* As noted above, § 2510(1)(b) provides that "any person who . . . intentionally uses, endeavors to use, or procures any other person to use . . . any electronic, mechanical, or other device to intercept any oral communication . . . shall be punished . . . or shall be subject to suit as provided in [the Act]." With respect to this prohibition, § 2510(5)(a)(1) defines "electronic, mechanical, or other device" as the following:

any device or apparatus which can be used to intercept a wire, oral, or electronic communication *other than* any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business . . . for connection to the facilities of such service and used in the ordinary course of its business.

§ 2510(5)(a)(i) (2000) (emphasis added). In short, then, the prohibition against wiretapping is not violated when one records a conversation using an instrument that is connected to the phone and used "in the ordinary course of . . . business" — hence the extension telephone exemption. In addressing and explaining this exemption to the Act, the *Barboza* court wrote the following:

Other courts, focusing on their sense of "Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other" have relied on the extension telephone exception . . . to uphold the introduction of evidence obtained through taping or eaves-dropping within the family home. The extension telephone exception exempts from the statute equipment, e.g., a second residential telephone, used by a telephone service subscriber in the ordinary course of business. This exception has been read to permit members within their own homes to eavesdrop on, and even record, each other.

Barboza, 763 N.E.2d at 553-54 (citations omitted). The court then references a series of federal court decisions that have adopted this extension telephone exemption. *Id.* See *Janecka v. Franklin*, 843 F.2d 110 (2nd Cir. 1988); *Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991).

Not everyone who has encountered the extension telephone exemption and the way the courts have interpreted it agrees that it is a viable exception to the prohibitions contained in Title III. One author wrote the following:

While [the extension phone exception] is arguably consistent with Title III to permit listening in on an extension phone in the family home, most courts considered cases involving conduct that exceeds the mere use of an extension phone or other standard equipment. Courts have tried to avoid the plain language of the telephone extension exemption by asserting that listening in on a telephone extension, recording a call, or installing a wiretapping device is a "distinction without a difference." Yet, courts have recognized precisely such differences in other contexts. Listening in on a telephone extension requires a party's physical presence in the house and is limited to the length of the conversation. In contrast, [installing a] recording or tapping devices is virtually unlimited and considerably more intrusive.

Thus, while the extension phone exemption theoretically exempts a parent from Title III liability, the exception, as expressly provided for in the statute, has not proven highly relevant or logically sound in this context.

Rahavy, *supra* note 21, at 91 (citations omitted). Another commentator wrote the following:

Although there may be areas where the *Pollock* decision could be improved, in adopting the vicarious consent doctrine rather than the extension phone exemption, the Sixth Circuit effectively rejected a clearly flawed doctrine. The first problem is that the extension phone exemption rejects Congress's intent to include domestic situations within the purview of the Federal Wiretapping Statute, and fails to truthfully acknowledge the meaning of the language in the statute. An additional problem with the extension phone exemption is the level of intrusion into privacy that it creates within the home.

Karkosak, *supra* note 54, at 1012. See also *United States v. Murdock*, 63 F.3d 1391, 1396-1400 (6th Cir. 1995) ("We conclude that the recording mechanism (a tape recorder connected to extension phones in Mrs. Murdock's home) does not qualify for the telephone extension (or business extension) exemption . . . Spying on one's spouse does not constitute use of an extension phone in the ordinary course of business."). For a more in-depth discussion of the extension telephone exemption, see generally Karkosak, *supra* note 54.

One issue that the court did not address is the major difference between the extension telephone exemption and the vicarious consent doctrine. Specifically, under the vicarious consent doctrine, a parent must have a reasonable and objective belief that recording the child's telephone conversation is in the child's best interest. See cases cited *supra* Part II.B.2.a. There is no such requirement under the extension telephone exemption, which simply requires that the interception be made from an extension telephone. See Rahavy, *supra* note 21, at 97.

n156 Other criminal courts have recognized the doctrine as well. See, e.g., *State v. Morrison*, 56 P.3d 63, 65 (Ariz. Ct. App. 2002) ("If the parent has good faith, objectively reasonable basis for believing that the recording of a child's telephone conversations is necessary and in the best interest of the minor, the guardian may vicariously consent on behalf of the child to the recording without violating Title III."); *State v. Diaz*, 706 A.2d 264 (N.J. Super. Ct. App. Div. 1998). In *Diaz*, the court wrote:

In this case, parents of a nine-month old daughter hired defendant to work in their home as a daytime nanny. . . . The parents became concerned about how defendant was treating their daughter and physical evidence of bruises supported their concern. We hold that [N.J. STAT. ANN. §] 2A:156A-4d incorporates the theory of vicarious consent and that, under these circumstances, the audio portions of the [video] recording involving statements to the child and the child's verbal reaction (as well as the video portion of the tape) are admissible.

Id. at 270.

n157 581 N.W.2d 777 (Mich. Ct. App. 1998).

n158 *Id.* at 778.

n159 *Id.*

n160 *Id.*

n161 *Id.* The Michigan Court of Appeals summarized the parties' arguments as follows: Defendant Brent Williams, who had sole legal and physical custody of [the couple's child] Jason at the time of the tape recording, argued that he had the authority to give consent on Jason's behalf to the interception of the telephone conversations. Plaintiff [Brenda Williams] posited that defendants' argument improperly expanded the scope of the consent exceptions in the federal and state statutes and that a proper interpretation would require summary disposition in her favor because defendant Brent Williams was not a participant in the conversation.

Id.

n162 *Id.*

n163 *Id.* at 778-79.

n164 *Id.* at 779-80. Michigan's wiretap statute is found in *Michigan Compiled Laws, section 750.539* (2005).

n165 *Williams*, 581 N.W.2d at 778.

n166 *Id.* at 779.

n167 *Id.*

n168 *Id.* at 780.

n169 *Id.* (citations omitted).

n170 The court wrote:

In the provisions of the Michigan eavesdropping statute, we find no indication that the Michigan legislature intended to create an exception for a custodial parent of a minor child to consent on the child's behalf to interceptions of conversations between the child and a third party. If the Legislature had intended the result argued by defendants, then it could have included such an exception in . . . the provision in the Michigan eavesdropping statute in which the Legislature delineated exceptions to the prohibition against eavesdropping. Because the Legislature did not include such an exception, we must presume it intended only the meaning that it plainly expressed.

Id. at 779.

n171 On this point, the court wrote:

Therefore, notwithstanding other courts' willingness to ascribe different meanings to the consent exception, we decline to follow their lead. We instead commend to the legislative branch the delicate question of the extent of privacy that family members may expect within their home vis-a-vis each other. Unlike the judiciary, the legislative branch of government is able to hold hearings and sort through the competing interests and policies at stake.

Id. at 781.

n172 *Williams v. Williams*, 593 N.W.2d 559 (Mich. 1999) (table decision).

n173 *Williams v. Williams*, 603 N.W.2d 114, 115 (Mich. Ct. App. 1999).

n174 *Id.* at 116 (stating that "we are bound to follow the *Pollock* holding with respect to the federal question in this case").

n175 *Id.*

n176 *Id.*

n177 *Id.*

n178 153 Wash. 2d 186, 102 P.3d 789 (2004).

n179 *Id.* at 191, 102 P.3d at 791.

n180 *Id.* at 190, 102 P.3d at 790.

n181 *Id.*

n182 *Id.*

n183 *Id.* at 190, 102 P.3d at 791.

n184 *Id.*

n185 *Id.*

n186 *Id. at 191, 102 P.3d at 791.*

n187 *Id.*

n188 *Id. at 193-94, 102 P.3d at 792.*

n189 *Id.* (citations omitted).

n190 *Id. at 199, 102 P.3d at 795.*

n191 *Id. at 201, 102 P.3d at 796.*

n192 *See WASH. REV. CODE § 9.73.030 (2005).*

n193 *See Christensen, 153 Wash. 2d at 190, 102 P.3d at 790.*

n194 *Id. at 193-94, 102 P.3d at 792.*

n195 *404 S.E.2d 887 (N.C. Ct. App. 1991).*

n196 *Id. at 888.*

n197 *Id. at 887-88.*

n198 *Id. at 887.*

n199 *Id. at 888.*

n200 Again, the *Thompson* decision, which was the first decision to propose and accept the vicarious consent doctrine, was not issued until 1993. *See supra* Part II.B.2.a.

n201 *See Shaw, 404 S.E.2d at 888.*

n202 *Id.*

n203 *Id.*

n204 *Id. at 889.*

n205 *Id.* (citations omitted).

n206 *Id.*

n207 *453 S.E.2d 646 (W Va. 1994).*

n208 *Id. at 652.*

n209 *Id. at 648.*

n210 *Id.*

n211 *Id. at 654.*

n212 *Id.*

n213 Commentator Alison S. Aaronson tells the story of the adoption of the vicarious consent doctrine by the Georgia Legislature:

The Georgia Court of Appeals reversed the trial court's decision and concluded that Bishop's motion to suppress the tape recordings should have been granted . . . [In so deciding] the court reasoned that [Georgia law, as it then existed] precluded the application of the vicarious consent exception. In addition, the court declared that "it is solely the task of the legislature to amend [Georgia's wiretapping statute] to allow the admission into evidence of tape recordings such as those at issue here, i.e., tapes made by parents with a good faith, objectively reasonable basis for concern regarding the safety of their children as victims of criminal conduct of another."

Several members of the Georgia House of Representatives took these words to heart, and introduced a bill that was signed into law in April, 2000, allowing a parent to monitor and intercept a minor child's phone conversations. Jim Stokes, a member of the Georgia House Judiciary Committee, sponsored the bill based on a letter he received from David Scott, the victim's father, asking him to address the lack of statutory support for parents to legally wiretap their children's telephone conversations. [In drafting the law,] the Committee sought a limited means of permitting parents to monitor their children's activities for the purpose of protecting them, particularly in sexual molestation cases.

Mr. Stokes acknowledged that the trial court's decision not to admit the tape recordings between Bishop and the victim into evidence under the previous law was the correct legal decision. However, to assist parents in similar situations, the law needed to be changed. Mr. Stokes agreed that parents have the authority to control their children, especially in situations where they suspect their children are in trouble. . . .

Judith Manning, also a member of the Georgia House of Representatives . . . met with the [*Bishop*] victim and her family, and she became involved in the [criminal case against Bishop] "because it was clear to her that Bishop was overwhelmingly guilty" and the girl's parents were helpless, going into trial with hearsay evidence." Although Ms. Manning acknowledged that the United States Constitution prevents unreasonable invasions of privacy, [she] believed that the *Bishop* case] was a situation where there were obvious signals that the child was suffering: the victim's grades dropped; her demeanor changed dramatically; and she neglected her personal appearance. [Manning expressed a belief that the] new law gives parents the power to monitor their children when they begin manifesting different behavioral patterns. Ms. Manning stressed that the *Bishop* case was a serious matter; it was not merely a case of a parent snooping through a child's room or reading a diary to learn about the child's healthy personal life. Thus, [she stated,] parents should be legally protected to intercept a child's phone calls where the child's welfare is at stake, and parents should not abuse the law to determine the truth in situations other than where they suspect their child is in physical or emotional danger. . . .

As a result of Georgia's new law, on October 13, 2000, Superior Court Judge George H. Kreeger convicted Bishop of child molestation, two counts of aggravated child molestation, and aggravated sexual battery. Sentencing took place on November 29, 2000, and Bishop was sentenced to ten years for each count, a sum total of thirty years.

Alison S. Aaronson, Note, *Changing with the Times: Why Rampant School Violence Warrants Legalization of Parental Wiretapping to Monitor Children's Activities*, 9 J.L. & POL'Y 785, 827-830 (2001) (citations omitted).

n214 GA. CODE ANN. § 16-11-66(d) (2005).

n215 The full text of Georgia's vicarious consent statute:

The provisions of this article shall not be construed to prohibit a parent or guardian of a child under 18 years of age, with or without the consent of such minor child, from monitoring or intercepting telephonic conversations of such minor child with another person by use of an extension phone located within the family home, or electronic or other communications of such minor child from within the family home, for the purpose of ensuring the welfare of such minor child. If the parent or guardian has a reasonable or good faith belief that such conversation or communication is evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child, the parent or guardian may disclose the content of such telephonic conversation or electronic communication to the district attorney or a law

enforcement officer. A recording or other record of any such conversation or communication made by a parent or guardian in accordance with this subsection that contains evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity shall be admissible in a judicial proceeding except as otherwise provided in subsection (b) of this Code section.

Id.

n216 An attempt to codify the doctrine was made in Virginia in 2000. That attempt, however, failed. See Aaronson, *supra* note 213, at 788 n.14.

n217 See *infra* Part II.C.

n218 See *supra* Part II.B.2.c.

n219 *Williams v. Williams*, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998).

n220 Ann B. Frick & Marjorie J. Long, *Interspousal Wiretapping and Eavesdropping: An Update — Part II*, 24 COLO. LAW 2569, 2570 (1995).

n221 Karkosak, *supra* note 54, at 1017.

n222 Debra Bogosavljevic, Note, *Can Parents Vicariously Consent to Recording a Telephone Conversation on Behalf of a Minor Child?: An Examination of the Vicarious Consent Exception Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 2000 U. ILL. L. REV. 321, 342 (2000) (citations omitted). See also Karkosak, *supra* note 54, at 1020 ("Additionally, [the doctrine of vicarious consent] could lead to circumstances where a parent could conceivably use wiretapping for their own devious means, subjecting their former spouse and child to emotional blackmail.").

n223 *Williams*, 581 N.W.2d at 781.

n224 Bogosavljevic, *supra* note 222, at 343. One commentator expressed concern regarding what a court would do when it cannot easily decide whether the parent was truly acting in what was believed to be the child's best interest, writing that "in a situation where it is unclear if the parent had the best interests of the child at heart, or had ulterior motives such as blackmail or harassment, it is possible that a court would err on the side of caution, trusting that the parent was truly concerned about their child." Karkosak, *supra* note 54, at 1021-22. See also Frick, *supra* note 220, at 2570 ("The danger is that after-the-fact subjective contentions that the parent is acting in the best interests of the child is an unworkable, unverifiable standard.").

n225 Frick, *supra* note 220, at 2570.

n226 *Pollock v. Pollock*, 154 F.3d 601, 603-04 (6th Cir. 1998).

n227 *Id.* at 603.

n228 *Id.* at 604.

n229 *Id.* at 605.

n230 *Id.* at 613.

n231 *Id.* at 612.

n232 Frick, *supra* note 220, at 2570.

n233 *Id.*

n234 Karkosak, *supra* note 54, at 1019 (citations omitted).

n235 *Id.* at 1018 (citations omitted). On this point, the author also references the fact that "court decisions have recognized that older children may have a right to consent for themselves in circumstances such as abortion (allowing for judicial bypass) and certain medical procedures." *Id.*

n236 *Id.* at 1019.

n237 *Id.*

n238 Frick, *supra* note 220, at 2569.

n239 Karkosak, *supra* note 54, at 1020.

n240 *See Pollock v. Pollock*, 154 F.3d 601, 605 (6th Cir. 1998).

n241 *See, e.g., Williams v. Williams*, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998).

n242 *See id.*

n243 *See, e.g., Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) ("There is no express exception [in Title III] for instances of willful, unconsented to electronic surveillance between spouses.").

n244 *See, e.g., Williams*, 581 N.W.2d at 780.

n245 *Id.*

n246 S. REP. No. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2274.

n247 *See, e.g., State v. Shaw*, 404 S.E.2d 887, 889 (N.C. Ct. App. 1991).

n248 *See, e.g., State v. Capell*, 966 P.2d 232, 241 (Or. Ct. App. 1998) (Armstrong, J. dissenting).

n249 *See supra* Part II.B.2.

n250 *See supra* Part II.C.

n251 22 F.3d 149 (7th Cir. 1994).

n252 *Id.* at 154.

n253 *Campbell v. Price*, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998).

n254 *Anonymous v. Anonymous*, 558 F.2d 677, 679 (1977) (citing *Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm.*, 90th Cong. 901 (1967) (statement of Professor Herman Schwartz)).

n255 *Campbell*, 2 F. Supp. 2d at 1190 (quoting *Newcomb v. Ingle*, 944 F.2d 1534, 1536 n.5 (10th Cir. 1995)); *see also State v. Capell*, 966 P.2d 232, 234 (Or. Ct. App. 1998) ("To the extent that there could be any doubt about what Congress would have intended in light of the facts in the case, the legislative history underlying the act expressly states that Congress did not want "to make it a crime for a father to listen in on his teenage daughter or some such related problem.").

n256 *Newcomb v. Ingle*, 944 F.2d 1534, 1535-36 (10th Cir. 1991).

n257 *See supra* Part II.A.3.

n258 *See id.*

n259 *Anonymous*, 558 F.2d at 679.

n260 Aaronson, *supra* note 213, at 794.

n261 944 F.2d 1537, 1539 (10th Cir. 1991).

n262 542 F.2d 661, 672-73 (6th Cir. 1976).

n263 *See Hegg*, 944 F.2d at 1539 ("The district court below held that Title III . . . does apply to interspousal wiretaps. We agree with the district court, and join the majority of federal circuit courts in holding that Title III does provide a remedy for such wiretapping."); *Jones*, 542 F.2d at 673 ("The plain language of the section and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps.").

n264 *See supra* Part II.B.2.a.

n265 966 P.2d 232 (Or. Ct. App. 1998).

n266 *Id.* at 234

n267 *Id.*

n268 *See supra* note 259 and accompanying text.

n269 Rahavy, *supra* note 21, at 97.

n270 *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993).

n271 831 F.2d 373 (2nd Cir. 1987).

n272 *Id.* at 378.

n273 *Id.*; *see also Grigg-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990) ("We agree with the Second Circuit that Congress intended the consent requirement to be construed broadly.").

n274 *Amen*, 831 F.2d at 378.

n275 *See supra* Part III.A.1.a.

n276 For example, many jurisdictions require parental consent for children of certain ages to marry, to obtain an abortion, or have certain medical procedures performed. *See generally* Karkosak, *supra* note 54, at 1021.

n277 Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965, 969 (1989).

n278 Karkosak, *supra* note 54, at 1017; *see also* Laura S. Killian, *Concerned or Just Plain Nosy? The Consequences of Parental Wiretapping Under the Federal Wiretap Act in Light of Pollock v. Pollock*, 104 DICK. L. REV. 561, 571 (2000) ("Parents, as the natural guardians of their children, hold the legal right to act on their behalf to make decisions for their protection.").

n279 *See supra* Part II.B.2.a.

n280 Labriola, *supra* note 53, at 456.

n281 *State v. Liebau*, 67 P.3d 156, 160 (Kan. Ct. App. 2003).

n282 *M.S. v. Wermers*, 557 F.2d 170, 177 (8th Cir. 1977).

n283 Karkosak, *supra* note 54, at 1016.

n284 *See Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

n285 Karkosak, *supra* note 54, at 1016.

n286 *Bishop v. Georgia*, 526 S.E.2d 917, 922 (Ga. Ct. App. 1999).

n287 Aaronson, *supra* note 213, at 823.

n288 *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

n289 Aaronson, *supra* note 213, at 822.

n290 *Id.* at 823.

n291 *Silas v. Silas*, 680 So. 2d 368, 372 (Ala. Civ. App. 1996).

n292 *See, e.g., Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected . . . concepts of the family as a unit with broad parental authority over minor children . . . More important, [it] has recognized that natural bonds of affection lead parents to act in the best interests of their children."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("The custody, care and nurture of the child reside first in the parents").

n293 Aaronson, *supra* note 213, at 821-22 (citation omitted). The author continues: "The continuing rise in school violence as evidenced by the . . . Columbine High School shootings, undoubtedly justifies the need for parents to monitor their children's activities without the fear of liability." *Id.* at 822.

n294 *See id.*

n295 *Bishop v. State*, 526 S.E.2d 917, 918-19, 922 (Ga. Ct. App. 1999).

n296 *Commonwealth v. Barboza*, 763 N.E.2d 547, 554 (Mass. App. Ct. 2002).

n297 In both cases the parents had legitimate suspicions of victimization and therefore had a reasonable belief that they were acting in their child's best interest. *See Bishop*, 526 S.E.2d at 922; *Barboza*, 763 N.E.2d at 554.

n298 *See Williams v. Williams*, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998).

n299 *Id.*

n300 *See supra* Part III.A.2.a.

n301 *See supra* Part II.B.2.b.

n302 *See Commonwealth v. Barboza*, 763 N.E.2d 547, 555 (Mass. App. Ct. 2002) ("We conclude that a recording by parents of their own minor son on the telephone in their own home, motivated by concerns that he was being sexually exploited by an adult, does not violate Title III.").

n303 *See supra* note 41 and accompanying text.

n304 As stated above, violations of Title III can result in civil, criminal, and evidentiary penalties. *See supra* Part II.A.2.b.

n305 *Schieb v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994).

n306 *See infra* Part III.B.

n307 *See supra* Part III.A.2.a.

n308 *See id.*

n309 *See id.*

n310 Labriola, *supra* note 53, at 461.

n311 *See* TED R. MILLER ET AL., U.S. DEPT OF JUST., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

n312 *See infra* Part III.B.2.a

n313 *See infra* Part III.B.2.b.

n314 *See infra* Part III.B.2.c.

n315 *Schall v. Martin*, 467 U.S. 253, 266 (1984).

n316 In addressing this issue, the United States Supreme Court has recognized that the consequences of a juvenile's criminal activity include "potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child." *Id.*

n317 *See, e.g., People v. Taylor*, 8 Cal. Rptr 2d 439, 449 (Cal. Ct. App. 1992) ("By saying this, we do not condone the sale or use of illegal drugs in any amount. Some risk of death is always present. As usage continues, the probability of adverse consequences rises. And these consequences are not always death. Drug and alcohol abuse ruins untold lives of users and their loved ones. Relationships and job performance suffer from an activity that has no social utility. These are but a few of the reasons for drug laws, education concerning the danger of drug use, and other social measures aimed at ameliorating this serious problem.").

n318 *See, e.g., United States v. Brown*, 64 F.3d 1083, 1088 (7th Cir. 1995) (stating that "cocaine trafficking is known to be an inherently dangerous criminal activity"); *Commonwealth v. Patterson*, 591 A.2d 1075, 1078 (Pa. Super. 1991) (taking judicial notice of the fact that "drug dealers are likely to be armed and dangerous").

n319 As put by the United States Supreme Court, "it is well known, that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension." *Treasury Employees v. Von Raab*, 489 U.S. 656, 669 (1989).

n320 The facts of the Nebraska case of *State v. Clark*, 588 N.W.2d 184 (Neb. 1999), provide a good example of the kinds of trouble that people, juveniles included, can find themselves in when interactions with drug dealers goes

bad — a type of trouble that a concerned parent who wants what is in a child's best interest would prefer that his or her child avoid. In *Clark*, Patrick A. Clark was convicted of second-degree murder and sentenced to life plus ten years. The individual whom he shot and killed, Leroy Fowler, was Clark's source for methamphetamine, an illegal drug to which he was addicted. The court described the facts — and in particular the situation that Clark found himself in when he accrued drug debts with Fowler — as follows:

Clark is a 42-year-old, divorced, unemployed carpenter addicted to methamphetamine. Clark had met Fowler 7 months prior to the shooting, in August 1996, in connection with a drug transaction. Clark began to buy methamphetamine regularly from Fowler, and his debt to Fowler rapidly increased. According to Clark, in late 1996, Fowler insisted that Clark work for him, apparently as security for the unpaid drug debt. In return for Fowler's "fronting" drugs to Clark without immediate payment, Clark worked for Fowler nearly every day without pay. Clark's debt to Fowler was not diminished by the services he provided to Fowler. The uncontroverted evidence showed that Fowler imposed usurious "interest" and that Clark's debt continued to increase.

Clark's jobs for Fowler included . . . [driving] Fowler around Omaha two or three times per week to collect money from drug sales. Clark testified that Fowler often gave Clark Fowler's gun to carry as the two made these nighttime rounds to collect Fowler's drug money. Fowler could not lawfully carry a gun, since he was a convicted felon. Clark testified that Fowler used intimidation, threats, and violence to collect money due to him for illegal drug sales.

Clark testified that he was dependent on the methamphetamine he got from Fowler, but that he could not pay for it. Clark said he felt increasingly frightened by Fowler's intimidation of him, including threats to injure or kill Clark, his young children, and Clark's parents . . . Clark stated that he felt he could not challenge Fowler because Fowler supplied him with methamphetamine to feed his addiction and Clark believed that Fowler would follow through on his threats to harm Clark or Clark's family because of the unpaid drug debt.

In the week preceding the March 12, 1997, shooting, Clark testified that he had worked for Fowler continuously for nearly 3 days without a break, including moving a large cache of Fowler's weapons, ammunition, and drugs. The weapons included hand grenades and automatic weapons. Clark testified that at approximately 7 p.m. on Friday, March 7, after moving Fowler's cache to a storage unit, Clark told Fowler that he had to get some sleep. According to Clark, Fowler grudgingly agreed to a few hours, telling Clark, "You come down to my house at 10 o'clock or I'm going to chase you down." Clark went to his parents' home, where he lived, to sleep. Contrary to Fowler's instructions, Clark did not return to Fowler's home.

Clark avoided Fowler's attempts to reach him until the following Wednesday, March 12. Fowler arrived at the Clark home in a rage at approximately 8:40 a.m., soon after Clark had awakened. Joseph Clark, Clark's brother, encountered Fowler as Fowler arrived at the Clark home and Joseph Clark was leaving for work. Joseph Clark had never before met Fowler. Fowler gave Joseph Clark "a dirty, dirty glare — like he could beat somebody up."

Once inside the Clark home, Fowler demanded that Clark leave with him. He took many of Clark's possessions, including clothes, tools, and three houseplants, which were later found in the back of Fowler's car. Fowler did not expressly mention Clark's unpaid drug debt, but Clark testified, "I knew that's what this was about" and "I knew he was going to kill me and I knew he had the potential."

Clark testified that he believed that Fowler was carrying a gun underneath his jacket. Fowler threatened to blow up the home of Clark's parents, who were in the upper level of the house. Clark testified that he was very scared that Fowler, who looked "more wicked this time than ever," would carry through with his threat. Clark believed that he could not communicate with his parents to call police, so he agreed to leave with Fowler, to get him out of the house.

Id. at 186-87. It was shortly after they left Clark's parents' house that Clark shot and killed Fowler, for which he was convicted and sent to prison. What happened to Patrick Clark as a result of his drug debts is not an uncommon occurrence in the world of narcotics distribution, and what happened to Clark can and does happen to juveniles who are involved in drug transactions.

n321 For example, in Ada County, Idaho, the county code reads as follows: "It shall be unlawful for any person under the age of eighteen (18) years . . . to attempt to run away or to run away from his parents, guardian or other legal custodian, or to be or remain a person who has run away from his parents, guardian or other legal custodian."

ADA COUNTY, IDAHO, CODE § 5-5-1A (2005).

n322 See, e.g., *People v. R.G.*, 546 N.E.2d 533, 542 (Ill. 1989) ("When a minor detaches himself or herself from parental authority by running away from home, the minor jeopardizes his or her welfare. The minor must find money, food and shelter, not to mention adult guidance, schooling, and medical care, among other things. Even if the minor finds refuge with a relative or friend, the minor's welfare could still be in jeopardy because the minor may not be receiving proper care there.").

n323 For example, the California courts, in a handful of unpublished opinions, have addressed the dangers inherent in both parents exposing children to criminal activity and children involving themselves in criminal activity. See, e.g., *In re A.V.*, No. B176601, 2005 WL 668494, at *3 n.3 (Cal. Ct. App. 2005) ("The [juvenile] court explained that the parents' shoplifting is my concern in the case. What I should actually say is I think there is a history of the parents using the children to engage in criminal activity and it is a danger to the children . . . because you don't know what is going to happen when you engage in criminal activity."); *Cynthia R. v. Superior Court*, No. B175834, 2004 WL 2152399, at *3 n.3 (Cal. Ct. App. 2004) ("She was directly using a baby as the cover. I think it still indicates that she is willing to involve children in criminal behavior, which is inherently dangerous to the children both in terms of their own morals . . . but also because when people steal sometimes people that are being stolen from pull guns and shoot you."); *Cynthia M. v. Superior Court*, No. D035860, 2004 WL 1759264 (Cal. Ct. App. 2004):

Mother fails to acknowledge that, as with her drug problem, her criminal behavior detrimentally affects her children's well-being. Her criminal behavior exposes her children to the potential dangers involved with a criminal lifestyle (for example, allowing them to sit in a car driven by a person who is ingesting drugs), prevents her from being available to parent her children during periods of incarceration, and provides a poor role model of acceptable behavior. The children are forced to suffer the consequences of mother's drug addiction and criminal lifestyle.

Id. at *3.

n324 *M.S. v. Wermers*, 557 F.2d 170, 178 (8th Cir. 1977) ("The right to custody and control over a minor child accrues to parents in reciprocation for their duty to support, educate and protect that child.").

n325 *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

n326 *Schall v. Martin*, 467 U.S. 253, 290 (1984) (citing J. STONE ET AL., CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, INC., JUVENILE DETENTION PROBLEMS IN NEW YORK CITY 3-4 (1970)) (Marshall, J., Brennan, J., and Stevens, J., dissenting).

n327 467 U.S. at 281-309.

n328 *Id.* at 291.

n329 See IDAHO CODE § 20-509(1) (Michie 2005). Idaho is not unique in allowing juveniles who have committed certain crimes to be directly charged in adult court. In Mississippi, for example, any "act attempted or committed by a child, which if committed by an adult would be punishable under state or federal law by life imprisonment or death, will be in the original jurisdiction of the [adult] court." MISS. CODE ANN. § 43-21-151(1)(a) (2005). Furthermore, in Mississippi any "act attempted or committed by a child with the use of a deadly weapon, the carrying of which concealed is prohibited by [law], or a shotgun or a rifle, which would be a felony if committed by an adult, will be in the original jurisdiction of the [adult] court." § 43-21-151(1)(b). And finally, Mississippi's juvenile courts, by statute, do "not have jurisdiction over offenses committed by a child . . . on or after his seventeenth birthday where such offenses would be a felony if committed by an adult." § 43-21-151(2).

n330 Under Idaho law, a juvenile court must consider a number of factors when making a determination of whether a waiver to adult court is appropriate. The factors to be considered are the following:

(a) The seriousness of the offense and whether the protection of the community requires isolation of the juvenile beyond that afforded by juvenile facilities; (b) Whether the alleged offense was committed in an aggressive, violent,

premeditated, or willful manner; (c) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons; (d) The maturity of the juvenile as determined by considerations of his home, environment, emotional attitude, and pattern of living; (e) The juvenile's record and previous history of contacts with the juvenile corrections system; (f) The likelihood that the juvenile will develop competency and life skills to become a contributing member of the community by use of the facilities and resources available to the court.

IDAHO CODE § 20-508(8). The amount of weight to be given to each of these factors is discretionary with the court. § 20-508(8)(g).

Mississippi law also provides for a discretionary waiver in certain cases: If a child who has reached his thirteenth birthday is charged by petition to be a delinquent child, the youth court, either on motion of the . . . prosecutor or on the youth court's own motion, after a hearing . . . may, in its discretion, transfer jurisdiction of the alleged offense . . . or a lesser included offense to the criminal court which would have trial jurisdiction of such offense if committed by an adult.

MISS. CODE ANN. § 43-21-157(1). After a hearing, "the youth court may transfer jurisdiction . . . if the youth court finds by clear and convincing evidence that there are no reasonable prospects of rehabilitation within the juvenile justice system." § 43-21-157(4). In making this determination, the court is required to weigh certain factors similar to those considered by Idaho judges in making a waiver determination. See § 43-21-157(5).

n331 Bypassing the juvenile justice system can result in a significant increase in penalties. For example, under Idaho law, the crime of robbery "is punishable by imprisonment in the state prison not less than five (5) years, and the imprisonment may be extended to life." *IDAHO CODE § 18-6503*. In other words, robbery carries a mandatory minimum of five years imprisonment with the possibility of life in prison. Because robbery is an auto-waiver crime those penalties apply to any person convicted of the crime, including juvenile offenders. Under Idaho's Juvenile Corrections Act, felonies committed by juveniles are punishable by up to 180 days in detention, three years of probation (or probation until age twenty-one if the crime is one of a sexual nature), and, if certain criteria are met, commitment to the Idaho Department of Juvenile Corrections (IDJC) not to exceed age twenty-one. See § 20-520(d). Therefore, if robbery could be adjudicated in the Idaho juvenile justice system, the maximum penalty for a juvenile sixteen years of age who committed a robbery would be commitment to the IDJC for a period of five years. But because robbery is, per the statute, automatically filed in the adult system, the same five-year period of confinement is the minimum penalty that can be imposed on a sixteen-year-old juvenile who commits the crime of robbery, not the maximum. In short, then, the range of penalties that can be imposed in juvenile court and adult court varies significantly.

n332 Federal law requires a fact-finding with respect to several factors before a juvenile can be transferred to district court:

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter . . . except that, with respect to a juvenile fifteen years and older alleged to have committed an act . . . which if committed by an adult would be a felony that is a crime of violence or an offense described in . . . the Controlled Substances Act . . . [or] the Controlled Substances Import and Export Act . . . or section 922(x) of this title, or in section 924(b), (g), or (h) of this title, criminal prosecution on the basis of the alleged act may be begun by motion to transfer . . . in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. . . .

Evidence of the following factors shall be considered and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

18 U.S.C. § 5032 (2000). The statute gives further guidance into how one of these factors should be examined:

In considering the nature of the offense . . . the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving

the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.

Id.

n333 In Idaho, for example, each of these potential penalties or sanctions is available to a juvenile judge. Specifically, *Idaho Code, section 20-520* permits a juvenile judge, at sentencing, to impose a period of probation; detention; community service; a revocation or restriction on driving privileges; commitment to the state's juvenile corrections system; any examination or treatment deemed necessary by the court, including substance abuse, medical, and psychiatric examinations and treatment; restrictions on associations with parents and other individuals; restrictions on activities that the juvenile may wish to engage in; fines and fees associated with probation and the juvenile court process; and "any other reasonable order which is in the best interest of the juvenile or is required for the protection of the public." *IDAHO CODE § 20-520(1)(j)* (Michie 2005).

n334 *See supra* Part III.B.1.

n335 For example, under Idaho Court Administrative Rules, "if a juvenile is adjudicated guilty of an act which would be a criminal offense if committed by an adult, the name, offense, and disposition of the court shall be open to the public." *IDAHO CT. A. R. 32(d)(7)(E)* (2005).

n336 *See generally* MILLER ET AL., *supra* note 311.

n337 *Id.*

n338 *Id.*

n339 Aaronson, *supra* note 213, at 814 (citations omitted).

n340 *CAL. PENAL CODE § 640.5(d)(2)* (West 2005); *see also id.* § 490.5(b) (holding parents jointly responsible with a minor child for the payment of restitution arising out of a theft offense).

n341 *IDAHO CODE § 20-520(3)* (Michie 2005).

n342 *TEX. FAM. CODE ANN. § 41.001* (Vernon 2005).

n343 For more on these types of laws, see generally Christine T. Greenwood, *Holding Parents Criminally Responsible for the Delinquent Acts of Their Children: Reasoned Response or "Knee-Jerk Reaction"?*, 23 *J. CONTEMP. L.* 401 (1997).

n344 *KY. REV. STAT ANN. § 530.060(1)* (Banks Baldwin 2005).

n345 *MO. REV. STAT. § 568.050.1(3)* (West 2005). *See also OR. REV. STAT. § 163.577(1)(a)* (2005): "A person commits the offense of failing to supervise a child if the person is the parent, lawful guardian or other person lawfully charged with the care or custody of a child under 15 years of age and the child: (a) Commits an act that brings the child within the jurisdiction of the juvenile court . . . [or] (b) Violates a curfew law . . . [or] (c) Fails to attend school as required under [Oregon law]."

n346 *OKLA. STAT. tit. 21, § 858.1* (2005).

n347 *OKLA. STAT. tit. 21, § 858.2* (2005).

n348 *See generally* Howard Davidson, *Violence in America: How Can We Save Our Children?*, 7 *STAN. L. & POL'Y REV.* 23 (1996).

n349 *See supra* Part III.A.1.d.

n350 *See, e.g., Bishop v. State, 526 S.E.2d 917, 918-19 (Ga. Ct. App. 1999)* (describing how difficult it was for law enforcement to investigate Bishop when the victim refused to cooperate).

n351 Aaronson, *supra* note 213, at 833.

n352 *See generally id.*

n353 Labriola, *supra* note 53, at 461.

n354 *Williams v. Williams, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998)*.

n355 *See supra* Part III.A.

n356 *See supra* Part III.A.2.a.

n357 *See supra* Part II.C.1.

n358 *Pollock v. Pollock, 154 F.3d 601, 605 (6th Cir. 1998)* (citations omitted).

n359 This is not to say that an application of the doctrine of vicarious consent does not help to diminish the possibility of misuse in the purely civil context:

If courts require a finding of a good faith objectively reasonable basis for believing consent is necessary to protect a child, the concern that parties would intercept communications solely to gain an advantage in a divorce or custody proceeding diminishes. Additionally, if the court satisfied the objectively reasonable standard and admitted the recorded conversation in a proceeding, concern for the child's welfare overrides any other detrimental effect resulting from admitting the evidence.

Rahavy, *supra* note 21, at 97.

n360 *Commonwealth v. Barboza, 763 N.E.2d 547, 551 (Mass. App. Ct. 2002)*.

n361 *Compare id.* at 546, with *Pollock v. Pollock, 154 F.3d 601, 602-03 (6th Cir. 1998)*.

n362 *Barboza, 763 N.E.2d at 549*.

n363 *Id.*

n364 *Bishop v. State, 526 S.E.2d 917, 918 (Ga. Ct. App. 1999)*.

n365 *See supra* Part II.C.1.

n366 *See supra* Part II.C.3.

n367 *See United States v. Leahey, 434 F.2d 7, 11 (1st Cir. 1970)* ("No one has the right to commit a crime."); *see also People v. Tillman, 282 N.E.2d 231, 233 (Ill. App. Ct. 1972)* ("There is no right to commit crime."); *State v. Strasburg, 60 Wash. 106, 132, 110 P. 1020, 1028 (1910)* (Morris, J. dissenting) ("No man, whether sane or insane, has any constitutional right to commit crime."); *ex parte Roper, 134 S.W. 334, 337 (Tex. Crim. App. 1910)* ("No one has a right to commit crime."); *State v. Cutshall, 15 S.E. 261, 266 (Sup. Ct. N.C. 1892)* ("Criminals have no right to commit crime.").

n368 *See supra* Part I and Part II.B.2.b.

n369 In Idaho, for example, it is a felony for any person to "commit any lewd or lascivious act or acts upon or with the body . . . of a minor child under the age of sixteen (16) years . . . when such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party." *IDAHO CODE § 18-1508* (Michie 2005). In other words, it is illegal for any person, whether a child or an adult, to have sexual contact with a child under the age of sixteen.

n370 See *infra* note 373 and accompanying text.

n371 See *supra* Part II.C.4.

n372 *Bishop v. State*, 526 S.E.2d 917, 918 (Ga. Ct. App. 1999).

n373 *Id.* at 919.

n374 See *supra* Part II.B.2.a. and the cases cited therein.

n375 *Id.*

n376 If a court chooses not to recognize the vicarious consent doctrine, a parent's surreptitious recording of her child's conversations are not automatically excluded from evidence in a criminal prosecution. This issue was addressed by the *Barboza* court, which held that the vicarious consent doctrine was not applicable to Massachusetts' state wiretap statute, which requires two-party consent, writing that "exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights." *Commonwealth v. Barboza*, 763 N.E.2d 547, 552 (Mass App. Ct. 2002) (quoting *Commonwealth v. Santoro*, 548 N.E.2d 862, 862 (Mass. 1990)). As such, the court continued, "we see no reason why the [exclusionary] rule should protect [Barboza] from the consequences of the unlawful interception by a private citizen, a father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation by [Barboza]." *Id.* at 553; see also *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("This Court has . . . consistently construed [the Fourth Amendment prohibition on unreasonable searches and seizures and the subsequent suppression of illegally obtained evidence] as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.") (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

n377 See *supra* Part II.B.2.a.

n378 See *supra* Part II.B.2.

n379 See *supra* Part II.C. and Part III.A.

n380 See *supra* Part II.B.3.

n381 See *supra* Part III.A.

n382 See *supra* Part III.A.1.b.

n383 See *supra* Part III.A.1.c.

n384 See *supra* Part III.A.2.

n385 See *supra* Part III.A.1.d.

n386 See *supra* Part II.A.2.

n387 See *supra* Part III.C.

HB

426

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB426CS(HES)-DHSS-DSDS-04-12-06
 () Publish Date: _____
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction): _____

Title: RELATING TO MEDICAL ASSISTANCE
ELIGIBILITY AND COVERAGE FOR PERSONS
UNDER 21
 RDU Senior and Disabilities Svcs
 Component: Senior/Disabilities Medicaid Svc

Sponsor: COGHILL
 Requester: HOUSE (FIN)

Component No. 2662

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	(83.1)	(415.0)	(500.0)	(500.0)	(500.0)	(500.0)
Miscellaneous						
TOTAL OPERATING	(83.1)	(415.0)	(500.0)	(500.0)	(500.0)	(500.0)
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	(47.8)	(220.9)	(252.2)	(250.0)	(250.0)	(250.0)
1003 GF Match	(35.3)	(194.1)	(247.8)	(250.0)	(250.0)	(250.0)
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	(83.1)	(415.0)	(500.0)	(500.0)	(500.0)	(500.0)

Estimate of any current year (FY2006) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill contains provisions that bring Alaska Statute into line with the deficit Reduction Act of 2005 including many mandatory rule changes related to determining financial eligibility for long-term-care related Medicaid.

Sec. 6 makes it more difficult to use an annuity to shelter assets when trying to qualify for Medicaid.

Sec. 7, subsection (m) allows the State to impose stricter penalties for transferring assets at below-market value.

Sec. 7, subsection (n) allows that a home valued over \$500,000 can be a resource in determining eligibility. Sec. 8 clarifies when a person on a home and community based waiver may be terminated from the waiver.

These provisions will reduce Medicaid costs by reducing the number of persons eligible for Medicaid, most of whom are eligible for the Older Alaskans waiver program.

Prepared by: Rod Moline, Director
 Division: Senior and Disabilities Services
 Approved by: Karleen Jackson, Commissioner
 Agency: Department of Health and Social Services

Phone 465-3819
 Date/Time 04/12/2006
 Date 04/12/2006

FISCAL NOTE

FN #

**STATE OF ALASKA
2006 LEGISLATIVE SESSION**

ANALYSIS CONTINUATION

MEDICAID-QUALIFYING ANNUITIES

Currently, various kinds of trusts and annuities can be used to shelter assets when trying to qualify for Medicaid. The federal law cited in the bill places more restrictions on annuities used for Medicaid purposes than exist now. Section 6 limits the annuities that do not affect eligibility to only those that meet the requirements of the federal law. This bill also gives the State the right to recover the balance of an annuity should a recipient die before the annuity has fully paid out.

Annual savings: \$0. This provision will not have a fiscal impact as it is not included in the budget now.

TRANSFER OF ASSETS AT BELOW-MARKET VALUE

Generally speaking, if a person applying for or receiving Medicaid benefits has transferred an asset at below-market value, that person may be subject to a period of ineligibility. Currently, the State can impose a penalty period beginning with the date of transfer. Section 7, subsection (m) allows the penalty period to begin with the date of application for Medicaid. This will eliminate almost all instances when an individual escapes serving a penalty period because the penalty period has already run its course before the Medicaid application is submitted. This would mostly affect applicant's seeking long-term care coverage including long-term care services under the Older Alaskans waiver program.

Annual savings to Medicaid = \$250.0 thousand

Assumptions:

- ~The number of applicants penalized in past 6 months = 6, which is 12 annually
- ~Average number of months penalized = 5
- ~Estimated total number of months eligibility is delayed annually due to penalties = 60
- ~Applicants would have been eligible for the OA waiver program
- ~Average annual cost per OA waiver recipient = \$50,000, which is \$4,167 per month
- ~The savings will ramp up over a 3-year period

HOMES AS A RESOURCE

Normally, a person's home is an exempt resource for Medicaid eligibility purposes. Section 7, subsection (n) puts a limit on the value of a home that would still qualify for this exemption. In effect, an individual will be ineligible for Medicaid if their home has an equity value for more than \$500,000, unless they sell it, borrowed against it, or take out a reverse mortgage to reduce the equity below \$500,000. This would mostly affect applicants seeking long-term care coverage including long-term care services under the OA Waiver program.

Annual savings to Medicaid = \$250.0 thousand

Assumptions:

- ~Currently number of long-term care recipients known to have a home valued over \$500,000=0
- ~Don't have any data on number of applicants with homes valued over \$500,000
- ~Estimated number of applicants per year with homes valued over \$500,000 who would now be ineligible = 5
- ~Applicants would have been eligible for the OA waiver program
- ~Average annual cost per OA waiver recipient = \$50,000

**FISCAL NOTE
FN #**

**STATE OF ALASKA
2006 LEGISLATIVE SESSION**

ANALYSIS CONTINUATION

**TERMINATING WAIVER
SERVICES**

This section is in response to a class action lawsuit filed against the Division regarding how individuals from the Older Alaskans and Adults with Physical Disabilities waivers are assessed and terminated from the program. Prior to the litigation the Division only assessed individuals based on the current circumstances and level of client function. Section 8 says that a person who is eligible for a home and community based waiver may be terminated from the waiver only if the recipient scores below the eligibility standard on the assessment and an independent qualified health care professional certifies that the recipient's condition has materially improved from the previous assessment.

Annual savings: \$0. This provision will not have a fiscal impact as it is not included in the budget now. It will be a cost avoidance.

Other Assumptions:

~The bill takes effect July 1, 2006; however, implementation would be delayed until the 4th Quarter while waiting for approval of a Medicaid State Plan Amendment. For this reason, FY2007 is 25% of a full year.

~The federal matching rate is the estimated SFY quarterly average FMAP for the applicable year: FY07=57.58%, FY08=53.22%, FY09=50.44%; FY10 to FY12=50.00%.

~The other sections of this bill do not need a fiscal note in this component.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB426CS(HES)-DHSS-DPA-04-12-06
 () Publish Date: _____
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction): _____

Title RELATING TO MEDICAL ASSISTANCE
ELIGIBILITY AND COVERAGE FOR PERSONS RDU Public Assistance
UNDER 21
 Component Public Assistance Field Svcs

Sponsor COGHILL
 Requester HOUSE (FIN) Component No. 236

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	40.6	162.4	162.4	162.4	162.4	162.4
Travel						
Contractual	4.3	17.0	17.0	17.0	17.0	17.0
Supplies	6.8	5.0	5.0	5.0	5.0	5.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	51.7	184.4	184.4	184.4	184.4	184.4

CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	25.9	92.2	92.2	92.2	92.2	92.2
1003 GF Match	25.8	92.2	92.2	92.2	92.2	92.2
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	51.7	184.4	184.4	184.4	184.4	184.4

Estimate of any current year (FY2006) cost: _____
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time	2	2	2	2	2	2
Part-time	1	1	1	1	1	1
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill contains provisions that change medical assistance eligibility in AS 47.07.020 , which will increase the workload of Eligibility Technicians.

Section 7, subsection (j-k) limits who may apply for medical assistance for a person under 18 years of age.

Section. 7, subsection (l) requires that persons applying for medical assistance must enroll for Medicare if eligible.

These provisions increase workload by requiring Eligibility Technicians to spend more time with applicants searching for legal guardians or parents of minors, and assisting eligible persons to enroll in Medicare.

Prepared by: Kitty Farnham, Director Phone 465-5835
 Division Public Assistance Date/Time 04/12/2006
 Approved by: Karleen Jackson, Commissioner Date 04/12/2006
 Agency Department of Health and Social Services

FISCAL NOTE
FN #

STATE OF ALASKA
2006 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

MINORS APPLYING FOR MEDICAID

Currently, any adult may apply on behalf of a minor and minors may apply for themselves. Section 7, subsections (j) and (k) provide that only an adult who has a legal or vested interest may apply for Medicaid on behalf of a child under age 18. The department must make reasonable efforts to contact the parent or legal guardian before granting a waiver of consent. If a waiver of consent is granted, the department must document the reason for the waiver in the child's medical assistance record. Under this provision, Division staff will have to spend more time with applicants to contact and obtain consent of the parent or legal guardian or document a waiver.

Total Annual Costs = \$110.6 thousand for an additional 1.5 positions plus an extra \$4.4 thousand in FY07

Assumptions:

- ~Approximately 3800 minor children apply for Medicaid each year.
- ~An additional 45 minutes per application, on average, will be needed for eligibility staff to contact a minor applicant's parent(s) or legal guardian to obtain consent (or make a reasonable attempt to obtain consent) for the application, or to gather enough information needed to waive consent.
- ~3800 applications/per year x 45 minutes = 171,000 minutes per year or 2,850 hours
- ~Eligibility staff work 162 hours/month x 12 = 1944 hours/year
- ~2850 hours per year/1944 hours per technician = 1.5 workers
- ~Average personnel costs for an Eligibility Technician II is \$64,944/year
- ~One-time cost for computers and software in FY2007 = \$2,200/position
- ~Annual costs for office space, phones & supplies = \$8,800/position
- ~1 Eligibility Technician II full time = \$64,944 + 1 Eligibility Technician II part-time = \$32,472 = \$97,416/year
- ~Supplies & contractual costs for 1.5 positions = \$15,400 in FY07; \$13,200/year FY08 and beyond

ENROLLMENT IN MEDICARE

Currently, enrollment in Medicare is optional for medical assistance applicants. Section 7, subsection (l) requires that a person who is eligible must first enroll in the Medicare program before they are eligible to receive benefits through Medicaid. Under this provision Division staff will have to spend more time with applicants to evaluate Medicare eligibility and monitor their continued enrollment in Medicare.

Total Annual Costs = \$73.7 thousand for an additional 1 position plus an extra \$2.2 thousand in FY07

Assumptions:

- ~On average, 1800 individuals per month appear eligible for, and not enrolled in Medicare
- ~Eligibility for Medicare will be assessed at initial application and during the 6-month eligibility review
- ~Eligibility staff will need an additional 60 minutes per month to evaluate an individual's eligibility for Medicare, and to require and monitor enrollment as a condition of eligibility for Medicaid
- ~1800 individuals per month x 60 mins/case = 1800 hours/12 months = 150 hours/month

**FISCAL NOTE
FN #**

**STATE OF ALASKA
2006 LEGISLATIVE SESSION**

ANALYSIS CONTINUATION

- ~Average personnel costs for an Eligibility Tech II is \$64,944/year
- ~One-time cost for computers and software in FY2007 = \$2,200/position
- ~Annual costs for office space, phones & supplies = \$8,800/position
- ~1 Eligibility Technician II full time = \$64,944/year
- ~Supplies & contractual costs for 1 position = \$15,400 in FY07; \$13,200/year FY08 and beyond

Other Assumptions:

~The bill takes effect July 1, 2006; however, implementation would be delayed until the 4th Quarter while waiting for approval of a Medicaid State Plan Amendment. For this reason, FY07 is 25% of a full year.

~The federal matching rate is 50%.

~The other sections of this bill will not substantially increase the workload and do not need a fiscal note in this component.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: _____
 () Publish Date: HB426CS(HES)-DHSS-DBH-04-12-06
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction): _____

Title RELATING TO MEDICAL ASSISTANCE
ELIGIBILITY AND COVERAGE FOR PERSONS RDU Behavioral Health
UNDER 21
 Component Behavioral Health Administration

Sponsor COGHILL
 Requester HOUSE (FIN) Component No. 2665

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Section 11 of this bill requires the Department to prepare a report of recommendations for changes for residential psychiatric and substance abuse treatment programs that address reduction of medical assistance expenditures, enhancement of parental responsibility, and maximization of third-party resources.

This provision will have a zero fiscal cost under the assumption that the new Bring the Kids Home Project Manager position in the FY07 proposed budget is funded. The report would be written by the new position.

This is the only section of the bill that affects the Division of Behavioral Health. The eligibility groups affected (recipients of long-term care services and minors applying for themselves) by this bill generally do not use mental health services.

Prepared by: Christy Wilier, Director Phone 269-3410
 Division Behavioral Health Services Date/Time 04/12/2006
 Approved by: Karleen Jackson, Commissioner Date 04/12/2006
 Agency Department of Health and Social Services

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB426CS(HES)-DHSS-DHCS#1-04-12-06
 () Publish Date: _____
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction): _____

Title RELATING TO MEDICAL ASSISTANCE
ELIGIBILITY AND COVERAGE FOR PERSONS RDU Health Care Services
UNDER 21
 Component Medicaid Services

Sponsor COGHILL

Requester HOUSE (FIN) Component No. 2077

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	(2,734.9)	(10,884.6)	(10,884.6)	(10,884.6)	(10,884.6)	(10,884.6)
Miscellaneous						
TOTAL OPERATING	(2,734.9)	(10,884.6)	(10,884.6)	(10,884.6)	(10,884.6)	(10,884.6)
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	(1,574.8)	(5,792.8)	(5,490.2)	(5,442.3)	(5,442.3)	(5,442.3)
1003 GF Match	(1,160.1)	(5,091.8)	(5,394.4)	(5,442.3)	(5,442.3)	(5,442.3)
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	(2,734.9)	(10,884.6)	(10,884.6)	(10,884.6)	(10,884.6)	(10,884.6)

Estimate of any current year (FY2006) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill contains provisions that would help to ensure repayment to the Medicaid program for cases involving Medicaid recipients receiving settlements or judgments from third party payers and would change medical assistance eligibility for minors and persons eligible for Medicare. These provisions will reduce Medicaid expenditures by increasing recoveries and reducing the number of persons eligible for Medicaid.

Sections 1-5 and 9-10 contain provisions that will result in more subrogation cases and increased recoveries for the Medicaid program.

Section 7, subsection (j-k) limits who may apply for medical assistance for a person under 18 years of age;

Section. 7, subsection (l) requires that persons applying for medical assistance must enroll for Medicare if eligible.

Prepared by: Dwayne Peeples, Director
 Division: Health Care Services
 Approved by: Karleen Jackson, Commissioner
 Agency: Department of Health and Social Services

Phone 465-5830
 Date/Time 04/12/2006
 Date 04/12/2006

FISCAL NOTE
FN #

STATE OF ALASKA
2006 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

SUBROGATION AND RECOVERIES

Sections 1-5 and 9-10 of this bill requires insurers to coordinate benefits with other insurers (including Medicaid); clarifies that the department may take the role of the recipient when the department has paid medical claims on ' half of the recipient and the recipient may be in a position to recover funds that are partially attributable to the injury and medical care received; clarifies that the Department may take the place of the recipient and pursue recovery if the recipient chooses not to pursue a liable 3rd party; and requires that the state be notified of cases and settlements from third party payers. Section 5 provides the state the ability to attach Permanent Fund dividends of recipients in cases where the state is not notified of a Medicaid recipient's recovery and has no other recourse to recover amounts paid. Currently the Department is authorized to garnish a recipient's PFD to recover General Relief, Adult Public Assistance, food stamps and Alaska Temporary Assistance Program overpayments, but not Medicaid. The department needs the same authority to recoup overpayments from Medicaid recipients who have received Medicaid coverage but shouldn't have, including those who choose to receive continued Medicaid benefits pending a fair hearing, but who ultimately lose the fair hearing. One of the most efficient and least intrusive recovery methods has been to garnish the recipient's PFD.

Annual savings to Medicaid: \$1,010.2

Assumptions:

- ~Additional staff resources from Department of Law applied to subrogation cases
- ~Annual subrogation recoveries of \$1M are doubled
- ~Increased amount of subrogation recoveries = \$1,000.0
- ~Number of cases with a successful garnishment of PFD annually = 12
- ~Average amount collected by garnishing PFD = \$850
- ~Annual amount collected by garnishing PFD = \$10.2

MINORS APPLYING FOR MEDICAID

Currently, any adult may apply on behalf of a minor and minors may apply for themselves. Section 7, subsections (j) and (k) provide that only an adult who has a legal or vested interest may apply for Medicaid on behalf of a child under age 18. The department must make reasonable efforts to contact the parent or legal guardian before granting a waiver of consent. If a waiver of consent is granted, the department must document the reason for the waiver in the child's medical assistance record. Under this provision, some applicants will not be eligible because either the adult refuses to enroll the minor or the additional income makes the minor ineligible.

Annual savings to Medicaid: \$334.4

Assumptions:

- ~Number of minor children who apply themselves for Medicaid each year = 3800
- ~1% would be ineligible because the parent/guardian refuses to enroll = 38 minors
- ~1% would be ineligible because the parent/guardian's income exceeds the income limits = 38 minors
- ~Average annual cost per minor = \$4,400

FISCAL NOTE
FN #

STATE OF ALASKA
2006 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

ENROLLMENT IN MEDICARE

Currently, enrollment in Medicare is optional for medical assistance applicants. Section 7, subsection (1) requires that a person who is eligible must first enroll in the Medicare program before they are eligible to receive benefits through Medicaid. In June, 2005, the Centers for Medicare and Medicaid Services (CMS) informally revised its policy and now allows states to require Medicare enrollment as a condition of eligibility for those who qualify for it. Most, but not all, seniors have enrolled in Medicare and adding this requirement would help the department maximize the 100% federal dollars available from Medicare for all Medicare eligible recipients. Medicare Part A would pay for some of the most expensive individual cases, including those with end-stage renal disease. Medicaid would continue to pay the premiums and co-payments for the lowest income Medicare recipients.

Annual savings to Medicaid: \$9,540.0

Assumptions:

- ~On average, 1800 individuals per year appear eligible for, and not enrolled in Medicare
- ~Total Average annual Medicaid benefits costs avoided per Medicare enrollee = \$6,500.00
- ~Annual amount of Medicaid benefit costs saved by requiring Medicare enrollment = \$11,700.0
(\$6,500 x 1,800)
- ~Savings are offset somewhat by the additional cost of premiums for Medicare recipients
- ~Weighted average monthly premium amount for Medicare = \$100 or \$1,200.00 p/year
- ~Increased annual costs for premium buy-in of persons required to enroll in Medicare = \$2,160.0
(\$1,200.00 x 1800)

Other Assumptions:

~The bill takes effect July 1, 2006; however, implementation would be delayed until the 4th Quarter while waiting for approval of a Medicaid State Plan Amendment. For this reason FY2007 is 25% of a full year's costs.

~The federal matching rate is the estimated SFY quarterly average FMAP for the applicable year:
FY07=57.58%, FY08=53.22%, FY09=50.44%; FY10 to FY12=50.00%.

~The other sections of this bill do not need a fiscal note in this component.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB426CS(HES)=DHSS-DHCS#2-04-12-06

() Publish Date: _____
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction): _____
Title: RELATING TO MEDICAL ASSISTANCE
ELIGIBILITY AND COVERAGE FOR PERSONS
UNDER 21

RDU: Health Care Services
Component: Medical Assistance Admin.

Sponsor: COGHILL
Requester: HOUSE (FIN)

Component No.: 242

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	190.3	190.3	190.3	190.3	190.3	190.3
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	190.3	190.3	190.3	190.3	190.3	190.3

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (0)						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	95.2	95.2	95.2	95.2	95.2	95.2
1003 GF Match	95.1	95.1	95.1	95.1	95.1	95.1
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	190.3	190.3	190.3	190.3	190.3	190.3

Estimate of any current year (FY2006) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill contains provisions that would help to ensure repayment to the Medicaid program for cases involving Medicaid recipients receiving settlements or judgments from third party payers.

The requirements contained in this bill will result in more subrogation cases and increased recoveries for the Medicaid program. This bill will increase the caseload for Department of Law employees working in the subrogation area.

Prepared by: Dwayne Peebles, Director
Division: Health Care Services
Approved by: Karleen Jackson, Commissioner
Agency: Department of Health and Social Services

Phone 465-5830
Date/Time 04/12/2006
Date 04/12/2006

**FISCAL NOTE
FN #**

**STATE OF ALASKA
2006 LEGISLATIVE SESSION**

ANALYSIS CONTINUATION

SUBROGATION AND RECOVERIES

Sections 1-5 and 9-10 of this bill requires insurers to coordinate benefits with other insurers (including Medicaid); clarifies that the department may take the role of the recipient when the department has paid medical claims on behalf of the recipient and the recipient may be in a position to recover funds that are partially attributable to the injury and medical care received; clarifies that the Department may take the place of the recipient and pursue recovery if the recipient chooses not to pursue a liable 3rd party ; requires that the state be notified of cases and settlements from third party payers; and provides the state the ability to attach Permanent Fund dividends of recipients in cases where the state is not notified of a Medicaid recipient's recovery and has no other recourse to recover amounts paid.

These provisions will increase the caseload for Department of Law employees working in the subrogation area. Health Care Services currently has an RSA with the Department of Law for subrogation work. Health Care Services would expand the RSA by \$190.3 for additional Department of Law staff of 1 FTE attorney and 1 FTE law office assistant. With the additional staff, the Department of Law estimates subrogation recoveries could easily double.

Assumptions:

~Subrogation caseload doubles from \$1M per year to \$2M

~The bill takes effect July 1, 2006. The Department of Law intends to staff the new positions in July.

~The federal matching rate is 50%.

~The other sections of this bill will not substantially increase the workload and do not need a fiscal note in this component.

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE CISSNA

TO: CSHB 426(), Draft Version "L"

1 Page 1, line 4, following "eligibility";

2 Insert "relating to home and community-based services;"

3

4 Page 7, following line 24:

5 Insert a new bill section to read:

6 "* Sec. 8. AS 47.07 is amended by adding a new section to read:

7 **Sec. 47.07.045. Home and community-based services.** (a) A person who is
8 eligible for medical assistance coverage may be paid for home and community-based
9 services under a waiver approved by the federal government if the person is approved
10 initially and at least once a year thereafter for the services by the department based on
11 an assessment described in regulation that finds that the person meets a level of care
12 necessary for admission to an intermediate care facility for the mentally retarded or to
13 a nursing facility.

14 (b) The department may not terminate payment for approved home and
15 community-based services unless, at any time,

16 (1) the recipient of the services scores below the eligibility standard on
17 the assessment employed under (a) of this section; and

18 (2) the score is reviewed by an independent qualified health care
19 professional who certifies that the recipient's condition has materially improved from
20 the previous assessment.

21 (c) In this section,

22 (1) "independent qualified health care professional" means a

23 (A) registered nurse licensed under AS 08.68 who is qualified
24 to assess children with complex medical conditions, older Alaskans, and adults

1 with physical disabilities for medical assistance waivers; and

2 (B) a person who is qualified under 42 CFR 483.430 as a
3 mental retardation professional for the mental retardation and developmental
4 disability waiver;

5 (2) "materially improved" means that the recipient has previously
6 qualified for a waiver for

7 (A) children with complex medical conditions, no longer needs
8 technical assistance for a life-threatening condition, and is expected to be
9 placed in a skilled nursing facility for less than 30 days each year;

10 (B) mental retardation or developmental disability, no longer
11 needs the level of care provided by an intermediate care facility for the
12 mentally retarded either because the qualifying diagnosis has changed or the
13 recipient is able to demonstrate the ability to function in a home setting without
14 the need for waiver services; or

15 (C) older Alaskans or adults with physical disabilities, no
16 longer has a functional limitation or cognitive impairment that would result in
17 the need for nursing home placement, and is able to demonstrate the ability to
18 function in a home setting without the need for waiver services."

19

20 Renumber the following bill sections accordingly.

21

22 Page 8, line 21:

23 Delete "sec. 11"

24 Insert "sec. 12"



Representative John Coghill
State Capitol, Room 204
Juneau, AK 99801-1182

HB 426 Medical Assistance Eligibility
Sponsor Statement

In times when federal dollars are diminishing, the legislature will have to review policies for providing for the public health. To better provide medical assistance to the truly needy, some eligibility requirements need to be changed.

As the department has put it, we are trying to address the "low hanging apples" that drain millions of dollars a year from a program that is growing in astounding increments.

HB 426 puts best practices to use by increasing third-party reimbursement, reducing Medicaid abuse and fraud, setting home equity limits, and implementing new federal requirements on the State for asset transfers and treating annuities like a Miller's Trust.

This bill also requires a person applying for medical assistance for a minor to be that person's parent or legal guardian, unless the parent or legal guardian is a minor. If a child is in state custody, an employee of the department can apply for coverage. The HSS committee substitute provides a waiver for unemancipated children who express fear of a parent or guardian, or whose parent or legal guardian cannot be located after a reasonable effort to do so by the department.

Currently, the unmarried father's income and resources are not considered in determining the eligibility of a pregnant woman for Medicaid. While the new CS eliminates income guidelines for unmarried fathers, we are exploring other ways to make the unmarried father financially responsible for the medical costs of a child.

HB 426 legislation repeals a statute that allowed the department to waive subrogation rights to third party reimbursements in cases of undue hardship. The department will now be required to pursue all third party reimbursements.

Lastly, this bill directs the department to report back to the legislature no later than the first day of the Twenty-Fifth Legislature on ways to reduce medical assistance expenditures for services received in residential psychiatric treatment centers by enhancing parental financial responsibilities and maximizing third-party resources available. Under current law a child could be placed in residential treatment and qualify for medical assistance after being out of the family home for thirty days, even though one or both parents have medical insurance.

ALASKA STATE HOUSE OF REPRESENTATIVES



Contact:

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Session

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

REPRESENTATIVE JOHN COGHILL

HB 426 Medical Assistance Eligibility

Sectional for Version I

Section 1: This section requires insurers to coordinate benefits, provide information on their covered population, and provide for a three-year timely filing limit for the Medicaid program.

Medicaid often bills other insurance for claims paid by the program when other insurance is found to exist for the recipient. A common problem has been short timely filing requirements by other insurance, which has resulted in a failure to recover the claim.

Section 2: This section clarifies that if the department has paid medical claims on behalf of the recipient and the recipient may be in position to recover funds which are partially attributable to the injury and medical care received, the Department can act on behalf of the recipient to recover funds even when the recipients does not pursue a liable third-party.

Section 3: A common problem has been that settlements will occur without the department's knowledge and recovery against recipients or their attorney after the fact is near impossible. This section requires not only the recipient, but also the recipient's attorney, to notify the department of any case or action, which may involve the recovery of payments made, by the department on behalf of the recipient.

It also provides for remedies when the law is not followed. A lawyer will be held civilly liable for not notifying the department of recovery actions.

Another provision of this section requires the Attorney General to sign off on any settlement that involves a recipient of medical assistance requiring past medical expenses paid by the department in a case that results in a settlement to be reimbursed.

Finally, AS 47.05.07 is a provision, which disqualifies any new provision of the law related to subrogation, assignment, or lien conflicts, that is contrary to federal law.

Section 4. This section creates a priority for liens that places the State's claims from Medicaid reimbursements over all other liens except tax liens and attorneys fees and costs. This gives a preference to the Medicaid claims over health care providers who would otherwise collect from Medicaid and leave it to the State to get reimbursement.

Section 5. Benefit overpayments occur under several circumstances. One situation would be someone is found guilty of program abuse or fraud. The department would seek repayment. Another would be a person's coverage is discontinued and that person requests a fair hearing. Benefits continue until the fair hearing occurs. If the fair hearing finds in favor of the State, the department can seek repayment of those benefits provided during the period of time between notice of discontinuance and the fair hearing.

This section adds medical assistance to the list of programs for which the department may garnish a recipient's PFD in order to secure reimbursement for an overpayment. The state paid portion of the overpayment goes to the Dept. of Revenue, the federal portion to the federal government.

Section 6. The section brings Alaska Statute in line with the Deficit Reduction Act of 2005 in regards to transfer of assets and annuities. It allows person to transfer assets into a Miller Trust and treats annuities like a Miller Trust. This allows them to qualify for medical assistance without having to sell resources or gives them the option of selling large resources and invest the proceeds in an annuity. The income from the annuity is counted as income in determining eligibility, but the annuity is not counted as a resource. When assets are transferred or an annuity is established, the applicant agrees to grant the State a claim to the assets remaining at the death of the individual to reimburse the total medical assistance paid on behalf of the individual.

Section 7. Subsection (j) limits who may apply for Medicaid coverage for a person under 18 years of age. Only a parent or legal guardian, an adult caretaker relative who lives with the child, or an employee of the department who is applying for a child in state custody can apply for Medicaid coverage for the child.

(k) Provides that an unemancipated child may apply for Medicaid on the child's own behalf if the parent or legal guardian consents. The department may waive consent if the child expresses reasonable fear of the parent or guardian or if reasonable effort has been made to locate a parent or legal guardian but is unsuccessful in locating the parent or legal guardian.

(l) Requires Medicare enrollment for senior citizens and certain individuals with disabilities before they can qualify for benefits and services under the Medicaid program. The department believes this change will maximize the 100% federal dollars available from Medicare.

(m) When a person transfers an asset for less than fair market value, the State can impose a penalty period beginning only with the date of the less than fair market value transfer. This provision will allow the penalty period to start with the date of application for Medicaid.

(n) This covers another provision of the Deficit Reduction Act of 2005. Generally, a home is an exempt resource. The provision puts a limit on the value of a home that would still qualify for this exemption of \$500,000.

Section 8. Repeals a subsection of AS 47.05.070 that allows the department to waive subrogation rights to all or part of the amount of medical assistance paid on behalf of a recipient of medical assistance in cases of undue hardship. The State would be mandated to pursue third party reimbursement.

Section 9. Sections 2 – 4 of HB 426 would apply to a cause of action related to subrogation, assignment, or lien by DHSS on or after the effective date.

Section 10. This section addresses concerns Representative Coghill has about the State paying for residential psychiatric treatment and substance abuse treatment for minors whose parents have medical insurance coverage. In discussing the issue with the department it became apparent the problem is not easily solved.

This section directs the department to review the authorization process with private insurance carriers and how they differ from the assessment process of the department. They are instructed to report back to the legislature no later than the first day of the next regular legislative session on how to maximize third-party coverage, enhance and clarify parental financial responsibility, and reduce medical assistance expenditures for residential psychiatric treatment and substance abuse treatment.

Section 11. Directs the department to, on enactment of HB 426, to apply for federal approval of a revised state plan reflecting the changes made in the bill.

Section 12. The bill would have the effective date of July 1, 2006 or the date of federal approval of revised plan, which is later.

24-LS1602L
Mischel
3/24/06

CS FOR HOUSE BILL NO. 426()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVE COGHILL

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to cooperation of insurers with the Department of Health and Social
 2 Services; relating to subrogation, assignment, and lien rights and notices for medical
 3 assistance claims; relating to recovery of medical assistance overpayments; relating to
 4 asset transfers by medical assistance applicants; relating to medical assistance eligibility;
 5 relating to medical assistance coverage for persons under 21 years of age; requiring a
 6 report by the Department of Health and Social Services; and providing for an effective
 7 date."

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

9 * Section 1. AS 21.09 is amended by adding a new section to read:

10 **Sec. 21.09.240. Cooperation with the Department of Health and Social**
 11 **Services.** An insurer, including a pharmacy benefits manager, shall coordinate benefits
 12 with medical assistance programs under AS 47.07, and shall cooperate with the
 13 Department of Health and Social Services by providing

1 (1) requested information on an insured who is receiving public
2 assistance and on claims made by the department as long as the department agrees to
3 keep the information confidential;

4 (2) prompt verification of an assignment to and right of recovery for
5 the department; and

6 (3) a claim period of at least 36 months from the date of service for
7 eligible claims made by the department.

8 * **Sec. 2.** AS 47.05.070(b) is amended to read:

9 (b) If the department provides or pays for medical assistance for injury or
10 illness under this title, the department is subrogated to the rights of the recipient of that
11 medical assistance for any claim arising from the injury or illness and to the proceeds
12 of an insurance policy covering the injury or illness to the extent of the value of the
13 medical assistance provided. [A RECIPIENT OF MEDICAL ASSISTANCE OR THE
14 RECIPIENT'S ATTORNEY MUST NOTIFY THE DEPARTMENT IN WRITING
15 OF ANY ACTION OR CLAIM AGAINST A THIRD-PARTY PAYOR IF
16 MEDICAL ASSISTANCE WAS PROVIDED BY THE DEPARTMENT TO TREAT
17 AN INJURY OR ILLNESS FOR WHICH THE THIRD PARTY MAY BE LIABLE.]
18 Notwithstanding the assertion of any action or claim by the recipient of medical
19 assistance, the department may bring an action in the superior court against an alleged
20 third-party payor to recover an amount subrogated to the department for medical
21 assistance provided on behalf of a recipient.

22 * **Sec. 3.** AS 47.05 is amended by adding new sections to read:

23 **Sec. 47.05.071. Duty of a medical assistance recipient.** (a) A medical
24 assistance recipient shall cooperate with and assist the department in identifying and
25 providing information concerning third parties who may be liable to pay for care and
26 services received by the recipient under the medical assistance program.

27 (b) A medical assistance recipient may not compromise or resolve an action or
28 claim seeking payment for or related to an injury or illness for which care or services
29 were provided or received under the medical assistance program against an insurer,
30 entity, or other person without first providing notice to the attorney general's office of
31 the facts and circumstances giving rise to the action or claim and the asserted basis for

1 supporting the action or claim.

2 (c) A medical assistance recipient may not receive payment from any source
3 on account of or related to care or services for which medical assistance was received
4 unless the recipient has received written consent of the attorney general's office and
5 has paid the department reimbursement of the amount of medical assistance provided
6 or paid.

7 (d) As a condition of medical assistance eligibility, a person who applies for
8 medical assistance shall, at the time of application,

9 (1) assign to the department the applicant's rights of payment for care
10 and services from any third party;

11 (2) cooperate with and assist the department in identifying and
12 providing information concerning third parties who may be liable to pay for care and
13 services received by the recipient under the medical assistance program;

14 (3) assign to the department the applicant's right to the applicant's
15 permanent fund dividend and agree to sign a new assignment each year; the
16 department shall use the assignment obtained under this paragraph to obtain
17 reimbursement or enforce repayment when a recipient does not pay to the state
18 reimbursement received from a third party for care or services provided or paid by the
19 medical assistance program or fails to satisfy a lien perfected under AS 47.05.075; and

20 (4) agree to make application for all other available third-party
21 resources that may be used to provide or pay for the cost of care or services received
22 by the medical assistance recipient or that may be used to finance reimbursement to
23 the state for the cost of care or services received by the medical assistance recipient.

24 **Sec. 47.05.072. Duty of attorney for medical assistance recipient.** (a) Before
25 pursuing an action or claim on behalf of a medical assistance recipient for care or
26 services for an injury or illness for which medical assistance was received, an attorney
27 representing the medical assistance recipient shall notify the attorney general's office.

28 (b) The notice to the attorney general's office required under (a) of this section
29 includes submission of the following:

30 (1) identification of the medical assistance recipient's name, last
31 known address, and telephone number, and the date of the injury or illness giving rise

1 to the action or claim;

2 (2) copies of the pleadings and other papers related to the action or
3 claim;

4 (3) the identification of each potentially liable third party, including
5 that party's name, last known address, and telephone number;

6 (4) the identification of any insurance policy potentially responsive to
7 the action or claim; and

8 (5) a description of the facts and circumstances supporting the action
9 or claim.

10 (c) An attorney who represents a medical assistance recipient shall give the
11 attorney general's office 30 days' notice before any judgment, award, or settlement
12 may be satisfied in an action or claim by the medical assistance recipient to recover
13 damages for an injury or illness that has resulted in the department's providing or
14 paying for medical assistance.

15 (d) An attorney representing a medical assistance recipient who has received
16 care or services for the injury or illness provided or paid for by the medical assistance
17 program shall maintain all proceeds paid in connection with the action or claim in a
18 trust account or deposit the proceeds into the registry of the court until any lien
19 perfected by the department under AS 47.05.075 is satisfied or, if a lien has not been
20 filed under AS 47.05.075, 60 days from the attorney's receipt of the proceeds.

21 (e) Notwithstanding AS 47.05.070(c), for pro rata reduction of the
22 department's lien if an attorney fails to comply with this section.

23 (1) the department is entitled to and shall collect the full lien amount
24 from the judgment, award, or settlement;

25 (2) if the attorney has already received payment for the attorney's
26 services through the pro rata reduction as provided in AS 47.05.070(c), the attorney is
27 civilly liable to the department for the amount of that payment.

28 (f) If a medical assistance recipient is handling the action or claim on a pro se
29 basis, the provisions of this section apply as if the medical assistance recipient were an
30 attorney representing the medical assistance recipient.

31 **Sec. 47.05.073. Judgment, award, or settlement of a medical assistance**

1 lien. (a) An action or claim brought by a medical assistance recipient or an attorney
2 who represents the medical assistance recipient against a third party or insurer may not
3 be compromised or discharged without the express written consent of the attorney
4 general.

5 (b) A judgment, award, or settlement that requires or results in the
6 compromise of a lien under AS 47.05.075 may not be entered into or granted by a
7 court without the express written consent of the attorney general.

8 (c) A medical assistance recipient may not maintain any rights to payment as a
9 result of a judgment, award, or settlement of an action or claim for which another
10 person may be legally obligated to pay without first making full repayment to the
11 department for costs of past medical assistance services provided to or paid for by the
12 medical assistance recipient that relate to that action or claim.

13 (d) A medical assistance recipient may not place any payment as a result of a
14 judgment, award, or settlement of an action or claim for which another person was
15 legally obligated to pay because of injury or illness into any trust for the purpose of
16 maintaining public assistance or medical assistance eligibility without first

17 (1) making full repayment to the department for costs of past medical
18 assistance services provided to the medical assistance recipient related to that action or
19 claim; and

20 (2) obtaining the express written consent of the attorney general.

21 (e) The department's recovery under a subrogation right, assignment, or
22 enforcement of a lien shall be applied to the entire payment made in satisfaction of
23 judgment, award, or settlement.

24 (f) The doctrine of equitable subrogation, the equitable made whole doctrine,
25 or the common fund doctrine may not be applied to defeat, reduce, limit, or prorate
26 any recovery by the department based upon its subrogation rights, assignment, or lien,
27 or the medical assistance recipient's obligation of repayment.

28 (g) The attorney general may only discharge or give written consent related to
29 a medical assistance lien under AS 47.05.075 if the discharge or consent complies
30 with federal law.

31 **Sec. 47.05.074. Conflict with federal requirements.** If any provision of this

1 chapter related to subrogation, assignment, or lien conflicts with federal law
2 concerning the Medicaid program or receipt of federal money to finance the medical
3 assistance program, the provision does not apply to the extent of the conflict.

4 * Sec. 4. AS 47.05.075(d) is amended to read:

5 (d) A perfected lien under this section has priority over all other liens except
6 tax liens and a lien perfected for attorney fees and costs [IMMEDIATELY AFTER
7 A LIEN PERFECTED BY A HOSPITAL, NURSE, OR PHYSICIAN UNDER
8 AS 34.35.450 - 34.35.480].

9 * Sec. 5. AS 47.05.080(a) is amended to read:

10 (a) Benefit overpayments collected by the department in administering
11 programs under AS 47.07 (medical assistance), AS 47.25.120 - 47.25.300 (general
12 relief), AS 47.25.430 - 47.25.615 (adult public assistance), AS 47.25.975 - 47.25.990
13 (food stamps), and 47.27 (Alaska temporary assistance program) shall be remitted to
14 the Department of Revenue under AS 37.10.050(a), except for overpayments
15 recovered under AS 47.07 that cover the value of services paid from federal
16 sources.

17 * Sec. 6. AS 47.07.020(f) is amended to read:

18 (f) A person may not be denied eligibility for medical assistance under this
19 chapter on the basis of a diversion of income or transfer of assets, whether by
20 assignment or after receipt of the income, into a Medicaid-qualifying trust or annuity
21 that, according to a determination made by the department.

22 (1) has provisions that require that the state will receive all of the trust
23 or annuity assets remaining at the death of the individual, subject to a maximum
24 amount that equals the total medical assistance paid on behalf of the individual: and

25 (2) otherwise meets the requirements of 42 U.S.C. 1396p(d)(4) for a
26 trust and 42 U.S.C. 1396p(c)(1)(F) and 42 U.S.C.1396p(e)(1) for an annuity.

27 * Sec. 7. AS 47.07.020 is amended by adding new subsections to read:

28 (j) A person may not apply for medical assistance coverage on behalf of a
29 child under 18 years of age who is not emancipated unless the person is the parent or
30 legal guardian of the child or, if the parent or legal guardian can be contacted and
31 consents to the application and the person is

1 (1) an adult caretaker relative who lives with the child and who is
2 exercising care and control of the child; or

3 (2) an employee of the department who is applying on behalf of a child
4 who is in the custody of the department.

5 (k) A child who is unemancipated may apply for medical assistance coverage
6 on the child's own behalf if the parent or legal guardian of the child consents to the
7 application. The department may waive consent under this section if the child
8 expresses a reasonable fear of the child's parent or legal guardian or the department
9 has been unable to contact the parent or legal guardian after the department has made
10 reasonable efforts to do so. If a waiver of consent is granted, the department shall
11 document the reason for the waiver in the child's medical assistance record.

12 (l) Notwithstanding the eligibility provisions under (a) and (b) of this section,
13 a person may not receive medical assistance under this section unless the person first
14 enrolls in the Medicare program under 42 U.S.C. 1395 to the extent that the person is
15 eligible to receive benefits and services under the program.

16 (m) Except as provided in (g) of this section, the department shall impose a
17 penalty period of ineligibility for the transfer of an asset for less than fair market value
18 by an applicant or an applicant's spouse consistent with 42 U.S.C. 1396p(c)(1).

19 (n) Except as provided under 42 U.S.C. 1396p(f) and 42 U.S.C. 1396u-1, the
20 department shall include as an asset for eligibility purposes the value of an applicant's
21 home if the equity value in the home exceeds \$500,000 at the time the application is
22 completed. Nothing in this subsection prohibits an applicant from reducing the equity
23 value in the applicant's home by selling the home or by taking out a loan that affects
24 the equity.

25 * **Sec. 8.** AS 47.05.070(e) is repealed.

26 * **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to
27 read:

28 **APPLICABILITY.** Sections 2 - 4 of this Act apply to a cause of action related to a
29 subrogation, assignment, or lien by the Department of Health and Social Services that accrues
30 on or after the effective date of this Act.

31 * **Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to

1 read:

2 REPORT. The Department of Health and Social Services shall prepare a report and
3 deliver the report to the legislature not later than the first day of the First Regular Session of
4 the Twenty-Fifth Alaska State Legislature. The report must include recommendations for
5 statutory, regulatory, and systematic changes that will

6 (1) assist the department in reducing medical assistance expenditures for
7 services received in residential psychiatric treatment centers and substance abuse treatment
8 facilities;

9 (2) enhance and clarify parental financial responsibility for children receiving
10 residential psychiatric treatment center and substance abuse treatment facilities services; and

11 (3) maximize all third-party resources available to pay for the cost of
12 residential psychiatric treatment center and substance abuse treatment facilities services
13 before a provider seeks reimbursement under AS 47.07.

14 * **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to
15 read:

16 STATE PLAN. (a) The Department of Health and Social Services shall immediately
17 apply for federal approval of a revised state plan to implement the changes to the medical
18 assistance program made under this Act.

19 (b) The commissioner of health and social services shall notify the revisor of statutes
20 of the date of the federal approval of the revised state plan submitted under (a) of this section.

21 * **Sec. 12.** This Act takes effect July 1, 2006, or on the date of notification under sec. 11 of
22 this Act of federal approval of a revised state plan for medical assistance coverage
23 incorporating the changes made by this Act, whichever is later.

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE COGHILL

TO: CSHB 426(), Draft Version "I"

1 Page 1, line 4, following "eligibility";

2 Insert "relating to home and community-based services;"

3

4 Page 8, following line 12:

5 Insert a new bill section to read:

6 **"* Sec. 9.** AS 47.07 is amended by adding a new section to read:

7 **Sec. 47.07.045. Home and community-based services.** (a) A person who is
8 eligible for medical assistance coverage may be paid for home and community-based
9 services under a waiver approved by the federal government if the person is approved
10 initially and at least once a year thereafter for the services by the department based on
11 an assessment described in regulation that finds that the person meets a level of care
12 necessary for admission to an intermediate care facility for the mentally retarded or to
13 a nursing facility.

14 (b) The department may not terminate payment for approved home and
15 community-based services unless, at any time,

16 (1) the recipient of the services scores below the eligibility standard on
17 the assessment employed under (a) of this section; and

18 (2) the score is reviewed by an independent qualified health care
19 professional who certifies that the recipient's condition has materially improved from
20 the previous assessment.

21 (c) In this section,

22 (1) "independent qualified health care professional" means a

23 (A) registered nurse licensed under AS 08.68 who is qualified

1 to assess children with complex medical conditions, older Alaskans, and adults
2 with physical disabilities for medical assistance waivers; and

3 (B) a person who is qualified under 42 C.F.R. 483.430 as a
4 mental retardation professional for the mental retardation and developmental
5 disability waiver;

6 (2) "materially improved" means that the recipient has previously
7 qualified for a waiver for

8 (A) children with complex medical conditions, no longer needs
9 technical assistance for a life-threatening condition, and is expected to be
10 placed in a skilled nursing facility for less than 30 days each year;

11 (B) mental retardation or developmental disability, no longer
12 needs the level of care provided by an intermediate care facility for the
13 mentally retarded either because the qualifying diagnosis has changed or the
14 recipient is able to demonstrate the ability to function in a home setting without
15 the need for waiver services; or

16 (C) older Alaskans or adults with physical disabilities, no
17 longer has a functional limitation or cognitive impairment that would result in
18 the need for nursing home placement."
19

20 Renumber the following bill sections accordingly.

21

22 Page 9, line 9:

23 Delete "sec. 12"

24 Insert "sec. 13"

By Prof. [unclear]
Hond [unclear]
Hond

(2) "materially improved" means that the recipient has previously qualified for a waiver for

(A) children with complex medical conditions, no longer needs technical assistance for a life-threatening condition, and is expected to be placed in a skilled nursing facility for less than 30 days each year;

(B) mental retardation or developmental disability, no longer needs the level of care provided by an intermediate care facility for the mentally retarded either because the qualifying diagnosis has changed or the recipient is able to demonstrate the ability to function in a home setting without the need for waiver services; or

(C) older Alaskan or adults with physical disabilities, no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and the recipient [department?] is able to demonstrate that recipient has, without the need for waiver services,

- (i) the ability to independently function in a home setting for the next twelve month period;
- (ii) the ability to independently maintain the recipient's current level of functional and cognitive functioning for the next twelve month period; and
- (iii) the ability to independently maintain the recipient's current health status level for the next twelve month period;



Representative John Coghill
State Capitol, Room 204
Juneau, AK 99801-1182

HB 426 Medical Assistance Eligibility
Sponsor Statement

In times when federal dollars are diminishing the legislature will have to decide policy for providing for the public health. To better provide medical assistance to the truly needy, some eligibility requirements need to be changed.

First, under existing law, a stepparent's income is not counted as household income if that income would disqualify a child for medical assistance. House Bill 426 would provide that medical assistance eligibility follow the same guidelines as other public assistance programs.

This bill also requires a person applying for medical assistance for a minor to be that person's parent or legal guardian, unless the parent or legal guardian is a minor. If a child is in state custody, an employee of the department can apply for coverage.

At the request of the department we have drafted a CS to add provisions to comply with federal law when dealing with transfer of assets and home equity value for Medicaid qualifications.

Lastly, this bill directs the department to report back to the legislature no later than the first day of the Twenty-Fifth Legislature on ways to reduce medical assistance expenditures for services received in residential psychiatric treatment centers by enhancing parental financial responsibilities and maximizing third-party resources available. Under current law a child could be placed in residential treatment and qualify for medical assistance after being out of the family home for thirty days, even though one or both parents have medical insurance.

24-LS1602V
Mischel
3/14/06

CS FOR HOUSE BILL NO. 426()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE COGILL

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to cooperation of insurers with the Department of Health and Social
2 Services; relating to subrogation, assignment, and lien rights and notices for medical
3 assistance claims; relating to recovery of medical assistance overpayments; relating to
4 asset transfers by medical assistance applicants; relating to medical assistance eligibility;
5 relating to medical assistance coverage for persons under 21 years of age; requiring a
6 report by the Department of Health and Social Services; and providing for an effective
7 date."

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

9 * Section 1. AS 21.09 is amended by adding a new section to read:

10 Sec. 21.09.240. Cooperation with the Department of Health and Social
11 Services. An insurer, including a pharmacy benefits manager, shall coordinate benefits
12 with medical assistance programs under AS 47.07, and shall cooperate with the
13 Department of Health and Social Services by providing

1 (1) requested information on an insured who is receiving public
2 assistance and on claims made by the department as long as the department agrees to
3 keep the information confidential;

4 (2) prompt verification of an assignment to and right of recovery for
5 the department; and

6 (3) a claim period of at least 36 months from the date of service for
7 eligible claims made by the department.

8 * **Sec. 2.** AS 47.05.070(b) is amended to read:

9 (b) If the department provides or pays for medical assistance for injury or
10 illness under this title, the department is subrogated to the rights of the recipient of that
11 medical assistance for any claim arising from the injury or illness and to the proceeds
12 of an insurance policy covering the injury or illness to the extent of the value of the
13 medical assistance provided. [A RECIPIENT OF MEDICAL ASSISTANCE OR THE
14 RECIPIENT'S ATTORNEY MUST NOTIFY THE DEPARTMENT IN WRITING
15 OF ANY ACTION OR CLAIM AGAINST A THIRD-PARTY PAYOR IF
16 MEDICAL ASSISTANCE WAS PROVIDED BY THE DEPARTMENT TO TREAT
17 AN INJURY OR ILLNESS FOR WHICH THE THIRD PARTY MAY BE LIABLE.]
18 Notwithstanding the assertion of any action or claim by the recipient of medical
19 assistance, the department may bring an action in the superior court against an alleged
20 third-party payor to recover an amount subrogated to the department for medical
21 assistance provided on behalf of a recipient.

22 * **Sec. 3.** AS 47.05 is amended by adding new sections to read:

23 **Sec. 47.05.071. Duty of a medical assistance recipient.** (a) A medical
24 assistance recipient shall cooperate with and assist the department in identifying and
25 providing information concerning third parties who may be liable to pay for care and
26 services received by the recipient under the medical assistance program.

27 (b) A medical assistance recipient may not compromise or resolve an action or
28 claim seeking payment for or related to an injury or illness for which care or services
29 were provided or received under the medical assistance program against an insurer,
30 entity, or other person without first providing notice to the attorney general's office of
31 the facts and circumstances giving rise to the action or claim and the asserted basis for

1 supporting the action or claim.

2 (c) A medical assistance recipient may not receive payment from any source
3 on account of or related to care or services for which medical assistance was received
4 unless the recipient has received written consent of the attorney general's office and
5 has paid the department reimbursement of the amount of medical assistance provided
6 or paid.

7 (d) As a condition of medical assistance eligibility, a person who applies for
8 medical assistance shall, at the time of application,

9 (1) assign to the department the applicant's rights of payment for care
10 and services from any third party;

11 (2) cooperate with and assist the department in identifying and
12 providing information concerning third parties who may be liable to pay for care and
13 services received by the recipient under the medical assistance program;

14 (3) assign to the department the applicant's right to the applicant's
15 permanent fund dividend and agree to sign a new assignment each year; the
16 department shall use the assignment obtained under this paragraph to obtain
17 reimbursement or enforce repayment when a recipient does not pay to the state
18 reimbursement received from a third party for care or services provided or paid by the
19 medical assistance program or fails to satisfy a lien perfected under AS 47.05.075; and

20 (4) agree to make application for all other available third-party
21 resources that may be used to provide or pay for the cost of care or services received
22 by the medical assistance recipient or that may be used to finance reimbursement to
23 the state for the cost of care or services received by the medical assistance recipient.

24 **Sec. 47.05.072. Duty of attorney for medical assistance recipient.** (a) Before
25 pursuing an action or claim on behalf of a medical assistance recipient for care or
26 services for an injury or illness for which medical assistance was received, an attorney
27 representing the medical assistance recipient shall notify the attorney general's office.

28 (b) The notice to the attorney general's office required under (a) of this section
29 includes submission of the following:

30 (1) identification of the medical assistance recipient's name, last
31 known address, and telephone number, and the date of the injury or illness giving rise

1 to the action or claim;

2 (2) copies of the pleadings and other papers related to the action or
3 claim;

4 (3) the identification of each potentially liable third party, including
5 that party's name, last known address, and telephone number;

6 (4) the identification of any insurance policy potentially responsive to
7 the action or claim; and

8 (5) a description of the facts and circumstances supporting the action
9 or claim.

10 (c) An attorney who represents a medical assistance recipient shall give the
11 attorney general's office 30 days' notice before any judgment, award, or settlement
12 may be satisfied in an action or claim by the medical assistance recipient to recover
13 damages for an injury or illness that has resulted in the department's providing or
14 paying for medical assistance.

15 (d) An attorney representing a medical assistance recipient who has received
16 care or services for the injury or illness provided or paid for by the medical assistance
17 program shall maintain all proceeds paid in connection with the action or claim in a
18 trust account or deposit the proceeds into the registry of the court until any lien
19 perfected by the department under AS 47.05.075 is satisfied or, if a lien has not been
20 filed under AS 47.05.075, 60 days from the attorney's receipt of the proceeds.

21 (e) Notwithstanding AS 47.05.070(c), for pro rata reduction of the
22 department's lien if an attorney fails to comply with this section.

23 (1) the department is entitled to and shall collect the full lien amount
24 from the judgment, award, or settlement;

25 (2) if the attorney has already received payment for the attorney's
26 services through the pro rata reduction as provided in AS 47.05.070(c), the attorney is
27 civilly liable to the department for the amount of that payment.

28 (f) If a medical assistance recipient is handling the action or claim on a pro se
29 basis, the provisions of this section apply as if the medical assistance recipient were an
30 attorney representing the medical assistance recipient.

31 **Sec. 47.05.073. Judgment, award, or settlement of a medical assistance**

1 **lien.** (a) An action or claim brought by a medical assistance recipient or an attorney
2 who represents the medical assistance recipient against a third party or insurer may not
3 be compromised or discharged without the express written consent of the attorney
4 general.

5 (b) A judgment, award, or settlement that requires or results in the
6 compromise of a lien under AS 47.05.075 may not be entered into or granted by a
7 court without the express written consent of the attorney general.

8 (c) A medical assistance recipient may not maintain any rights to payment as a
9 result of a judgment, award, or settlement of an action or claim for which another
10 person may be legally obligated to pay without first making full repayment to the
11 department for costs of past medical assistance services provided to or paid for by the
12 medical assistance recipient that relate to that action or claim.

13 (d) A medical assistance recipient may not place any payment as a result of a
14 judgment, award, or settlement of an action or claim for which another person was
15 legally obligated to pay because of injury or illness into any trust for the purpose of
16 maintaining public assistance or medical assistance eligibility without first

17 (1) making full repayment to the department for costs of past medical
18 assistance service provided to the medical assistance recipient related to that action or
19 claim; and

20 (2) obtaining the express written consent of the attorney general.

21 (e) The department's recovery under a subrogation right, assignment, or
22 enforcement of a lien shall be applied to the entire payment made in satisfaction of
23 judgment, award, or settlement.

24 (f) The doctrine of equitable subrogation, the equitable made whole doctrine,
25 or the common fund doctrine may not be applied to defeat, reduce, limit, or prorate
26 any recovery by the department based upon its subrogation rights, assignment, or lien,
27 or the medical assistance recipient's obligation of repayment.

28 (g) The attorney general may only discharge or give written consent related to
29 a medical assistance lien under AS 47.05.075 if the discharge or consent complies
30 with federal law.

31 **Sec. 47.05.074. Conflict with federal requirements.** If any provision of this

1 chapter related to subrogation, assignment, or lien conflicts with federal law
2 concerning the Medicaid program or receipt of federal money to finance the medical
3 assistance program, the provision does not apply to the extent of the conflict.

4 * Sec. 4. AS 47.05.075(d) is amended to read:

5 (d) A perfected lien under this section has priority over all other liens except
6 tax liens and a lien perfected for attorney fees and costs [IMMEDIATELY AFTER
7 A LIEN PERFECTED BY A HOSPITAL, NURSE, OR PHYSICIAN UNDER
8 AS 34.35.450 - 34.35.480].

9 * Sec. 5. AS 47.05.080(a) is amended to read:

10 (a) Benefit overpayments collected by the department in administering
11 programs under AS 47.07 (medical assistance), AS 47.25.120 - 47.25.300 (general
12 relief), AS 47.25.430 - 47.25.615 (adult public assistance), AS 47.25.975 - 47.25.990
13 (food stamps), and 47.27 (Alaska temporary assistance program) shall be remitted to
14 the Department of Revenue under AS 37.10.050(a), except for overpayments
15 recovered under AS 47.07 that cover the value of services paid from federal
16 sources.

17 * Sec. 6. AS 47.07.020(b)(14) is amended to read:

18 (14) pregnant women who are not covered under (a) of this section if
19 (A) the pregnant woman's [AND WHOSE] household
20 income does not exceed

21 (i) [(A)] \$2,208 a month if the household consists of
22 two persons;

23 (ii) [(B)] \$2,782 a month if the household consists of
24 three persons;

25 (iii) [(C)] \$3,355 a month if the household consists of
26 four persons;

27 (iv) [(D)] \$3,928 a month if the household consists of
28 five persons;

29 (v) [(E)] \$4,501 a month if the household consists of six
30 persons;

31 (vi) [(F)] \$5,074 a month if the household consists of

1 seven persons:

2 (vii) [(G)] \$5,647 a month if the household consists of
3 eight persons:

4 (viii) [(H)] \$5,647 a month, plus an additional \$574 a
5 month for each extra person above eight persons who is in the
6 household if the household consists of nine persons or more:

7 (B) the pregnant woman has identified the putative father
8 of the fetus: and

9 (C) the putative father's household income and resources,
10 as defined by the department, each do not exceed \$50,000 annually, as
11 determined on the first day of the month in which the application for
12 assistance was received:

13 * Sec. 7. AS 47.07.020(f) is amended to read:

14 (f) A person may not be denied eligibility for medical assistance under this
15 chapter on the basis of a diversion of income or transfer of assets, whether by
16 assignment or after receipt of the income, into a Medicaid-qualifying trust or annuity
17 that, according to a determination made by the department,

18 (1) has provisions that require that the state will receive all of the trust
19 or annuity assets remaining at the death of the individual, subject to a maximum
20 amount that equals the total medical assistance paid on behalf of the individual; and

21 (2) otherwise meets the requirements of 42 U.S.C. 1396p(d)(4) for a
22 trust and 42 U.S.C. 1396p(c)(1)(F) and 42 U.S.C.1396p(e)(1) for an annuity.

23 * Sec. 8. AS 47.07.020 is amended by adding new subsections to read:

24 (j) A person may not apply for medical assistance coverage for a child under
25 18 years of age who is not emancipated unless the person is

26 (1) an adult and the parent or legal guardian of the child;

27 (2) an adult caretaker relative who lives with the child and who is
28 exercising care and control of the child; or

29 (3) an employee of the department who is applying on behalf of a child
30 who is in the custody of the department.

31 (k) Notwithstanding the eligibility provisions under (a) and (b) of this section.

1 a person may not receive medical assistance under this section unless the person first
2 enrolls in the Medicare program under 42 U.S.C. 1395 to the extent that the person is
3 eligible to receive benefits and services under the program.

4 (l) Except as provided in (g) of this section, the department shall impose a
5 penalty period of ineligibility for the transfer of an asset for less than fair market value
6 by an applicant or an applicant's spouse consistent with 42 U.S.C. 1396p(c)(1).

7 (m) Except as provided under 42 U.S.C. 1396p(f) and 42 U.S.C. 1396u-1, the
8 department shall include as an asset for eligibility purposes the value of an applicant's
9 home if the equity value in the home exceeds \$500,000 at the time the application is
10 completed. Nothing in this subsection prohibits an applicant from reducing the equity
11 value in the applicant's home by selling the home or by taking out a loan that affects
12 the equity.

13 * Sec. 9. AS 47.05.070(e) is repealed.

14 * Sec. 10. The uncodified law of the State of Alaska is amended by adding a new section to
15 read:

16 APPLICABILITY. Sections 2 - 4 of this Act apply to a cause of action related to a
17 subrogation, assignment, or lien by the Department of Health and Social Services that accrues
18 on or after the effective date of this Act.

19 * Sec. 11. The uncodified law of the State of Alaska is amended by adding a new section to
20 read:

21 REPORT. The Department of Health and Social Services shall prepare a report and
22 deliver the report to the legislature not later than the first day of the First Regular Session of
23 the Twenty-Fifth Alaska State Legislature. The report must include recommendations for
24 statutory, regulatory, and systematic changes that will

25 (1) assist the department in reducing medical assistance expenditures for
26 services received in residential psychiatric treatment centers and substance abuse treatment
27 facilities:

28 (2) enhance and clarify parental financial responsibility for children receiving
29 residential psychiatric treatment center and substance abuse treatment facilities services; and

30 (3) maximize all third-party resources available to pay for the cost of
31 residential psychiatric treatment center and substance abuse treatment facilities services

1 before a provider seeks reimbursement under AS 47.07.

2 * Sec. 12. The uncodified law of the State of Alaska is amended by adding a new section to
3 read:

4 STATE PLAN. (a) The Department of Health and Social Services shall immediately
5 apply for federal approval of a revised state plan to implement the changes to the medical
6 assistance program made under this Act.

7 (b) The commissioner of health and social services shall notify the revisor of statutes
8 of the date of the federal approval of the revised state plan submitted under (a) of this section.

9 * Sec. 13. This Act takes effect July 1, 2006, or on the date of notification under sec. 12 of
10 this Act of federal approval of a revised state plan for medical assistance coverage
11 incorporating the changes made by this Act, whichever is later.

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

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MEMORANDUM

DATE: February 22, 2006

TO: Honorable John Coghill
Alaska House of Representatives

THRU: Karleen K. Jackson, Ph. D.
Commissioner

FROM: Kevin D. Henderson
Medical Assistant Administrator III

RE: Suggestions for HB 426.

On February 13, 2006 you met with Sherry Hill, Ellie Fitzjarrald, and me to discuss HB 426 dealing with the Medicaid program. Thank you for that opportunity. Even though we expressed reservations about our legal ability to implement the original provisions of HB 426, we share your conviction that those who are able to contribute to their health care should do so and that Medicaid be reserved for those who cannot. You stated it was not your desire to make major reductions in Medicaid eligibility, but that you did want to find "low hanging fruit" that would help address your concerns. At the conclusion of that meeting, we promised to provide you with suggestions.

The following ideas are the result of department brain storming and the opportune timing of the federal Deficit Reduction Act of 2005. We offer them to you as suggestions for amendments to HB 426, in lieu of the original provisions of HB 426.

1. **Require Medicare Enrollment:** In June, 2005, the Centers for Medicare and Medicaid Services (CMS) informally revised its policy and now allows states to require Medicare enrollment as a condition of eligibility for those who qualify for it. Most, but not all, seniors have enrolled in Medicare and adding this requirement would help the department maximize the 100% federal dollars available from Medicare. Medicare-Part A, would pay for some of the most expensive individual cases, including those with end-stage renal disease. Medicaid would continue to pay the premiums and co-payments for the lowest income Medicare recipients.

An amendment to HB 426 could require the department to make Medicare enrollment a condition of Medicaid eligibility for the elderly or disabled who are eligible to receive Medicare.

2. **Authority to Garnish PFD:** AS 47.05.080 currently authorizes the department to garnish a recipient's PFD to recover General Relief, Adult Public Assistance, food stamps and Alaska Temporary Assistance Program overpayments. The department needs the same authority to recoup overpayments from Medicaid recipients who have received Medicaid coverage but shouldn't have, including those who choose to receive continued Medicaid benefits pending a fair hearing, but who ultimately lose the fair hearing. Existing regulation 7 AAC 43.1800 explains this policy. Realistically, however, recipients rarely have the will or the means to arrange for repayment. One of the most efficient and least intrusive recovery methods has been to garnish the recipient's PFD.

HB 426 is an appropriate vehicle to amend AS 47.05.080 so medical assistance programs are included.

3. **Study Parental Contributions for Extended Medical Care Away from Home:** In some situations, a child who is outside the home receiving extended medical care for 30 days or more is eligible for Medicaid based only on the child's own income and resources. The department would benefit from investigating strategies other states are using to require financial contributions from parents under these circumstances. Minnesota, for example, has a plan that requires parents to pay "parental fees" when their child is residing in a residential psychiatric treatment facility or a substance abuse treatment facility. In some situations, the State of Washington considers a child receiving inpatient mental health treatment to still be in the parent's household unless the child is found to require treatment for more than 90 days.

We believe there is value in the department studying alternative policies in other states to determine what might work best in Alaska. Before trying to implement any cost-containment strategies in this area we need to better understand how these other programs are implemented, the legal challenges they faced, and which ones have been effective. This is more than we can do during the session, but we see an opportunity for you direct such a study through HB 426.

4. **Asset Test for Pregnant Women Eligibility:** The poverty-level pregnant woman Medicaid eligibility category is the only group where the income and resources of the unmarried father of an unborn child are not counted.