11886 SENATE JUDICIARY

HB

408

SENATE COMMITTEE REPORT

DATE: 3/22/06

FURTHER: Finance

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 408(FIN) am

HB 408 DEFINITION OF CHILD ABUSE AND NEGLECT

"An Act relating to the standard of proof required to terminate parental rights in child- in-need-of-aid proceedings; relating to a healing arts practitioner's duty to report a child adversely affected by or withdrawing from exposure to a controlled substance or alcohol; relating to disclosure of confidential or privileged information about certain children by the Department of Health and Social Services and Administration; relating to permanent fund dividends paid to foster children and adopted children; amending Rule 18, Alaska Child in Need of Aid Rules of Procedure; and providing for an effective date."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	X			
			X	
			X	
	X			
CHAIR	✓			

AMENDMENT #1

OFFERED IN THE SENATE BY SEEKINS

TO: SCS CSHB 408(FIN)am

Page 6, line 10:

After the word "healing arts"

Insert:

, as defined in AS 47.17.290(13),

adopted

This amendment would put a fence around who is responsible to report, so professionals clearly understand who is required to report.

24-GH2021\L.1
Mischel
3/31/06

AMENDMENT #2

OFFERED IN THE SENATE

TO: SCS CSHB 408( ), Draft Version "L"

adopted

Page 5, lines 3 - 18:

Delete all material and insert:

"* **Sec. 6.** AS 47.10.093(j) is repealed and reenacted to read:

(j) The department may publicly disclose information pertaining to a child or an alleged perpetrator named in a report of harm described under (i) of this section, or pertaining to a household member of the child or the alleged perpetrator, if the information relates to a determination, if any, made by the department regarding the nature and validity of a report of harm under AS 47.17 or to the department's activities arising from the department's investigation of the report. The commissioner or the commissioner's designee

(1) shall withhold disclosure of the child's name, picture, or other information that would readily lead to the identification of the child if the department determines that the disclosure would be contrary to the best interests of the child, the child's siblings, or other children in the child's household; or

(2) after consultation with a prosecuting attorney, shall withhold disclosure of information that would reasonably be expected to interfere with a criminal investigation or proceeding or a criminal defendant's right to a fair trial in a criminal proceeding."

ALASKA STATE HOUSE OF REPRESENTATIVES

Representative John Coghill
State Capitol Room 204
Juneau, AK 99801-1182
(907)-465-3719

Representative Mike Chenault
State Capitol, Room 505
Juneau, AK 99801-1182
(907) 465-3779

FAMILY RIGHTS ACT of 2006
SCS CSHB 408(JUD)

In an effort to assist OCS in making public policy transparent and accountable in 2005, Representatives Coghill, Chenault, Rokeberg, and McGuire joined in with Department of Law and OCS to combine legislation into one bill. This also avoided duplication and canceling each other out. The process worked very well.

Because of the success of the Family Rights Act of 2005, Representatives Coghill and Chenault have again joined with OCS and Department of Law to fine tune some OCS issues.

The Department of Law has sections of the bill that raises the standard for termination of parental rights or denying a parent reasonable effort to clear and convincing evidence. Representative Kerttula amended the legislation to clarify the department's intent to require health care providers to report to OCS when they believe a child has been adversely affected by or is withdrawing from exposure to a controlled substance or alcohol.

Representative Chenault contributed language to clarify that when an official identified as a public official or employee under AS 47.10.092 requests information from the department about a CINA case, the department will have five working days to provide access to the information.

Representative Coghill's language clarifies the intent of HB 53 that once a report of harm has resulted in a parent making public disclosure, the alleged perpetrator being charged with a crime, or has resulted in fatality or near fatality of a child, OCS is able to disclose the nature and validity of any report of harm about any child in the family of the parent in a report of harm.

Representative Coghill also has language that preserves the permanent fund dividends of children in state custody until they turn 18 or if they are reunited with their parent(s). OCS applies for the PFD's and places them in a trust.

A new Section 9 incorporates language from Rep. Neuman's HB 346 which requires training of OCS social workers to include learning the constitutional and statutory rights of the children and their parents, require them to work with law enforcement to prevent compromising evidence, and requiring them to disclose to the accused the specific complaint or allegation without disclosing the reporter.

24-LS1800\A
Mischel
3/25/06

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 408, relating to the standard of proof required to terminate parental rights in child-in-need-of-aid proceedings; relating to the definition of "child abuse or neglect"; relating to disclosure of confidential or privileged information about certain children by the Departments of Health and Social Services and Administration; relating to permanent fund dividends paid to foster children and adopted children; and amending Rule 18, Alaska Child in Need of Aid Rules of Procedure.

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

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 408, relating to the standard of proof required to terminate parental rights in child-in-need-of-aid proceedings; relating to the definition of "child abuse or neglect"; relating to disclosure of confidential or

privileged information about certain children by the Departments of Health and Social Services and Administration; relating to permanent fund dividends paid to foster children and adopted children; and amending Rule 18, Alaska Child in Need of Aid Rules of Procedure.

24-GH2021\L
Mischel
3/24/06

SENATE CS FOR CS FOR HOUSE BILL NO. 408( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the standard of proof required to terminate parental rights in child-in-need-of-aid proceedings; relating to a healing arts practitioner's duty to report a child adversely affected by or withdrawing from exposure to a controlled substance or alcohol; relating to disclosure of confidential or privileged information about certain children by the Departments of Health and Social Services and Administration; relating to permanent fund dividends paid to foster children and adopted children; relating to child abuse or neglect investigations and training; amending Rule 18, Alaska Child in Need of Aid Rules of Procedure; and providing for an effective date."

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

*** Section 1.** AS 47.10.086(c) is amended to read:

(c) The court may determine that reasonable efforts of the type described in (a) of this section are not required if the court has found by **clear and convincing** [A

New Text Underlined [DELETED TEXT BRACKETED]

PREPONDERANCE OF THE] evidence that

(1) the parent or guardian has subjected the child to circumstances that pose a substantial risk to the child's health or safety; these circumstances include abandonment, sexual abuse, torture, chronic mental injury, or chronic physical harm;

(2) the parent or guardian has

(A) committed homicide under AS 11.41.100 - 11.41.130 of a parent of the child or of a child;

(B) aided or abetted, attempted, conspired, or solicited under AS 11.16 or AS 11.31 to commit a homicide described in (A) of this paragraph;

(C) committed an assault that is a felony under AS 11.41.200 - 11.41.220 and results in serious physical injury to a child; or

(D) committed the conduct described in (A) - (C) of this paragraph that violated a law or ordinance of another jurisdiction having elements similar to an offense described in (A) - (C) of this paragraph;

(3) the parent or guardian has, during the 12 months preceding the permanency hearing, failed to comply with a court order to participate in family support services;

(4) the department has conducted a reasonably diligent search over a time period of at least three months for an unidentified or absent parent and has failed to identify and locate the parent;

(5) the parent or guardian is the sole caregiver of the child and the parent or guardian has a mental illness or mental deficiency of such nature and duration that, according to the statement of a psychologist or physician, the parent or guardian will be incapable of caring for the child without placing the child at substantial risk of physical or mental injury even if the department were to provide family support services to the parent or guardian for 12 months;

(6) the parent or guardian has previously been convicted of a crime involving a child in this state or in another jurisdiction and, after the conviction, the child was returned to the custody of the parent or guardian and later removed because of an additional substantiated report of physical or sexual abuse by the parent or

guardian;

(7) a child has suffered substantial physical harm as the result of abusive or neglectful conduct by the parent or guardian or by a person known by the parent or guardian and the parent or guardian knew or reasonably should have known that the person was abusing the child;

(8) the parental rights of the parent have been terminated with respect to another child because of child abuse or neglect, the parent has not remedied the conditions or conduct that led to the termination of parental rights, and the parent has demonstrated an inability to protect the child from substantial harm or the risk of substantial harm;

(9) the child has been removed from the child's home on at least two previous occasions, family support services were offered or provided to the parent or guardian at those times, and the parent or guardian has demonstrated an inability to protect the child from substantial harm or the risk of substantial harm; or

(10) the parent or guardian is incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and need for care by an adult.

*** Sec. 2.** AS 47.10.088(a) is amended to read:

(a) Except as provided in AS 47.10.080(o), the rights and responsibilities of the parent regarding the child may be terminated for purposes of freeing a child for adoption or other permanent placement if the court finds

[(1)] by clear and convincing evidence that

(1) [(A)] the child has been subjected to conduct or conditions described in AS 47.10.011;

(2) [AND (B)] the parent

(A) [(i)] has not remedied the conduct or conditions in the home that place the child at substantial risk of harm; or

(B) [(ii)] has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child in substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury; and

(3) [(2) BY PREPONDERANCE OF THE EVIDENCE THAT] the department has complied with the provisions of AS 47.10.086 concerning reasonable efforts.

* **Sec. 3.** AS 47.10.088(b) is amended to read:

(b) In making a determination under (a)(2) [(a)(1)(B)] of this section, the court may consider any fact relating to the best interests of the child, including

(1) the likelihood of returning the child to the parent within a reasonable time based on the child's age or needs;

(2) the amount of effort by the parent to remedy the conduct or the conditions in the home;

(3) the harm caused to the child;

(4) the likelihood that the harmful conduct will continue; and

(5) the history of conduct by or conditions created by the parent.

* **Sec. 4.** AS 47.10.092 is amended by adding a new subsection to read:

(f) Each department shall respond to a request made by an official identified under (a) of this section within five working days after receiving the request, or by a later date specified in the request, by providing access to all or part of the information requested or by providing the specific citation to a federal or state law that prohibits disclosure of all or part of the information requested.

* **Sec. 5.** AS 47.10.093(i) is amended to read:

(i) The commissioner of health and social services or the commissioner's designee or the commissioner of administration or the commissioner's designee, as appropriate, may disclose to the public, upon request, confidential information, as set out in (j) of this section, when

(1) the parent or guardian of a child who is the subject of **one or more reports** [A REPORT] of harm under AS 47.17 has made a public disclosure concerning the department's involvement with the family;

(2) the alleged perpetrator named in **one or more reports** [A REPORT] of harm under AS 47.17 has been charged with a crime concerning the alleged abuse or neglect; or

(3) **abuse or neglect** [A REPORT OF HARM UNDER AS 47.17] has

resulted in the fatality or near fatality of **a** [THAT] child **who is the subject of one or more reports of harm under AS 47.17**.

* **Sec. 6.** AS 47.10.093(j) is amended to read:

(j) The type of information that may be publicly disclosed under (i) of this section is information related to the determination, if any, made by the department regarding the **nature and** validity of **any** [A] report of harm under AS 47.17 **pertaining to a child in the care of a person who is the alleged perpetrator described in a report of harm** and the department's activities arising from the department's investigation of **such a** [THE] report. The commissioner or the commissioner's designee

(1) shall withhold disclosure of the child's name, picture, or other information that would readily lead to the identification of the child if the department determines that the disclosure would be contrary to the best interests of the child, the child's siblings, or other children in the child's household; or

(2) after consultation with a prosecuting attorney, shall withhold disclosure of information that would reasonably be expected to interfere with a criminal investigation or proceeding or a criminal defendant's right to a fair trial in a criminal proceeding.

* **Sec. 7.** AS 47.10 is amended by adding a new section to read:

Sec. 47.10.115. Permanent fund dividend. (a) The department shall annually apply for a permanent fund dividend and retain in trust under AS 43.23.015(e) for the benefit of the child the dividend and accrued interest on the dividend if the child is in the custody of the department when the application is due.

(b) The department may not distribute the proceeds of a trust under this section unless

(1) the child has reached 18 years of age and is no longer in the custody of the department;

(2) the child has been adopted and one year has elapsed since the adoption;

(3) the child is no longer in the custody of the department and the child has been reunited with the child's parents; or

(4) ordered to do so by the court in the best interest of the child.

(c) Notwithstanding (b)(1) - (3) of this section, the department may not distribute the proceeds of a trust under this section if the payment would be made to a guardian of a child who had been in the custody of the department immediately before the establishment of the guardianship, unless the guardianship was established under AS 13.26.090 - 13.26.155.

*** Sec. 8.** AS 47.17 is amended by adding a new section to read:

Sec. 47.17.024. Duties of practitioners of the healing arts. (a) A practitioner of the healing arts ~~involved~~ listed in 47.17.290(13) in the delivery or care of a child who the practitioner determines has been adversely affected by, or is withdrawing from exposure to, a controlled substance or alcohol shall immediately notify the nearest office of the department of the child's condition.

(b) In this section, "controlled substance" has the meaning given in AS 11.71.900, but does not include a substance lawfully taken under a prescription from a health care provider who is authorized to prescribe the substance.

*** Sec. 9.** AS 47.17.033 is amended by adding new subsections to read:

(j) The training required under (c) of this section must address the constitutional and statutory rights of children and families that apply throughout the investigation and department intervention. The training must inform department representatives of the applicable legal duties to protect the rights and safety of a child and the child's family.

(k) During a joint investigation by the department and a law enforcement agency, the department shall coordinate an investigation of child abuse or neglect with the law enforcement agency to ensure that the possibility of a criminal charge is not compromised.

(*l*) Unless a law enforcement official prohibits or restricts notification under (k) of this section, at the time of initial contact with a person alleged to have committed child abuse or neglect, the department shall notify the person of the specific complaint or allegation made against the person, except that the identity of the complainant may not be revealed.

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

INDIRECT COURT RULE AMENDMENT. Sections 1 - 3 of this Act have the effect of amending Rule 18, Alaska Child in Need of Aid Rules of Procedure, relating to the termination of parental rights proceedings by increasing the standard of proof concerning some elements from proof by a preponderance of the evidence to proof by clear and convincing evidence.

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

APPLICABILITY OF SECS. 1 - 3 OF THIS ACT. Sections 1 - 3 of this Act apply to a child-in-need-of-aid proceeding that is pending before the court, that is on appeal to the court, or for which the time for appeal to the court has not yet passed on or after the effective date of this Act.

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

CONDITIONAL EFFECT. Sections 1 - 3 of this Act take effect only if sec. 10 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 13.** This Act takes effect immediately under AS 01.10.070(c).

FAMILY RIGHTS ACT of 2006
CSHB 408(FIN)am

SECTIONAL FOR SENATE JUDICIARY CS

Section 1. This section contains language that would release OCS from providing family support services when they can show the court, by clear and convincing evidence, that the parent or guardian poses substantial risk to a child, has committed a homicide of a child, or parent has taken such actions as described in Section 1. This raises the level of proof from "a preponderance of the evidence". (Requested by Department of Law)

Section 2. This section raises the standard for termination of parental rights from a "preponderance of evidence" to "clear and convincing evidence". (Requested by OCS language; Rep. Coghill legislation-HB 261, 2001)

Section 3. This section is language clean up to accommodate Section 2 amendments. (Department of Law)

Section 4. When a public official or an employee requests information from the department, they will now have five working days to respond. (HB 327 – Rep. Chenault)

Section 5. Clarifies the intent of HB 53 that once a report of harm has resulted in a parent making public disclosure, the alleged perpetrator being charged with a crime, or has resulted in fatality or near fatality of a child, OCS is able to disclose the nature and validity of any report of harm about a child in a report of harm. (Representative Coghill)

Section 6. Broadens the department's ability to discuss a report of harm pertaining to not only children in the family or household, but also children who may be under the care of a perpetrator in a report of harm. (Representative Coghill)

Section 7. Last summer two teenagers were placed in a foster home and the foster parents were appointed as legal guardians. The State released the teens' permanent fund dividends to the legal guardians. The placement did not work and the children were removed from the home without their dividends. Section 6 says the only way a child's past dividend can be released is if the child is adopted and has remained adopted for one year, the child turns eighteen and the PFD's are released by OCS, the child is returned to the parent(s), or the department is ordered to do so by the court. The one-year provision is put in place because there is a high rate of adoptions being disturbed. Subsection (c) clarifies this applies to legal guardians of children who have been in state custody, unless the guardianship was established for an incapacitated person. (Representative Coghill)

Section 8. This section requires practitioners of the healing arts involved in the delivery or care of a child who determines the child is adversely affected by a controlled substance or alcohol to notify OCS. It clarifies that a "controlled substance" does not include prescription medication, but rather "a drug, substance, or immediate precursor included in the schedules set in AS 11.71.140 – 11.71.190".

Section 9. This provision consolidates HB 346 sponsored by Representative Mark Neuman into HB 408. The provision requires social worker training to include constitutional and statutory rights of children and families, requires cooperation by OCS with law enforcement to ensure the possibility of criminal charges is not compromised in the investigation, and that the alleged perpetrator be advised of what the specific complaint or allegation is without disclosing the identity of the accuser.

Section 10. Indirect Court Rule change dealing with changing "preponderance of evidence" in Sections 1, 2, & 3 to "clear and convincing evidence". (Department of Law)

Section 11. Applicability language to clarify that pending cases and non-pending cases still within the statute of limitation will have "clear and convincing evidence" standard applied to them. (Department of Law)

Section 12. Because Sections 1, 2, & 3 will result in an Indirect Court Rule Amendment, those section of the bill will only take place if the vote on Section 9 receives a two-thirds vote of each house of the legislature. (Department of Law)

Section 13. Immediate effective date clause.

AMENDMENT

OFFERED IN THE SENATE BY

TO: CSHB 408(FIN) am

Page 5, line 7:

Delete: "for which there has been a report of harm"

Insert: **who is the alleged perpetrator described in a report of harm**

AMENDMENT

OFFERED IN THE SENATE BY

TO: CSHB 408(FIN)am

Page 6, line 1:

Insert:

(c) Notwithstanding (b)(1) – (3) of this section, the department may not distribute the proceeds of a trust under this section if the payment would be made to a guardian of a child who had been in the custody of the department immediately before the establishment of the guardianship, unless the guardianship was established under AS 13.26.090 – 13.26.155.

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 11[illegible]
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030
FAX: (907) 465-3068

March 20, 2006

Honorable Ralph Seekins, Chairman
Senate Judiciary Committee
Alaska State Capitol; Rm. 125
Juneau, AK 99801

Dear Senator Seekins,

The Department of Health and Social Services respectfully requests that House Bill 408 "An Act relating to the definition of 'child abuse and neglect' for child protection purposes; and providing for an effective date," be scheduled for a hearing in the Senate Judiciary Committee at your earliest convenience.

The House Health, Education, and Social Services Committee heard the companion bill, Senate Bill 252, and reported it out without amendment.

Changes and amendments were made to House Bill 408 in the House Finance Committee; amendments were made to the House (FIN) Committee Substitute on the House floor. The department supports the House version of House Bill 408.

I am providing you with a copy of CS HB 408(FIN)am; a sectional analysis, Governor's transmittal letter and a copy of Representative Coghill's sponsor statement.

A copy of the zero fiscal note should be on file with the committee. Your favorable consideration of this request will be most appreciated.

Sincerely,

Sherry Hill, Special Assistant
Office of the Commissioner

cc: Kevin Jardell, Legislative Director
Office of the Governor

Tammy Sandoval, Deputy Commissioner
Office of Children's Services

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 408
(H) Publish Date: 1/30/06
Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: SUBSTANCE EXPOSED NEWBORNS AND CHILD ABUSE
RDU: Children's Services
Component: Front Line Social Workers

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR
Requester: GOVERNOR
Component No.: 2305

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)*

The Office of Children's Services (OCS) has determined that many medical professionals in Alaska are already reporting affected infants to our offices. The potential increased reporting that would result from the enactment of this bill should be minimal, and the OCS does not anticipate any fiscal impact.

Prepared by: Tammy Sandoval, Deputy Commissioner — Phone 465-3791
Division: Office of Children's Services — Date/Time 11/04/2005
Approved by: Karleen Jackson, Commissioner — Date 11/08/2005
Agency: Department of Health and Social Services

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 408(FIN)
(H) Publish Date: 3/8/2006

Revision Date/Time (Note if correction):
Dept. Affected: DHSS
Title: Relating to Child in Need of Aid Proceedings
RDU: Children's Services
Component: Children's Services Management
Sponsor: (RLS) by Request of Governor
Requester: HFC
Component No.: 2666

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 ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
Check 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)*

Prepared by: House Finance Committee
Phone: 465-4945/465-3779

Rep. Kevin Meyer, Co-Chair
Date: 3/7/2006

Rep. Mike Chenault, Co-Chair

ALASKA STATE HOUSE OF REPRESENTATIVES

Representative John Coghill
State Capitol Room 204
Juneau, AK 99801-1182
(907)-465-3719

Representative Mike Chenault
State Capitol, Room 505
Juneau, AK 99801-1182
(907) 465-3779

FAMILY RIGHTS ACT of 2006
CSHB 408(FIN)

In an effort to assist OCS in making public policy transparent and accountable in 2005, Representatives Coghill, Chenault, Rokeberg, and McGuire joined in with Department of Law and OCS to combine legislation into one bill. This also avoided duplication and canceling each other out. The process worked very well.

Because of the success of the Family Rights Act of 2005, Representatives Coghill and Chenault have again joined with OCS and Department of Law to fine tune some COS issues.

The Department of Law has sections of the bill that raises the standard for termination of parental rights or denying a parent reasonable effort to clear and convincing evidence. They also have amended the definition of "child abuse or neglect" to include a report from a physician at birth that a child has been adversely affected by or is withdrawing from exposure to a controlled substance or alcohol.

Representative Chenault contributed language to clarify that when an official identified as a public official or employee under AS 47.10.092 requests information from the department about a CINA case, the department will have five working days to provide access to the information.

Representative Coghill's language clarifies the intent of HB 53 that once a report of harm has resulted in a parent making public disclosure, the alleged perpetrator being charged with a crime, or has resulted in fatality or near fatality of a child, OCS is able to disclose the nature and validity of any report of harm about any child in the family of the parent in a report of harm.

Representative Coghill also has language that preserves the permanent fund dividends of children in state custody until they turn 18 or if they are reunited with their parent(s). OCS applies for the PFD's and places them in a trust.

FAMILY RIGHTS ACT of 2006
CSHB 408(FIN)am

SECTIONAL

Section 1. This section contains language that would release OCS from providing family support services when they can show the court, by clear and convincing evidence, that the parent or guardian poses substantial risk to a child, has committed a homicide of a child, or parent has taken such actions as described in Section 1. This raises the level of proof from "a preponderance of the evidence". (Requested by Department of Law)

Section 2. This section raises the standard for termination of parental rights from a "preponderance of evidence" to "clear and convincing evidence". (Requested by OCS language; Rep. Coghill legislation-HB 261, 2001)

Section 3. This section is language clean up to accommodate Section 2 amendments. (Department of Law)

Section 4. When a public official or an employee requests information from the department, they will now have five working days to respond. (HB 327 – Rep. Chenault)

Section 5. Clarifies the intent of HB 53 that once a report of harm has resulted in a parent making public disclosure, the alleged perpetrator being charged with a crime, or has resulted in fatality or near fatality of a child, OCS is able to disclose the nature and validity of any report of harm about any child in the family of the parent in a report of harm. (Representative Coghill)

Section 6. Broadens the department's ability to discuss a report of harm pertaining to not only children in the family or household, but also children who may be under the care of a perpetrator in a report of harm. (Representative Coghill)

Section 7. Last summer two teenagers were placed in a foster home and the foster parents were appointed as legal guardians. The State released the teens' permanent fund dividends to the legal guardians. The placement did not work and the children were removed from the home without their dividends. Section 6 says the only way a child's past dividend can be released is if the child is adopted and has remained adopted for one year, the child turns eighteen and applies for past PFD's, the child is returned to the parent(s), or the department is ordered to do so by the court. The one-year provision is put in place because there is a high rate of adoptions being disturbed. (Representative Coghill)

Section 8. This section requires practitioners of the healing arts involved in the delivery or care of a child who determines the child is adversely affected by a controlled substance or alcohol must notify OCS. It clarifies that a "controlled substance" does not include prescription medication, but rather "a drug, substance, or immediate precursor included in the schedules set in AS 11.71.140 – 11.71.190".

Section 9. Indirect Court Rule change dealing with changing "preponderance of evidence" in Sections 1, 2, & 3 to "clear and convincing evidence". (Department of Law)

Section 10. Applicability language to clarify that pending cases and non-pending cases still within the statute of limitation will have "clear and convincing evidence" standard applied to them. (Department of Law)

Section 11. Because Sections 1, 2, & 3 will result in an Indirect Court Rule Amendment, those section of the bill will only take place if the vote on Section 9 receives a two-thirds vote of each house of the legislature. (Department of Law)

Section 12. Immediate effective date clause.

Citizen Review Panel
c/o Information Insights, Inc.
PO Box 73490
212 Front Street, Suite 100
Fairbanks, Alaska 99707

Sylvan Robb
907.450.2456
sylvan@iialaska.com

February 17, 2006

Tammy Sandoval
Deputy Commissioner
Office of Children's Services
P.O. Box 110630
Juneau, AK 99811

Dear Deputy Commissioner Sandoval:

As you know, a number of serious concerns regarding the operations of the Mat-Su OCS have been brought to the attention of the Citizen Review Panel (CRP) over the past one and a half years. You are aware that the CRP is charged with investigating such concerns. In that capacity, group members conducted a site visit and spoke with many staff of collaborating agencies as well as staff at the Mat-Su OCS to follow-up on these concerns. What follows is a report of our activities, our findings, and recommendations for addressing deficiencies and strengthening the existing positive attributes of the system in the Mat-Su.

Purpose of Visit:

Investigate alleged issues violating or not complying with policy and procedures in the Mat-Su OCS. If allegations are deemed to be true, highlight the patterns of problems we found and make recommendations to improve child welfare in the Mat-Su Valley by encouraging collaboration and the most effective use of existing resources.

Methodology

CRP members compiled a list of ten standardized questions to ask every agency interviewed (see attached). All primary child welfare agencies in the Mat-Su were interviewed with the exception of two who did not respond to CRP requests to meet (Alaska Family Resources and the Attorney General's Office). Teams of two or three CRP members (Dana Hallett, Susan Heuer, Carol Olson, and Fred Van Wallinga) visited all remaining agencies and interviewed a number of staff across a variety of positions and levels of responsibility within the agencies. These visits took place on January 31 and February 1, 2006. The agencies visited are listed below.

- Alaska State Troopers, Palmer Post
- Department of Juvenile Justice
- Kids are People
- Mat-Su Borough School District: 11 schools spanning K-12

- Mat-Su Services for Children and Adults
- Southcentral Regional Office/Mat-Su OCS
- The Children's Place
- Valley CASA
- Wasilla Police Department

Findings

These findings may or may not represent the true situation on the ground. However, they do represent the observations and perceptions of the staff interviewed.

Positives from agencies

- The agencies want to collaborate with OCS. They understand that OCS is the hub of the system and they are the spokes of the wheel. For the child welfare system to work most effectively to protect vulnerable children, everyone needs to work together.
- Several agencies noted that, in spite of the tremendous responsibility and thanklessness of the job, Mat-Su social workers have very low worker turnover and continue to come back to work day after day to "the hardest job in the world." Many people expressed their admiration for the OCS staff and said they could not do the job themselves.
- It was reported that a few years ago, two social workers did a training on child abuse at Colony High School and did a fantastic job. Also an annual meeting between school nurses and social workers was appreciated by the school staff which improved communication and built relationships between the two agencies.
- Every agency wanted to share some of OCS's burden for caring for Mat-Su's abused and neglected children because they know that the social workers are overwhelmed. They want to share their expertise to streamline services, to maximize the benefit to these children and their families, and make the job easier and more satisfying for the OCS staff.
- Every person interviewed said that they wanted to move on from the present conflicted interagency relationship and start fresh in the best interest of the children. No one wanted to rehash old business; they just want to get to work and do what they do best as a team.

Negatives from agencies

- It appears that OCS policies and procedures are not being followed on a consistent basis. The policies and procedures exist for good reason to protect children by removing some discretion from workers. While sometimes frustrating, the policies and procedures need to be followed every time in every case to ensure child safety and demonstrate objectivity and lack of bias to the public. Additionally, consistent application of the policies and

procedures enables OCS's partner agencies to experience consistent, high quality, professional behavior from OCS staff.

- Communication between the agencies and OCS is poor. One reflection of the poor communication is that OCS does not perceive that communication is poor. Given how closely the agencies and OCS must work together, and the stakes for vulnerable children if they do not, it is imperative that communication between these parties be open and timely.
- In many instances, there are ill feelings between the agencies and OCS. This has fueled an "us vs. them" mentality on both sides. Trust is lacking between the agencies and OCS; neither has faith the other's actions are motivated by a desire to keep children safe. Obviously, this is a major obstacle to improved collaboration and communication, and children are falling through the cracks or not being served because of bureaucratic stonewalling.
- There has been a plethora of reports of OCS burying reports of alleged sexual abuse of children by both agencies and individuals.

Strengths of Mat-Su OCS

- OCS recognizes the need to improve the quality of their partnership with collaborative agencies, especially their relationship with the Child Advocacy Center (CAC).
- OCS advocates a team approach.
- OCS initiated a Multidisciplinary Team (MDT) protocol group and perceives that the majority of cases are now going well.
- OCS acknowledged being in a "hunkering down" mode.

Weaknesses from Mat-Su OCS

- Mat-Su OCS's perception of current relationship with collaborative agencies is much rosier than interviews with those agencies revealed.
- Mat-Su OCS has an inclination to blame pressure of media, litigious inclinations of the Valley and a court system that favors parents, among others for their increased tendency to close ranks without admitting that some of the blame may be within OCS, in spite of the aforementioned situations.

Recommendations

The following recommendations are designed to begin to address some of the problems highlighted above. Given the severity of the problems and the gravity of a failure to act, we request that a timeline for addressing these recommendations by provided to the CRP Coordinator, Sylvan Robb, by March 3rd.

1. Action be taken to ensure that the Differential Response Program is being used at its maximum capacity. Efforts should also be vigorously pursued by the Deputy Commissioner to loosen the program criteria to allow more P3's to be referred, and documentation of those efforts should be sent to the CRP.

7 day response by 3 area grantees

2. OCS staff always be in attendance at MDT meetings. At the non-supervisory MDT meetings, mandatory attendance should be required of assigned social workers for each case who should come with documents (including protective services reports) to share. (For example, eight cases staffed would yield potentially eight social workers during the duration of the meetings.) Sometimes the list of MDT cases to be discussed does not include an OCS caseworker. An OCS staff member will be in attendance for potential child protection issues that may come up at an MDT case review. Discussion should be two-way dialog so each representative comes away fully updated and able to proceed to work on his/her portion of the child protection case. A supervisory representative of Mat-Su OCS will attend all supervisors' MDT meetings.

3. It is recommended that Deputy Commissioner Sandoval write a letter to Dianne Olson, Assistant Attorney General for the Human Resources Department of the Department of Law, and request an explanation in writing as to why disclosure policies regarding sharing of protective services reports with collateral child-protection agencies varies from area to area. If necessary, she should pursue this answer through the Attorney General to have the confidentiality issue resolved and standardized throughout the state. In her request to Ms. Olson, we recommend she emphasize that open communication is essential to effective child protection and encourage Ms. Olson to make that determination legally. We recommend that the Deputy Commissioner ensure that all OCS staff are aware of and operating in accordance with the interpretation.

4. A comprehensive training on confidentiality should be held in the Mat-Su OCS office. This training would be mandatory for all supervisors and social workers. Staff should be trained on state statute 47.10.93 Disclosure of Agency Records and OCS Policy 6.1.2 Confidentiality. It has become apparent that interagency confidentiality issues have been addressed at top administrative levels that would significantly reduce the barriers between collateral agencies and the Mat-Su OCS, but these have not been communicated to Mat-Su OCS. Once training has been given, the policy and procedure regarding confidentiality should be immediately implemented.

5. Every effort needs to be made to put the relationship between OCS and the Troopers back into balance. AS Statute 47 needs to be followed and turf wars left behind. It is unacceptable that the Troopers' perception is that Mat-Su OCS tries to make cases go away. Since OCS is perceived as "doing what they want to do," fences must be mended and this most important collaboration needs to be restored to its previously cooperative relationship. These two groups should be brought together with as many representatives as possible from each side to air differences and then proceed on an improved collaborative track. Deputy Commissioner Sandoval should preside at such a meeting along with Director of the Division of Alaska State Troopers so as to hear issues first hand. The same level of effort should apply to dealings with local law enforcement agencies as well.

6. To an agency, all requested that there be some sort of feedback regarding protective services reports. Every agency visited did not request details, just a call indicating reports have been followed through on or dropped. This would seem a simple courtesy (and is required by policies and procedures and statute) and not a violation of confidentiality and a relatively easy recommendation to take under advisement.

7. All incoming children be screened by either The Children's Place or a private physician. According to the CAPTA regulations, all children taken into OCS custody must have a medical evaluation and developmental screening (for those under 3) within 30 days. The Children's Place has two child abuse experts on staff and are available to perform these evaluations in conjunction with Mat-Su Services for Children and Adults. The policy should be that all children who do not have a personal primary physician be seen by The Children's Place for these evaluations to maximize the potential for identifying and documenting physical signs of child abuse and neglect. Use of other community resources like the urgent care centers is not an appropriate alternative for this population of children because they lack the appropriate training. Only if the child can be seen by his/her own physician should The Children's Place not be utilized for these exams. It also should be a standard referral by the social workers – not left to the discretion of the foster parents.

8. OCS should provide schools with information on the non-academic needs of children in their care. When OCS places a child in a new school situation, there should be an immediate (same day) consultation with the school nurse, counselor or principal to discuss the child's non-academic needs. This is critical for the school to provide the best services for the child while in school and to protect other children around the OCS client. This consultation would include generalized reasons why the child is in custody, information about the history of the child (at home/foster care, in the system for an extended period of time, residential treatment history, etc.) and current health/emotional concerns that the child has. This consultation would occur every time the child moves to a new school.

9. OCS will notify a child's school within 48 hours if the child has changed placement. This is a safety issue when schools do not have current information about how to locate caretakers. They often are unaware that children have been taken into custody at all and are unable to support the child through the traumatic adjustment into foster care or conversely, return home.

In light of these recommendations, there will be a follow up review in Mat-Su by the CRP within a reasonable period of time.

We hope this report will be read in the spirit in which it was intended—to improve OCS's services and, through achieving that goal, improve the safety of abused and neglected children. Due to the systemic lack of collaboration with affiliated agencies, it has become clear that the best interests of children are not being served in many cases. As was stated by the head of SCRO, the response of that office to public criticism and media highlights has been largely to "hunker down." This strategy has not worked. It is clear to

the CRP that the Mat-Su OCS would be better served if they were to adopt a strategy of openness and accountability to the collateral agencies with whom they share the responsibility to serve children. Our motivation is not to vilify Mat-Su OCS nor demean the efforts of the many caring, dedicated staff. We view OCS as our partner, not our adversary, and look forward to the day when our agenda is empty.

Sincerely,

Fred Van Wallinga
Chair, CRP

Questions for Interviewing Collateral Agencies:

1. Do you get direct reports of child abuse and neglect? If so do you contact OCS-What is their response time a)same day b)24hrs c)48hrs or more.

2. Is the feedback you get from the OCS office done in a timely manner?

3. Do you feel that you are working as a team to solve child abuse problems when working with the OCS office?

4. How is the communication between you and OCS workers and supervisors?

5. How would you characterize your relationship with OCS? Please expiain why you feel the way you do.

6. Did you offer a suggestion and not have it taken seriously by the OCS worker and you felt frustrated? Who and when?

7. Do you have any examples where OCS "dropped the "ball " so to speak, where a child was left in a situation that you felt was not safe?

8. What are some examples of what you think is working between you and OCS?

9. What suggestions do you have for working more effectively in partnership with OCS?

10. In general, are you satisfied with the process that is laid out for you? How could the process be improved? What part of the process would you not want to see changed?

HB

410

SENATE COMMITTEE REPORT

DATE: 3/3/06

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 410(JUD)

HB 410 REVISOR'S BILL

"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	X			
	X			
	X			
CHAIR: Ralph Seekins	✓			

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

LEGISLATION & REGULATIONS SECTION
P.O. BOX 110300
DIMOND COURT HOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 455-2520

March 3, 2006

Honorable Ralph Seekins
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol, Room 125
Juneau, AK 99801

Re: CSHB 410(JUD) -- (2006 Revisor's Bill)

Dear Senator Seekins:

The Department of Law has reviewed CSHB 410(JUD) (2006 revisor of statutes bill). The bill makes technical changes to improve Alaska statutes.

We appreciate the revisor's excellent efforts in preparing this necessary legislation.

We find no legal issues with HB 410.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

DEB:pvp

cc: Pam Finley
Revisor of Statutes

Randy Ruaro, Legislative Contact
Dept. of Law

Kevin Jardell, Legislative Director
Office of the Governor

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 6, 2006

SUBJECT: CSHB 410(JUD); 2006 Revisor's Bill

TO: Senator Ralph Seekins
Chair of the Senate Judiciary Committee

FROM: Pam Finley
Revisor of Statutes

The following is a sectional analysis of CSHB 410(JUD), the 2006 revisor's bill. Please note comments about bill sections 13 and 17 concerning the intent of the House Judiciary Committee, with which I concur. The bill is prepared under AS 01.05.036, which provides, in part, that the revisor of statutes:

> ...shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state.

To assist the reader in understanding the bill, I have summarized the contents by listing sections that have similar purposes or effects.

Sections that delete, repeal, or update obsolete provisions: Sections 1, 11, 19, 27, 28, 29, 30, and 31 amend or repeal provisions that have become obsolete through other legislative action.

Sections that correct errors or oversights: Sections 2, 3, 5, 8, 9, 10, 12, 14, 16, 20, 21, 22, 23, 24, 25, 26, 32, 36, 37, 40, 41, and 42 correct errors or oversights.

Sections that improve the form or substance of the law: Sections 4, 6, 7, 13, 15, 17, 18, 33, 34, 35, 38 and 39 propose amendments to improve the form or substance of the statutory law of Alaska.

SECTIONAL ANALYSIS

Bill section 1 substitutes "United States Postal Service" for "United States Post Office" in the definition of "send" in AS 04.11.499(2). "United States Postal Service" is the correct term for the mail service, as opposed to a building. This amendment was requested by the Department of Law.

Bill sections 2 and 3 substitute the correct name of the Alaska Rules of Civil Procedure in AS 09.45.825 and 09.45.830.

Bill section 4 adds the article "the" and "n" to the first sentence of AS 09.55.536 to make it more readable.

Bill section 5 amends AS 09.65.161 to change "public health significance" to "public health importance". Section 5, ch. 54, SLA 2005, a Governor's bill, amended AS 18.05.040(a)(1) to substitute "disease or other condition of public health importance" for "diseases of public health significance." See also AS 18.15.355, added by sec. 8, ch. 54, SLA 2005. Unfortunately, ch. 54, SLA 2005 did not amend AS 09.65.161, which confers immunity on those reporting the health care data required to be reported "for conditions or diseases of public health significance." This bill section amends AS 09.65.161 so that the language in that statute matches the language used in ch. 54, SLA 2005 and current AS 18.05.

Bill sections 6 and 7 amend AS 11.46.130(a)(6) and 11.46.220(c)(1)(C), respectively, to improve the language. A person is convicted of an offense under a statute, not convicted of the statute.

Bill sections 8 - 10 substitute "performance designation" for "achievement designation" in AS 14.03.123 (c), (d), and (e). The term "performance designation" is used in AS 14.03.123(a) and (b) and 14.03.120 and according to the Department of Education and Early Development is the preferred term.

Bill section 11 removes a reference to Bureau of Indian Affairs schools from the definition of "public schools" in AS 14.60.010 because there are no longer BIA schools in Alaska. However, at the Department of Education and Early Development's request and to preserve the authority of the Department and regional school boards, a reference to BIA schools is retained in AS 14.07.030(2), AS 14.08.101(2), and AS 14.14.110(a).

Bill section 12 amends AS 15.07.137 to insert "identification" between "voter" and "numbers". "Voter identification number" is the term that is used in AS 15.07.195(a)(4) and AS 15.60.010(18).

Bill section 13 amends AS 15.10.105(a) to create the division of elections in statute. The current language of AS 15.10.105 gives the power to control and supervise the division of elections to the lieutenant governor, but does not formally create the division. This amendment does so. The House Judiciary Committee noted, and I concur, that the creation of a division in statute is unusual for a revisor's bill and is done here only because of the clear assumption throughout the relevant body of existing law that the division already exists. This bill section should not be used as precedent for the creation of a division in statute in other circumstances.

Bill section 14 amends AS 15.20.072(c) to insert "identification" between "voter" and "number". See explanation for bill section 12.

Bill section 15 defines "division" as the division of elections for purposes of the Alaska Election Code. The term "division" is used frequently throughout AS 15, but is not defined. See also explanation for bill section 13.

Bill section 16 amends AS 21.89.080(b) by substituting a reference to AS 09.80, the Uniform Electronic Transactions Act, for a reference to AS 09.25.500 - 09.25.520, which covered electronic transactions and was repealed by the same bill that enacted AS 09.80 (ch. 110, SLA 2004). The error occurred because AS 21.89.080(b) was also enacted in 2004.

Bill section 17 adds a section creating the division of workers' compensation and providing that the commissioner shall appoint the director. Chapter 10, FSSLA 2005 defined and referred to both the division and director of workers' compensation, but did not establish the division or the position of director in statute. The Department of Law agreed that a statute establishing the division and position of director would be a good idea. (Chapter 10, FSSLA 2005 was a governor's bill.) The language used in bill section 17 is based on AS 21.06.010 and 21.06.020 (division of insurance) and AS 38.05.005 - 38.05.015 (division of lands). The House Judiciary Committee noted, and I concur, that the creation of a division in statute is unusual for a revisor's bill and is done here only because of the clear assumption throughout the relevant body of existing law that the division already exists. This bill section should not be used as precedent for the creation of a division in statute in other circumstances.

Bill section 18 gives a short title ---The Legislative Ethics Act--- to AS 24.60. This would make it easier to refer to that chapter in bill titles and discussions.

Bill section 19 amends AS 26.23.040(e)(12) to substitute "49 U.S.C. 5116(a)(2)(B)" for "49 U.S.C. Appx. 1815(a)(3)." AS 26.23.040(e)(12) was added by sec. 3, ch. 32, SLA 1994. When ch. 32, SLA 1994 was drafted, 49 U.S.C. Appx. 1815(a)(3) required a state receiving a planning grant under that section to make available at least 75 percent of the grant to local emergency planning committees. However, later in 1994, Congress repealed 49 U.S.C. Appx. 1815 and transferred its provisions to 49 U.S.C. 5116. See P. L. 103-272. And, even later in 1994, sec. 7(c) of P.L. 103-429 added what is now 49 U.S.C. 5116(a)(3). Despite the existence of 49 U.S.C. 5116(a)(3), 49 U.S.C. 5116(a)(2)(B) corresponds to the language of former 49 U.S.C. Appx. 1815(a)(3), which is why that substitution is made in this bill section.

Bill sections 20 and 21 amend AS 28.10.181(p) and (q) to substitute "person in the Department of Military and Veterans' Affairs in charge of veterans' affairs" for "director of division of veterans affairs." There is no division of veterans affairs. There currently is an office of veterans' affairs, but it is created administratively rather than in statute and

therefore could disappear at any time. The suggested language would cover any administrative unit of the DMVA.

Bill section 22 amends AS 29.05.200(b) to substitute the office of management and budget for the Department of Administration as the entity that the Department of Commerce, Community, and Economic Development is to notify about the amount that should be budgeted for municipal organization grants. This change was requested by the OMB.

Bill sections 23 and 24 amend AS 32.11.220 and 32.11.230, respectively, to substitute "does not specify the allocation" for "does not specify". The reference to "allocation" is to the requirement that appears in the preceding sentence of the respective sections. This makes the sentence more readable. (The Uniform Act used the phrase "does not so provide".)

Bill section 25 amends AS 32.11.300 by substituting "interests" for "interest". This conforms the section to the language of the Uniform Act.

Bill section 26 adds "AS 32.06" and "former" before "AS 32.05" in the definition of "qualifying entity" as used in AS 36.30.170(e). This change should have been made in ch. 115, SLA 2000, which repealed AS 32.05, the old Uniform Partnership Act, and enacted AS 32.06, the current Uniform Partnership Act.

Bill sections 27 - 31 amend AS 37.05.530(a), (c), (d), (e), and (g) to reflect that the provisions of 42 U.S.C. 6508 were transferred so that the relevant provisions now appear at 42 U.S.C. 6506a. The provision governing receipts is at 6506a(*l*). See section 347(a)(2), P.L. 109-58.

Bill section 32 amends the definition of "former member" in AS 39.35.680 to delete a reference to an employee who is eligible for a refund under AS 39.35.200(b). In sec. 24, ch. 92, SLA 2004, the first sentence of AS 39.35.200(b)---which provided for a refund to an employee with less than five years of credited service and less than $1,000 in the account---was deleted. AS 39.35.200(b) no longer provides for a refund.

Bill sections 33 and 34 amend AS 39.50.200(a) and (b) to move the members of the board of trustees, the executive director, and the investment officers of the Alaska Permanent Fund Corporation from the definition of "state commission or board" in subsection (b) to the definition of "public official" in subsection (a). AS 37.13.110 provides that the members of the board, executive director, and investment officers are subject to AS 39.50. The amendments proposed by bill sections 33 and 34 would place these positions in the correct part of the definitions for AS 39.50. The Permanent Fund Corporation agreed that these amendments were appropriate.

Bill section 35 adds a short title for AS 39.52. This chapter is commonly referred to as the Alaska Executive Branch Ethics Act, but the short title does not exist in law.

Bill section 36 amends AS 42.45.010(b)(2) to make subparagraphs (B) and (C) consistent with the paragraph's lead-in language. In sec. 1, ch. 36, SLA 2004, "or for bulk fuel, waste energy, energy conservation, energy efficiency, or alternative energy facilities or equipment" was added to the lead-in language of AS 42.45.010(b)(2). However, the same language was not added to subparagraphs (B) and (C). The Department of Law agrees that the same language should have been added to the subparagraphs. (Chapter 36, SLA 2004 was a Governor's bill.)

Bill section 37 amends AS 43.55.013(g) by adding "rate" after "monthly production" in the first sentence. The term used throughout this section (and specifically in the second sentence of AS 43.55.013(g)) is "monthly production rate." It is my understanding that "monthly production rate" means the rate of production per month. This corrects an error in ch. 116, SLA 1981.

Bill section 38 adds definitions of "qualified regional seafood development association" and "seafood development region"---terms that are used but not defined in AS 43.76.350 - 43.76.399. The meanings of the terms were clear in ch. 53, SLA 2005, which enacted both AS 43.76.350 - 43.76.399 and AS 44.33.065, but a definition is needed now that the provisions are in different parts of the statutes.

Bill section 39 amends AS 44.33.502 to substitute a reference to the first, second, third, and fourth judicial districts for a reference to the Southeastern, Southcentral, Central, and Northwestern Senatorial Districts, which no longer exist. The judicial districts are roughly equivalent to the old Senatorial Districts. Although the Native Art Competitions have not been held for many years due to lack of funding, if they were reinstated, it would be a good idea to have the regions be easily identifiable.

Bill section 40 modifies AS 46.40.210(1)----the definition of "area which merits special attention" for the purposes of the coastal management program---by substituting "the department's" for "council". Chapter 24, SLA 2003, which was a Governor's bill, repealed the Alaska Coastal Policy Council and transferred responsibility for the development and implementation of the Alaska coastal management program to the Department of Natural Resources. The Department of Law has asked that "department" be substituted for "council" in this definition to reflect that transfer of responsibility and this amendment is consistent with the department's power under AS 46.40.040(a)(1)(F).

Bill section 41 amends sec. 26, ch. 28, SLA 2000, which will repeal and reenact AS 12.25.190(c) when the boating provisions of AS 05.25 are repealed (which is currently scheduled for July 1, 2010, at the latest). AS 12.25.190(c) exempts certain violations from the requirement that the offender promise to appear in court. Under the amendment proposed by this revisor's bill section, a reference to AS 05.45.100 (skiing violations), added to AS 12.25.190(c) by ch. 64, SLA 2004, would be retained even when the reference to AS 05.25.090(b) is deleted. Under sec. 1, ch. 28, SLA 2000, intervening amendments to laws repealed and reenacted under ch. 28, SLA 2000 are not to be

retained. It is, however, difficult to understand why a reference to skiing violations under AS 05.45.100 should be deleted from AS 12.25.190(c) just because a reference to boating provisions is being deleted. Accordingly, sec. 26, ch. 28, SLA 2000 is amended so that the reference to skiing provisions will be retained.

Bill section 42 repeals several sections. The reasons for the repeals are set out below, and the text of the provisions is attached at the end of this memo.

AS 14.08.031(d) requires BIA schools to be included in a regional educational attendance area boundary. There are no longer BIA schools in Alaska. See explanation for bill section 11.

AS 14.20.215(8) defines "unconditional discharge," a term that is no longer used in AS 14.20.010 - 14.20.215. It was used in former provisions of AS 14.20.020(f) and 14.20.030(b), and the definition should have been repealed when those provisions were rewritten in secs. 17 and 18, ch. 81, SLA 1998.

AS 18.56.590 requires an annual report about the housing assistance loan fund. The fund was repealed by ch. 134, SLA 2004. Because ch. 134, SLA 2004 was a Governor's bill, I asked the Department of Law whether they would prefer to have AS 18.56.590 repealed or amended to refer to the housing assistance loan "program." The Department of Law requested repeal of AS 18.56.590 as consistent with ch. 134, SLA 2004.

AS 44.99.009 establishes the Governor as the prime sponsor for purposes of the federal Comprehensive Employment and Training Act of 1973. However, CETA was repealed in 1982 when the Job Training Partnership Act was enacted. Accordingly, AS 44.99.009 is no longer needed.

AS 47.12.240(g) should have been repealed in ch. 95, SLA 2004. The former provisions of AS 47.12.240(c)(3) allowed a minor to be incarcerated in a correctional facility if the incarceration constituted a protective custody detention of the minor authorized by AS 47.37.170(b). This provision was deleted and what was formerly (c)(4) was renumbered as (c)(3) in sec. 1, ch. 95, SLA 2004. However, ch. 95, SLA 2004 did not repeal or amend the provisions of AS 47.12.240(g), which provides that the provisions of AS 47.37.170(i) apply to a minor incarcerated in a correctional facility when authorized by (c)(3) of that section. Because ch. 95, SLA 2004 was a Governor's bill, I brought this to the attention of the Department of Law, which agreed that AS 47.12.240(g) should be repealed.

Bill section 43 gives the bill an immediate effective date.

Please give me a call if you have any questions about the above.

TEXT OF REPEALED PROVISIONS

AS 14.08.031(d): U.S. Bureau of Indian Affairs schools shall be included in a regional educational attendance area boundary.

AS 14.20.215(8):

(8) "unconditional discharge" has the meaning given in AS 12.55.185.

AS 18.56.590: Annual report.

To further ensure effective budgetary decision making by the legislature, the corporation shall prepare a complete accounting of the housing assistance loan fund and notify the legislature each year by January 10 that the accounting is available. The accounting must consist of an audit by an independent outside auditor for that year. The accounting must include a full description of all mortgage loan interest and principal repayments and program receipts for purposes of programs under AS 18.56.400 - 18.56.600, including mortgage loan commitment fees, received by or accrued to the corporation during the preceding fiscal year, and all income earned on assets held by the corporation for purposes of programs under AS 18.56.400 - 18.56.600 during that period.

AS 44.99.009: Governor as prime sponsor.

(a) The governor is authorized to participate as a prime sponsor in the Comprehensive Employment and Training Act of 1973 (P.L. 93-203) as amended. The governor may delegate the functions as a prime sponsor to such other state agency as, in the exercise of discretion, the governor sees fit.

(b) The governor, or the state agency to which the governor has delegated the functions, may adopt regulations necessary to carry out the functions as a prime sponsor.

(c) The governor shall submit as part of the annual budget submission to the legislature a complete program budget for state participation in the Comprehensive Employment and Training Act of 1973 (P.L. 93-203) as amended.

AS 47.12.240(g): The provisions of AS 47.37.170(i) apply to a minor incarcerated in a correctional facility when authorized by (c)(3) of this section.

PF:med
06-194.med

Enclosure

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 410(JUD)
(H) Publish Date: 2/24/06

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Revisior's Bill
RDU: Alaska Court System
Component: Trial Courts
Sponsor: Rules Committee by Request
Requester: Legislative Budget and Audit
Component No.:

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 ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
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)*

The court system does not anticipate any fiscal impact from the passage of HB 410.

Prepared by: Doug Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 2/21/06 @ 2:30 pm
Approved by: Doug Wooliver for Stephanie Cole, Adminstrative Director
Date 2/21/2006
Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 410(JUD)
(H) Publish Date: 2/24/06

Revision Date/Time (Note if correction):
Dept. Affected: All
Title: Revisor's Bill
RDU
Component
Sponsor: House Rules Committee
Requester: House Judiciary Committee
Component No.

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 ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
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 legislation would not have a significant fiscal impact on any state agency.

Prepared by: Jack Kreinheder, Senior Analyst
Phone 465-4676
Division: Office of Management and Budget
Date/Time 2/21/06 10:18 AM
Approved by: Cheryl Frasca, Director
Date 2/21/2006
Agency: Office of Management and Budget

(Revised 9/7/2005 OMB)

HB

414

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 2, 2006

SUBJECT: Possible title change issue related to SCS for CS for HB 414(JUD) (Work Order Number 24-LS1565\R)

TO: Senator Ralph Seekins
Chair of the Senate Judiciary Committee

FROM: Dan Wayne DW
Legislative Counsel

Enclosed is the final draft SCS for CS for HB 414(JUD) requested by the Senate Judiciary Committee.

The expansion of the definition of "parent" on page 3, lines 21 - 26, to include "stepparent" might raise a question as to whether a title change is required. A legal challenge is possible on the basis that failure to specifically include "stepparent" does not give legally adequate notice of the bill's contents and therefore the bill is procedurally or legally deficient. In my opinion the draft bill would withstand such a challenge because notice in the title is legally adequate; "stepparent" has been added to the definition of parent already in the bill, the title gives prominent notice of "parent or guardian," and a reasonable person would assume that "parent or guardian" might include "stepparent."

I raise the possibility of a title-based challenge for your consideration, and stand ready to change the title and prepare a draft title-change resolution at your request.

If I may be of further assistance, please advise.

DCW:ljw
06-231.ljw

Enclosure

ORIGINAL

SENATE COMMITTEE REPORT

DATE: 4/25/06

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 414(RLS) am

HB 414 INTERCEPTION OF MINOR'S COMMUNICATIONS

"An Act relating to the interception of the private communications of a minor."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			X	
			X	
	X			
CHAIR: Ralph Seekins	✓			

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 414, relating to the interception of the private communications of a minor.

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

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 414, relating to the interception of the private communications of a minor.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 2, 2006

SUBJECT: Possible title change issue related to SCS for CS for HB 414(JUD)
(Work Order Number 24-LS1565\R)

TO: Senator Ralph Seekins
Chair of the Senate Judiciary Committee

FROM: Dan Wayne DCW
Legislative Counsel

Enclosed is the final draft SCS for CS for HB 414(JUD) requested by the Senate Judiciary Committee.

The expansion of the definition of "parent" on page 3, lines 21 - 26, to include "stepparent" might raise a question as to whether a title change is required. A legal challenge is possible on the basis that failure to specifically include "stepparent" does not give legally adequate notice of the bill's contents and therefore the bill is procedurally or legally deficient. In my opinion the draft bill would withstand such a challenge because notice in the title is legally adequate; "stepparent" has been added to the definition of parent already in the bill, the title gives prominent notice of "parent or guardian," and a reasonable person would assume that "parent or guardian" might include "stepparent."

I raise the possibility of a title-based challenge for your consideration, and stand ready to change the title and prepare a draft title-change resolution at your request.

If I may be of further assistance, please advise.

DCW:ljw
06-231.ljw

Enclosure

CS FOR HOUSE BILL NO. 414(JUD)

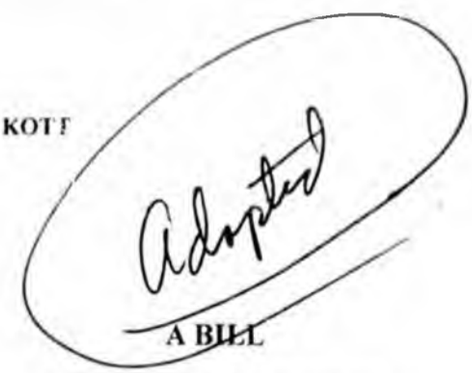
IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 3/28/06
Referred: Rules

Sponsor(s): REPRESENTATIVE KOTT



A BILL

FOR AN ACT ENTITLED

"An Act relating to allowing a parent or guardian of a minor to intercept the private communications of the minor and to consent to an order authorizing law enforcement to intercept the private communications of the minor."

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

* **Section 1.** AS 12.37.030 is amended by adding a new subsection to read:

(b) In addition to exercising authority under (a) of this section, on consideration of an application relating to a private communication of a minor, the court may enter an ex parte order authorizing the interception of the private communication. The court may enter the order only if the court determines, on the basis of the application, that there is probable cause, which may include a finding that a parent of a minor has consented in good faith to the interception of a communication of the minor based on the parent's objectively reasonable belief that it is necessary for the welfare of the minor and is in the best interest of the minor. In this subsection, "minor" and "parent" have the meanings given in AS 42.20.390.

* **Sec. 2.** AS 42.20.320(a) is amended to read:

(a) The following activities are exempt from the provisions of AS 42.20.300 and 42.20.310:

(1) listening to a radio or wireless communications of any sort where the same are publicly made;

(2) hearing conversation when heard by employees of a common carrier by wire incidental to the normal course of their employment in the operation, maintenance, or repair of the equipment of the common carrier by wire, provided the information obtained is not used or divulged in any manner by the hearer;

(3) a broadcast by radio or other means whether it is a live broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations that are overheard are incidental to the main purpose for which the broadcast is then being made;

(4) recording or listening with the aid of any device to an emergency communication made in the normal course of operations by a federal, state, or local law enforcement agency or institutions dealing in emergency services, including hospitals, clinics, ambulance services, fire fighting agencies, a public utility emergency repair facility, civilian defense establishment, or military installations;

(5) inadvertent interception of telephone conversations over party lines;

(6) a peace officer, or a person acting at the direction or request of a peace officer, engaging in conduct authorized by or under AS 12.37;

(7) interception, listening, or recording of communications by a peace officer, or a person acting under the direction or request of a peace officer, in an emergency where the communications are received from a device that intercepts the communications of a person

(A) barricaded and not exiting or surrendering at the direction or request of a peace officer, in circumstances where there is an imminent risk of harm to life or property;

(B) holding another person hostage; or

(C) threatening the imminent illegal use of an explosive;

(8) the interception by a peace officer of an oral communication by use of an electronic, mechanical, or other eavesdropping device that is concealed on or carried on the person of the peace officer and that transmits that oral communication by means of radio to a receiving unit that is monitored by other peace officers, if

(A) the interception and monitoring occurs

(i) during the investigation of a crime or the arrest of a person for a crime; and

(ii) for the purpose of ensuring the safety of the peace officer conducting the investigation or making the arrest;

(B) the peace officer who intercepts the oral communication is a party to the communication and has consented to the interception; and

(C) the communication intercepted is not recorded;

(9) interception of a private communication to which a minor is a party by a parent of the minor, except that interception of a private communication between a minor and the minor's attorney or guardian ad litem is not exempt from the provisions of AS 42.20.300 and 42.20.310.

* **Sec. 3.** AS 42.20.390 is amended by adding new paragraphs to read:

(11) "minor" means a child under 18 years of age who has not had the disabilities of a minor removed as described in AS 09.55.590;

(12) "parent" means a natural person who is the minor's natural or adoptive parent, or who has been legally appointed as the minor's guardian, with parental rights that are not terminated by court order and who is not prohibited by court order from communicating with the minor.

Step parent living in the home w/ a natural parent.

ALASKA STATE LEGISLATURE

Chair:
Legislative Council

Member:
Community and Regional Affairs
Judiciary
Labor and Commerce – Vice Chair

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-3777
Fax: (907) 465-2819
Toll Free (877) 861-5688

Interim:
10928 Eagle River Road – Suite 238
Eagle River, AK 99501-2133
Phone: (907) 694-8944
Fax: (907) 694-8945

REPR E PETE KOTT
DISTRICT 17 – EAGLE RIVER

Memorandum
For
House Bill 414
Committee Substitute for the House Rules Committee

Currently, under Alaska law, it is illegal for a parent to intercept the private communications of their children, including telephonic or electronic without consent of either party. The proposed legislation carves out two exceptions:

- The court may enter an ex parte order authorizing the interception of the private communication if the court determines, on the basis of the application that there is probable cause to believe that the party has committed or is about to be a victim of, or witness of a felony or misdemeanor, or the health or safety of a minor is in danger, and may include a finding that the parent of a minor has consented in good faith to the interception of a communication of the minor based on the parent's objectively reasonable belief that it is necessary for the welfare of the minor and is in the best interest of the minor.
- Allows a parent to intercept a private communication to which a minor is a party if the parent is acting in good faith and has an objectively reasonable belief that the interception is in the best interest of the minor. It prohibits the interception of the communication of a minor and the minor's attorney, guardian ad litem, or a child custody investigator.

Evidence obtained may be considered by the guardian ad litem or a child custody investigator, or may be admitted in court or official proceeding only if it is found that the parent was acting in good faith and has an objectively reasonable belief that the interception is necessary for the welfare of the minor and is in the best interest of the minor.

With passage of this legislation, we allow parents and guardians to protect their children from predators and other unhealthy individuals. HB 414 provides them the tools to do so.

I appreciate your support.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 414(HES)
(H) Publish Date: 2/17/06

Revision Date/Time (Note if correction):
Dept. Affected:

Title: Interception of Minor's Communication
RDU: Alaska Court System
Component: Trial Courts

Sponsor: Representative Kott
Requester:
Component No.:

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 ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
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)*

The court system does not anticipate any fiscal impact from the passage of HB 414.

Prepared by: Doug Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 2-10-06 @ 8:45 am
Approved by: Doug Wooliver for Stephanie Cole, Adminstrative Director
Date 2/10/2006
Agency: Alaska Court System

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 414(JUD)
(H) Publish Date: 3/28/06

Revision Date/Time (Note if correction): 3/10/06 / 11:29 a.m.
Dept. Affected: Administration

Title: An act relating to allowing a parent or guardian of a minor to intercept the private communication..
RDU: Legal and Advocacy Services
Component: Office of Public Advocacy

Sponsor: Representative Kott
Requester: (H) JUD
Component No.: 43

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
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 legislation allows a court to issue an ex parte order authorizing the interception of a private communication of a minor if a parent or guardian has consented to the interception in good faith based on an objectively reasonable belief that it is necessary for the welfare of the child or in the child's best interest. This legislation further exempts the interception of such communications from the Communication, Eavesdropping, and Wiretapping Act (AS 42.20.300-310). However, minors' communications with an attorney or guardian ad litem would not be exempted from this act.

It is not expected that this would have a fiscal impact on OPA.

Prepared by: Joshua P. Fink, Director
Phone (907) 269-3500
Division: Office of Public Advocacy
Date/Time 3/10/06 at 11:29 a.m.

Approved by: Mike Tibbles, Deputy Commissioner
Date 3/13/2006
Agency: Administration

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 414(JUD)
(H) Publish Date: 3/28/06

Revision Date/Time (Note if correction): 3/11/06 / 9:35 a.m.
Dept. Affected: Administration

Title: An act relating to allowing a parent or guardian of a minor to intercept the private communication..
RDU: Legal and Advocacy Services
Component: Public Defender Agency

Sponsor: Representative Kott
Requester: (H) JUD
Component No. 43

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
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 legislation allows a court to issue an ex parte order authorizing the interception of a private communication of a minor if a parent or guardian has consented to the interception in good faith based on an objectively reasonable belief that it is necessary for the welfare of the child or in the child's best interest. This legislation further exempts the interception of such communications from the Communication, Eavesdropping, and Wiretapping Act (AS 42.20.300-310). However, minors' communications with an attorney or guardian ad litem would not be exempted from this act.

It is not expected that this would have a fiscal impact on the Agency.

Prepared by: Quinlan Steiner, Director
Phone (907) 269-3500
Division: Public Defender Agency
Date/Time 3/11/06 / 9:35 a.m.

Approved by: Mike Tibbies, Deputy Commissioner
Date 3/13/2006
Agency: Administration

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: CSHB 414(JUD)
(H) Publish Date: 3/28/06

Revision Date/Time (Note if correction):
Dept. Affected:

Title: Interception of Minor's Communications
RDU: Alaska Court System
Component: Trial Courts

Sponsor: Representative Kott
Requester:
Component No.:

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 ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
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)*

The court system does not anticipate and fiscal impact from the passage of CSHB 414(HES).

Prepared by: Doug Wooliver, Administrative Attorney — Phone 463-4750
Division: Alaska Court System — Date/Time 3/13/06 @ 11:30 am
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director — Date 3/13/2006
Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 5
Bill Version: CSHB 414(JUD))
(H) Publish Date: 3/28/06

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title "An Act relating to allowing a parent or guardian of a minor to intercept the private communications..."
RDU Alaska State Troopers
Component AST Detachments
Sponsor Representative Kott
Requester House Judiciary Committee
Component No. 2325

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 ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
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: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The proposed language in this legislation will not have a fiscal impact on the Department of Public Safety.

Prepared by: Lieutenant James Helgoe
Phone 907-269-4532
Division Alaska State Troopers
Date/Time 3/13/06 10:13 AM
Approved by: Commissioner William Tandeske
Date 3/13/2006
Agency Department of Public Safety

(Revised 9/23/2004 OMB)

LEGISLATIVE RESEARCH REPORT

FEBRUARY 6, 2006

REPORT NUMBER 06.130

VICARIOUS CONSENT: PARENTAL CONSENT FOR INTERCEPTION OF CHILD COMMUNICATIONS

PREPARED FOR REPRESENTATIVE PETE KOTT

BY CHUCK BURNHAM, LEGISLATIVE ANALYST

You asked about parental consent for the interception of child communications. Specifically, you wanted to know which states have codified such exceptions into their wiretapping laws. In addition, you asked about court decisions that upheld this practice, which, in legal terminology, is known as "vicarious consent."

Generally, in the absence of a court order, intercepting written or oral communications without the permission of at least one party to that communication is against the law. The federal government and 49 states (all but Vermont) have laws regarding wiretapping and the interception of communications.[1] Georgia is, however, the only state we found that has successfully included vicarious consent in statute as a legitimate exception to the prohibitions on interception of communications established under those laws.[2]

Federal law and many states' laws allow what is known as a "one-party" exception under which a participant in a communication may record that interaction without the knowledge or permission of other parties.[3] In recent years, in circumstances where the court determines such action is in the best interest of the child, a number of courts have extended the one-party exception to include the interception by parents of communications involving their children in circumstances where the parents believe their authority as custodial parent, or the safety of a child, is being threatened.

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[1] The federal wiretap statute was enacted in 1968 as part of the Omnibus Crime Control and Safe Streets Act. Courts have held that states' wiretap laws must include, at a minimum, the prohibitions on intercepting communications that are included in federal law.

[2] We include, as Attachment A, Georgia Code § 16-11-66(d).

[3] The person recording must, however, be generally known by the other parties to be involved in the communication in question. In other words, the recording party must not be eavesdropping in the literal sense.

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907-465-3908 (fax)

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In 1993, the U.S. District Court for the District of Utah became the first to judicially address the issue of vicarious consent. In the case, Denise Delaney recorded conversations between her children and the children's father, who Ms. Delaney was divorcing. The father brought suit under federal wiretapping laws whereupon Ms. Delaney admitted she made the recordings, but claimed her actions were necessary because her former husband was interfering with her ability to raise the children to whom she was awarded custody. The court determined that as long as the guardian of the child acts on an "objectively reasonable" good faith basis, that guardian has a right to consent on behalf of her minor children to the recording of phone conversations in order to fulfill the guardian's statutory mandate to act in the best interests of the child.[4]

In recent years, a small number of court cases have expanded this practice to include its use in criminal proceedings. Most commonly, these have been cases in which parents record a child's telephone conversations with a non-family adult who, the parents believe, may be putting the child in harm's way by either sexually abusing or otherwise involving the child in criminal activity. Overall, however, the number of cases involving vicarious consent—particularly the number of such criminal cases—is relatively small.

In the Summer 2005 edition of the *Seattle University Law Review*, Daniel R. Dinger, a prosecuting attorney from Ada County, Idaho, published "Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution." This article, which we include as Attachment B, provides a statutory and judicial history of the vicarious consent doctrine. Further, Mr. Dinger offers common criticisms of the doctrine and argues strongly for the adoption of vicarious consent exceptions to wiretapping prohibitions in both state statutes and the courts.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

---

[4] *Thompson v. Delaney* 838 F. Supp. 1535 (D. Utah 1993). This and all information regarding court cases in this report are from Daniel R. Dinger, "Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution," *Seattle University Law Review*, 28-955, Summer 2005.

Attachment A

Georgia Code § 16-11-66(d).

1 of 1 DOCUMENT

TITLE 16. CRIMES AND OFFENSES
CHAPTER 11. OFFENSES AGAINST PUBLIC ORDER AND SAFETY
ARTICLE 3. INVASIONS OF PRIVACY
PART 1. WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

O.C.G.A. § 16-11-66 (2005)

§ 16-11-66. Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception

(a) Nothing in *Code Section 16-11-62* shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(b) After obtaining the consent required by this subsection, the telephonic conversations or electronic communications to which a child under the age of 18 years is a party may be recorded and divulged, and such recording and dissemination may be done by a private citizen, law enforcement agency, or prosecutor's office. Nothing in this subsection shall be construed to require that the recording device be activated by the child. Consent for the recording or divulging of the conversations of a child under the age of 18 years conducted by telephone or electronic communication shall be given only by order of a judge of a superior court upon written application, as provided in subsection (c) of this Code section, or by a parent or guardian of said child as provided in subsection (d) of this Code section. Said recording shall not be used in any prosecution of the child in any delinquency or criminal proceeding. An application to a judge of the superior court made pursuant to this Code section need not comply with the procedures set out in *Code Section 16-11-64*.

(c) A judge to whom a written application has been made shall issue the order provided by subsection (b) of this Code section only:

(1) Upon finding probable cause that a crime has been committed;

(2) Upon finding that the child understands that the conversation is to be recorded and that such child agrees to participate; and

(3) Upon determining that participation is not harmful to such child.

A true and correct copy of the recording provided for in subsection (b) of this Code section shall be returned to the superior court judge who issued the order and such copy of the recording shall be kept under seal until further order of the court.

(d) 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.

HISTORY: Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3006, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1993, p. 565, § 1; Ga. L. 1994, p. 97, § 16; Ga. L. 2000, p. 491, § 4.

NOTES:

LAW REVIEWS.—For note on 1993 amendment of this section, see *10 Ga. St. U.L. Rev. 109 (1993)*.

For comment on *Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509 (1977)*, see *29 Mercer L. Rev. 351 (1977)*.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Conversations in Furtherance of Crime

GENERAL CONSIDERATION

WHEN THIRD PARTY MAY INTERCEPT, RECORD, AND DIVULGE A CONVERSATION. — *O.C.G.A. 16-11-66* allows a third party to intercept, record, and divulge conversation, (1) where parties to conversation consent, or (2) where message is a crime or is directly in furtherance of a crime and one party to conversation consents. *Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509*, on remand, *142 Ga. App. 802, 237 S.E.2d 243 (1977)*, for comment, see *29 Mercer L. Rev. 351 (1977)*.

DISCLOSURE UNDER FORMER PARAGRAPH (B)(7) OF *O.C.G.A. § 16-11-64* was not required where consent of one party is received under *O.C.G.A. § 16-11-66*. *Luck v. State, 163 Ga. App. 657, 295 S.E.2d 584 (1982)*.

CHILDREN'S TELEPHONE CALLS. — *O.C.G.A. § 16-11-66* does not allow parents to vicariously consent to interceptions of their children's telephone calls. *Bishop v. State, 241 Ga. App. 517, 526 S.E.2d 917 (1999)*.

A child can not give consent to the recording of the child's phone calls either by implication or by subsequent ratification. *Bishop v. St[illegible] 241 Ga. App. 517, 526 S.E.2d 917 (1999)*.

FINDING OF CONSENT NOT ERRONEOUS WHERE THERE IS CONFLICTING EVIDENCE.—The denial of defendants' motion to suppress the admission of the two tape recordings of their conversations with an informant made on the ground that the informant did not consent to the conversations being recorded is not clearly erroneous where the evidence on this issue was in conflict, with several law officers testifying that the informant was fully aware of what the informant was doing and was not coerced into consenting to the conversations and the recording thereof and the informant's testimony, while somewhat equivocal, indicated the contrary. *Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983)*.

FORMER CODE 1933, § 26-3006 (SEE *O.C.G.A. § 16-11-66*) *DEALT SOLELY WITH INTERCEPTION AND ACTS FOLLOWING INTERCEPTION*. *Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509*, on remand, *142 Ga. App. 802, 237 S.E.2d 243 (1977)*, for comment, see *29 Mercer L. Rev. 351 (1977)*.

FORMER CODE 1933, § 26-3006 (SEE *O.C.G.A. § 16-11-66*) *DID NOT PROHIBIT ACTUAL PARTIES TO CONVERSATION FROM RECORDING OR DIVULGING IT*. *Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509*, on remand, *142 Ga. App. 802, 237 S.E.2d 243 (1977)*, for comment, see *29 Mercer L. Rev. 351 (1977)*.; *Felty v. State, 268 Ga. 365, 489 S.E.2d 813 (1997)*.

INVOLVEMENT IN DIVORCE ACTION IS NOT EQUIVALENT OF IMPLIED CONSENT to have one's telephone line tapped. *Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971)*.

CITED in *Farmer v. State, 228 Ga. 225, 184 S.E.2d 647 (1971)*; *Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971)*;

Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973); Adams v. State, 130 Ga. App. 362, 203 S.E.2d 314 (1973); Cross v. State, 233 Ga. 960, 214 S.E.2d 374 (1975); Cross v. State, 136 Ga. App. 400, 221 S.E.2d 615 (1975); United States v. Ransom, 515 F.2d 885 (5th Cir. 1975); Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976); Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893 (1977); Mitchell v. State, 142 Ga. App. 802, 237 S.E.2d 243 (1977); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); O'Dillon v. State, 245 Ga. 342, 265 S.E.2d 18 (1980); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980); Ford v. State, 160 Ga. App. 707, 288 S.E.2d 39 (1981); Green v. State, 250 Ga. 610, 299 S.E.2d 544 (1983); Stephenson v. State, 171 Ga. App. 938, 321 S.E.2d 433 (1984); Peugh v. State, 175 Ga. App. 90, 332 S.E.2d 384 (1985); Norris v. State, 176 Ga. App. 164, 335 S.E.2d 611 (1985); Hall v. State, 176 Ga. App. 428, 336 S.E.2d 291 (1985); Duren v. State, 177 Ga. App. 421, 339 S.E.2d 394 (1986); Martin v. State, 179 Ga. App. 551, 347 S.E.2d 247 (1986); Reeves v. State, 192 Ga. App. 12, 383 S.E.2d 613 (1989); Lawrence v. State, 195 Ga. App. 320, 393 S.E.2d 475 (1990); Kemp v. State, 201 Ga. App. 629, 411 S.E.2d 880 (1991).

CONVERSATIONS IN FURTHERANCE OF CRIME

ONE-PARTY CONSENT REQUIREMENT RENDERS EXCEPTION CONSTITUTIONAL.—Requirement of consent of one party ensures that overhearing by third parties is by divulgence of one party to conversation, which is constitutionally permissible, and not by surreptitious interception unbeknownst to any party to conversation, which is constitutionally impermissible. *Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).*

APPLICABILITY TO FACE-TO-FACE ORAL COMMUNICATION.—One-party consent provision of former Code 1933, § 26-3006 (see *O.C.G.A. § 16-11-66*) was applicable to face-to-face oral communication. *Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977).*

Face-to-face communications are included in the consent exceptions to the electronic surveillance prohibitions of former Code 1933, § 26-3006 (see *O.C.G.A. § 16-11-66*). *Thornton v. State, 139 Ga. App. 483, 228 S.E.2d 919 (1976).*

Face-to-face conversations were intended by legislature to be included in consent exceptions contained in former Code 1933, § 26-3006 (see *O.C.G.A. § 16-11-66*). *Humphrey v. State, 231 Ga. 855, 204 S.E.2d 603*, cert. denied, *419 U.S. 839, 95 S. Ct. 68, 42 L. Ed. 2d 66 (1974).*

SCOPE OF SECTION.—The legislature intended former Code 1933, § 26-3006 (see *O.C.G.A. § 16-11-66*) to govern specifically conversations or communications arranged or anticipated by one of the parties for purpose of interception, recording, and divulging. *Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).*

ONE-PARTY CONSENT MAY BE GIVEN TO LAW ENFORCEMENT OFFICERS.—Former Code 1933, § 26-3006 (see *O.C.G.A. § 16-11-66*) allowed law enforcement officers to intercept, record, and divulge a conversation, where at least one party thereto consents, and where conversation is a crime or is in furtherance of a crime. *Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).*

SECTION APPLICABLE WHERE CONSENTING PARTY IS A POLICE OFFICER.—Former Code 1933, § 26-3006 (see *O.C.G.A. § 16-11-66*) was intended to cover situations in which conversation was between two private parties, one of whom consented to interception by some third party, most likely a law enforcement agency. This does not mean that if one party to conversation was a police officer who had consented that the section cannot apply. *Cross v. State, 128 Ga. App. 837, 198 S.E.2d 338 (1973).*

MERE FACT THAT ONE PARTY TO CONVERSATION RECORDS IT DOES NOT VITIATE ITS EVIDENTIARY VALUE.—Anyone who makes a statement to another knows that person to whom it was made may repeat it to others who may use it against the person, mere fact that person to whom statement was directed made a recording without knowledge of person recorded does not vitiate its evidentiary value. *Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974).*

DIVULGING CONVERSATION BY MEANS OF RADIO TRANSMITTING EQUIPMENT.—State agent may divulge contents of conversations with accused by carrying radio equipment which simultaneously transmits conversations to other agents monitoring transmission frequency, and police officers who are simultaneously listening to conversation through electronic amplification of conversation may testify as to what they have heard. *Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).*

TAPED TESTIMONY OF INCESTUOUS-RAPE VICTIM'S INITIATED CONVERSATION with assailant found admissible. See *Legg v. State, 207 Ga. App. 399, 428 S.E.2d 87 (1993); Cofield v. State, 216 Ga. App. 623, 455 S.E.2d 342 (1995).*

RESEARCH REFERENCES

ALR. --Opening, search, and seizure of mail, *61 ALR2d 1282.*

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act *(47 U.S.C. § 605)* or similar state statutes, *9 ALR3d 423.*

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, *24 ALR4th 1208.*

Title Note

Chapter Note

Article Note

Part Note

Attachment B

Daniel R. Dinger, "Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution," *Seattle University Law Review*, 28-955, Summer 2005

FOR JUDICIAL HISTORY, SEE PAGES 6-12.

THE REMAINDER OF THE ARTICLE PROVIDES HISTORY OF FEDERAL LAW AND THE ARGUMENTS FOR AND AGAINST VICARIOUS CONSENT EXCEPTIONS.

LEXSEE 28 SEATTLE UNIV. L. R. 955

Seattle University Law Review

Summer, 2005

28 Seattle Univ. L. R. 955

LENGTH: 36343 words

ARTICLE: Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution

NAME: Daniel R. Dinger *

BIO:

* Deputy Prosecuting Attorney, Ada County Prosecuting Attorney's Office, Boise, Idaho; B.A., Brigham Young University, 1998; J.D., J. Reuben Clark Law School, Brigham Young University, 2001. The views expressed in this article are those of the author and do not necessarily represent the views of the Ada County Prosecutor's Office.

SUMMARY:

... On February 28, 1997, the mother of a Georgia teenager picked up a telephone in her home and found that her daughter, then thirteen years old, was engaged in conversation with Kyle Richard Bishop. ... However, under the doctrine of vicarious consent, the parent is deemed to have vicariously consented to the interception and recording of a conversation on behalf of the minor child. ... In addressing the vicarious consent doctrine, some commentators have further suggested that allowing one parent to make and use a surreptitiously recorded telephone conversation between the other parent and a child, or a child and a third party, will lead to significant family discord, and may also cause a child to resent one or both parents for their interception and use of the communication. ... The vicarious consent doctrine is a legally viable doctrine in the sense that its application is consistent with both statutory and case law in the area of eavesdropping and child privacy rights, as well as with the legislative history of Title III. ... 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." ...

TEXT:

[*955] I. INTRODUCTION

On February 28, 1997, the mother of a Georgia teenager picked up a telephone in her home and found that her daughter, then thirteen years old, was engaged in conversation with Kyle Richard Bishop. n1 While it is not unusual for a thirteen-year-old girl to talk on the telephone, the conversation that the young girl's mother overheard that day was not a typical teenage conversation. In fact, the conversation was very much atypical for two reasons. First, Bishop was a thirty-eight-year-old man who, along with his wife, lived across the street from the young girl. n2 Second, the conversation involved both talk of a sexual nature and discussions of killing the young girl's parents. n3

Concerned for her daughter's safety and well-being, the young girl's mother contacted law enforcement and informed them of what she had overheard. n4 The authorities immediately launched an investigation of [*956] Bishop, but it stalled as quickly as it started because the young girl denied that anything inappropriate had occurred between her and Bishop. n5 Not satisfied, the girl's parents took matters into their own hands. Specifically, "within hours of the police interview, the victim's parents went to Radio Shack and purchased a tape recorder to record all of the phone calls to and from their home. After installing the equipment, the parents recorded numerous phone conversations between Bishop and the victim." n6 Copies of these conversations were later turned over to law enforcement. These tapes, in conjunction with the young victim's testimony "that she had engaged in sexual acts with Bishop," n7 ultimately led to Bishop's indictment on charges of child molestation, aggravated child molestation, and aggravated sexual battery. n8

As the case against Bishop proceeded, prosecutors sought to use the taped conversations as evidence against him. n9 In response, Bishop filed a challenge to the prosecution's use of the tapes, arguing that they were recorded in violation of Georgia law. n10 The trial court denied Bishop's motion." n11 In so doing, it relied on a legal doctrine known as the doctrine of vicarious consent. n12 Though the trial court was ultimately overruled on the issue, based on the language of a specific Georgia statute, n13 it expressed a belief that has been accepted by a small handful of federal and state courts. n14 Specifically, the trial court adopted the view that a parent can surreptitiously tape record a minor child's telephone conversations with a third party -- and do so without violating federal and state wiretap statutes -- if the parent has a good faith and objectively reasonable basis for believing that recording the conversations is in the minor child's best interest. n15

This Article will address the little-used but important doctrine of vicarious consent; in particular, this Article will argue that the doctrine should be more widely accepted by the criminal courts. Part II gives a brief overview of the federal wiretap statute, its state law counterparts, and the doctrine of vicarious consent that has emerged as courts have [*957] interpreted federal and state wiretap legislation. Part III addresses the doctrine's viability and, as referenced above, argues that it should be accepted by the criminal courts. Specifically, Part III argues that when a parent records a child's telephone conversations with a third party out of a true concern for the child and under a belief that doing so is in the child's best interest, those recordings should be available for use during a criminal prosecution as evidence against both the third party and, if necessary, the child whose parents recorded the conversations. Finally, Part IV briefly addresses important procedural issues arising when criminal courts accept the vicarious consent doctrine, and Part V concludes by summarizing the policies, issues, and answers presented herein.

II. BACKGROUND

The judicially created doctrine of vicarious consent has developed over the last ten years through a series of little-referenced but significant federal and state court decisions. n16 These court decisions, though relatively few in number, have uniformly held that parents who secretly, but with appropriate motivations, record a child's telephone conversations can avoid civil and criminal liability under federal and state wiretapping laws that generally prohibit such action. n17 This section addresses those federal and state laws, the creation and nature of the vicarious consent doctrine, and the various criticisms that have been leveled against it.

A. The Federal Wiretap Statute

Enacted in 1968 as Title III of the Omnibus Crime Control and Safe Streets Act, the federal wiretap statute governs the interception and capture of wire and other specified communications. n18 As stated by the United States Supreme Court, the purpose of Title III is "to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act." n19 Because the doctrine of vicarious consent necessarily involves parental interception and capture of a child's communications, understanding the basics of Title III is a prerequisite to understanding the doctrine itself. [*958] Specifically, to fully understand the ramifications of the vicarious consent doctrine, what is needed is a basic understanding of Title III's history, combined with an overview of the process for obtaining a valid wiretap, the penalties associated with violations of the federal wiretap statute, the consent exception to the general prohibition of wiretapping, and the applicability of Title III in domestic situations.

1. A Brief History of the Federal Wiretap Statute

As stated above, Congress enacted the federal wiretap statute in 1968 as Title III of the Omnibus Crime Control and Safe Streets Act. Prior to Title III's existence, wiretapping by both law enforcement and private citizens was governed by the Federal Communications Act of 1934. n20 In 1986, nearly twenty years after its enactment, Congress amended and updated Title III to keep pace with technological advancements in the area of wiretapping and eavesdropping. n21 The original act, which was passed to assist law enforcement in the investigation and prosecution of organized crime and to protect the privacy rights of United States citizens against the unwarranted interception of telephonic and other communications, n22 was a response to two key decisions by the [*959] United States Supreme Court. In the first case, *Berger v. New York*, n23 the Supreme Court ruled that Fourth Amendment protections apply to the electronic eavesdropping of oral communications such that conversations intended to be private are protected by the Fourth Amendment. n24 The *Berger* Court further "delineated the constitutional criteria that electronic surveillance legislation should contain." n25 In the second case, *Katz v. United States*, n26 the Court held that when there is a reasonable expectation of privacy, intercepting a telephone conversation in a public telephone booth constitutes a search and seizure for the purposes of the Fourth Amendment. n27 Title III was enacted to provide for compliance with these two rulings

and the constitutional standards that they set forth for the lawful interception of covered communications. n28

2. An Overview of Title III

In its current form, Title III is a very complex piece of legislation that addresses many different aspects of legal and illegal wiretapping. With respect to the doctrine of vicarious consent, however, only a few portions of the legislation are particularly relevant. These portions of the law, which include the basic process for obtaining a valid wiretap, the penalties associated with violations of Title III, and the one-party consent exception to the general prohibition against wiretapping, are discussed below.

a. Obtaining a Legally Valid Wiretap

As stated by the United States Supreme Court, Title III "prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses." n29 Title III also identifies the types of interceptions that are lawful and those that are not in an effort to "safeguard privacy in oral and wire communications while [*960] simultaneously articulating when law enforcement may intercept such communications." n30

The Supreme Court provided an overview of the way in which wiretaps are authorized under the federal wiretap statute in its decision in *United States v. Giordano*:

> Judicial wiretap orders must be preceded by applications containing prescribed information. The judge must make certain findings before authorizing interceptions, including the existence of probable cause. The orders themselves must particularize the extent and nature of the interceptions that they authorize, and they expire within a specified time unless expressly extended by a judge based on further application by enforcement officials. Judicial supervision of the progress of the interception is provided for, as is official control of the custody of any recordings or tapes produced by the interceptions carried out pursuant to the order. n31

In addressing this detailed procedure for obtaining a valid wiretap, the Supreme Court also noted that wiretaps are not available in all cases or as an initial method of investigation. n32 With respect to these limitations, the Court wrote the following:

> The Act . . . not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress . . . evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. n33

Finally, the Supreme Court pointed out that under Title III, wiretaps can only be requested by certain specified persons:

> The Act plainly calls for the prior, informed judgement of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgement of a particular, responsible [*961] Department of Justice official is interposed as a critical precondition to any judicial order. n34

In addressing these detailed procedural requirements, the Supreme Court has held that strict compliance with the procedures set forth in the statute is required for a wiretap to be considered lawful. n35

b. The Civil, Criminal, and Evidentiary Penalties Associated with Violating Title III

Title III violations stemming from one person recording another person's telephone conversations can result in the imposition of criminal, civil, and evidentiary penalties against the violator. On the issue of penalties, the legislative history stresses that the prohibitions of Title III "must be enforced with all appropriate sanctions." n36 In addressing these "sanctions" the legislative history reads as follows: "Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." n37 "Each of these objectives," the drafters concluded, "is sought by the proposed legislation." n38

With respect to criminal penalties, Title III provides that "whoever violates [the prohibition against intercepting the specified communications] shall be fined under this title or imprisoned not more than five years, or both." n39 The

issue of civil penalties is slightly more complex. The statute provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." n40 In defining what "relief may be appropriate, the law provides that "appropriate relief includes: (1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) [actual or statutory damages] and punitive damages in appropriate [*962] cases; and (3) a reasonable attorney's fee and other litigation costs reasonably incurred." n41 Finally, any evidence obtained during a wiretap made in violation of Title III is not admissible in a criminal or civil trial, or in a number of other types of hearings:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. n42

These three distinct types of penalties are independent of one another such that any person who violates Title III can potentially be subject to all three types of penalties for a single violation of the law. n43 At the same time, however, they also work in conjunction with one another to "form . . . an integral part of the system of limitations designed to protect privacy" n44 and "serve to . . . curtail the unlawful interception of wire and oral communications." n45

c. The One-Party Consent Exception

As stated above, Title III prohibits "all interceptions of oral and wire communications, except those specifically provided for in the Act." n46 One important exception — the exception at issue in cases involving the doctrine of vicarious consent — is the one-party consent exception. In brief, the one-party consent exception holds that if one party to a communication consents to a recording of that communication, there is no violation of Title III. n47

> [*963] It shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State. n48

Under this important exception, as stated above, one participant in a "wire, oral, or electronic communication" can record the communication without violating Title III. n49 So too can a third party who has been given prior consent by one of the parties to the conversation. n50 Significantly, the statute does not require that the person making the recording notify the other participants that a recording is being made or that the conversation is being intercepted. n51

3. The Federal Wiretap Statute & Domestic Wiretapping

The doctrine of vicarious consent, as will be discussed more fully, is a legal doctrine that addresses a parent's ability to intercept a child's telephone conversations — a type of domestic wiretapping — without violating Title III. n52 Yet, the language of the federal wiretap statute does not expressly address the applicability or nonapplicability of Title III to domestic or interfamily wiretap situations. n53 This omission has led to some confusion in the application of Title III. Since its passage, and even during the time that Congress debated its enactment, legislators, courts, and commentators have argued about whether the federal wiretap statute applies in domestic or interfamily wiretapping situations, including situations involving parent-child wiretapping. n54 These debates have resulted [*964] in a circuit split on the issue, with two federal circuits holding that inter-family wiretapping is outside the reach of the statute and its penalties, while four circuits have held that the law prohibits both domestic and nondomestic wiretapping alike. n55 More succinctly put, "the general applicability of the Wiretap Act in the domestic realm remains unclear." n56 This is a problem because, according to some estimates, "nearly 80 percent of reported wiretapping matters involve wiretaps within the family context." n57

[*965] 4. State Wiretap Statutes

In addition to being subject to the federal wiretap statute and its prohibitions and procedures, all but one of the fifty states have enacted their own wiretapping laws to govern the recording of telephone and other conversations. n58 With respect to a consent exception to the prohibition against recording telephone and other communications, a significant number of state wiretap statutes follow the federal model and contain a one-party consent exception. n59 For example, Ohio's wiretap statute is [*966] similar to the federal statute. Under Ohio law, it is illegal for any person to

"intercept, attempt to intercept, or procure another person to intercept or attempt to intercept a wire, oral, or electronic communication." n60 The law, however, includes a one-party consent exception:

> This section does not apply to . . . [a] person . . . who intercepts a wire, oral, or electronic communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act . . . or for the purpose of committing any other injurious act. n61

Similar to the federal statute, Ohio law provides for civil remedies against those who violate its wiretap statute. n62 Texas also provides for a one-party consent exception:

> A person commits an offense if the person . . . intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication. . . . It is an affirmative defense to prosecution . . . [that] the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception. n63

Under this code section, which provides an affirmative defense in the form of a one-party consent requirement, it is a criminal offense to make an unauthorized interception of another person's wire, oral, or other electronic communication. n64

Since Title III's passage, courts have held that states may adopt wiretap laws that are more stringent than federal law, but states "may not adopt standards that are less restrictive." n65 As such, while most states [*967] have adopted one-party consent exceptions to their wiretap statutes, a small handful of states have adopted a more stringent form of the statute, one which requires the consent of both parties to a conversation before it can be lawfully recorded. n66 California's statute provides a good example of this two-party consent requirement:

> Every person who, intentionally and without the consent of *all parties* to a confidential communication, by means of any electronic . . . recording device, eavesdrops upon or records a confidential communication . . . shall be punished by a fine not exceeding two thousand five hundred dollars ($ 2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. n67

Under California's statutory scheme, more severe penalties apply when a person has a prior conviction for wiretap violations. n68 Civil penalties are also available to those persons "injured by a violation" of California's wiretap law. n69

As it has developed, the vicarious consent doctrine is available only in those jurisdictions that enact one-party consent exceptions. The doctrine is only applicable in these specific jurisdictions because its sole purpose, as discussed below, is to allow a parent or guardian to record a child's telephone conversations without the child or, in particular, the person with whom the child is speaking, becoming aware of the interception; necessarily, it is made without the consent of the party to whom the child is speaking. n70

[*968] *B. Parental Recording of a Minor Child's Telephone Conversations and the Doctrine of Vicarious Consent*

The doctrine of vicarious consent, a legal doctrine created by judicial decision, addresses a parent's ability to consent to a recording of a child's telephone communications on the child's behalf, without running afoul of federal or state wiretap laws. This section addresses the principles underlying the doctrine, its specific development over the last decade, and the response that critics of the doctrine have made to its acceptance by a small handful of state and federal courts.

1. The Doctrine of Vicarious Consent and Its Underlying Principles

The basic premise of the doctrine of vicarious consent is that a parent can avoid liability for violations of the federal wiretap statute or its state law counterparts that might otherwise attach when he or she surreptitiously records a minor child's telephone conversations with a third party without gaining prior consent from the child or the third party. As stated above, the federal and state wiretap statutes generally prohibit such recordings. n71 However, under the doctrine of vicarious consent, the parent is deemed to have vicariously consented to the interception and recording of a conversation on behalf of the minor child. As such, the recording is therefore considered to be one to which one of the parties to the conversation — specifically the minor child — has consented, thereby satisfying the one-party consent exception and protecting the parents from civil or criminal liability. n72

The doctrine of vicarious consent is not codified in Title III, but was created by judicial decision. n73 As such, the doctrine's details are found in those state and federal decisions that have accepted the concept of vicarious consent in the

context of the one-party consent exception. The most fundamental requirement, as explained below, is that the parent who records the conversation must do so under a good faith and reasonable belief that he or she is acting in the child's best interest. n74

2. The Cases Through Which the Doctrine Has Developed

The doctrine of vicarious consent has slowly developed over the last decade as courts have adjudicated cases that, in one way or another, involve a parent who has surreptitiously recorded one or more of a minor [*969] child's telephone conversations with either the other parent or a third party. n75 To date, the majority of courts to address the issue have done so in the context of either custody disputes or civil tort claims for alleged violations of the federal wiretap statute arising from custody disputes. n76 A small handful of criminal courts have also addressed the issue, all in the context of a parent recording a child's telephone conversations with a third-party adult who is not a member of the immediate family. n77 Of these criminal courts, some have adopted the doctrine of vicarious consent and have further allowed prosecutors to use the recorded conversations at the trial of one of the parties to the conversation. n78 Other courts, however, have rejected the doctrine and therefore have not allowed such a use of the recordings. n79

a. The Development of the Concept of Vicarious Consent

The first court to present and address the issue of vicarious consent was the United States District Court for the District of Utah in the 1993 case of *Thompson v. Dulaney*. n80 *Thompson* arose out of a custody dispute between the parents of two young children. n81 While the divorce and custody issues underlying the case were adjudicated in Utah state court, James Thompson, the noncustodial parent, filed suit in federal court alleging that the custodial parent, Denise Dulaney, had violated various portions of Title III. n82 Specifically, Thompson alleged that Dulaney illegally tape recorded conversations between Thompson and his children during the pendency of the aforementioned divorce and custody proceedings. n83 Dulaney freely admitted that she had taped Thompson's conversations with their children — the conversations were even used as evidence in the custody dispute — but argued that it was not illegal for her to do so because Thompson "was interfering with her relationship with the children to whom she was awarded custody." n84 Dulaney further argued that she was within her rights to record the conversations because she needed [*970] to monitor and document that interference in order to effectively and appropriately protect her children. n85

The court's creation and discussion of the doctrine of vicarious consent arose in the context of a ruling on Dulaney's motion for summary judgment. n86 In what the court itself described as a "very narrow [holding] limited to the particular facts of this case," n87 it held the following:

> As long as the guardian has a good faith basis that 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. n88

Noting that the case presented a "unique legal question of first impression," n89 the court recognized the existence of a right of vicarious consent in the case before it because of its concerns regarding parents' ability to protect very young children "who lack *both* the capacity to consent and the ability to give actual consent." n90 It further noted the following: "In this case, or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating [*971] minor children, vicarious consent is necessary to enable the guardian to protect the children from further harassment . . . ." n91 Protection of a young child, the court concluded, is the reason that the principle of "vicarious consent is necessary." n92

In holding as it did, the court stressed the importance of divining parental motivations. n93 In ruling on Dulaney's motion for summary judgment, the court wrote that whether or not Dulaney would be permitted to rely on the vicarious consent exception "requires a factual resolution of what Denise Dulaney's purpose' was in intercepting the communication." n94 The court later added that "the viability of the consent defense is contingent on a resolution of [Dulaney's] purpose in intercepting these communications." n95 Because it determined that there existed factual issues regarding Denise Dulaney's motivation, the court, while accepting the principle of vicarious consent, denied Dulaney's motion for summary judgment. n96

After the district court handed down its ruling in *Thompson v. Dulaney*, the doctrine of vicarious consent was reshaped in subsequent court rulings from myriad jurisdictions. One such ruling came from the Court of Civil Appeals of Alabama in its 1996 decision in *Silas v. Silas*, n97 which involved a father who made recordings of telephone conversations

between his child and the child's mother. n98 In *Silas* the court referenced *Thompson* and adopted that court's reasoning, while issuing a slightly narrower holding. n99

> The tapes were subsequently produced to and listened to by the guardian ad litem and the court-appointed psychologist, Dr. Karl Kirkland. Dr. Kirkland testified that the tapes showed verbal abuse of the minor child by the mother and that the verbal abuse was damaging to the minor child.
>
> Based on the foregoing, we conclude that the father had a good faith basis that was objectively reasonable for believing that the minor [*972] child was being abused, threatened, or intimidated by the mother, therefore it was permissible for the father to vicariously consent on behalf of the minor child to the taping of the telephone conversations. n100

While it is not fully clear, the holding in *Silas* appears to potentially narrow the application of the doctrine to situations in which there is a good faith basis for believing that the child is "being abused, threatened, or intimidated" by the other parent. n101 In *Thompson* there was no such specific limitation, but only a general statement of reasonable parental concern for the child's best interests. n102

Another major court decision on the vicarious consent doctrine was the Sixth Circuit's ruling in the case of *Pollock v Pollock*, n103 the first federal appellate-level court to address the doctrine. *Pollock* arose from a civil suit filed by Samuel Pollock alleging that his ex-wife Sandra violated the federal wiretap statute by tape recording a number of conversations that took place, over a few weeks' time, between their daughter Courtney and Samuel and his new wife, conversations that "occurred in the context of a bitter and protracted custody dispute." n104 Neither Samuel, his new wife, nor Courtney consented to the recordings. n105 Sandra justified the recordings by arguing that "she believed that Courtney was being subject to emotional and psychological pressure by Samuel and Samuel's wife, Laura, whereby Samuel was trying to get Courtney to do whatever she could to convince [Sandra] to let Courtney primarily live with Samuel." n106 Sandra further claimed that her sole motivation in recording her daughter's telephone conversations with her father was Sandra's concern for Courtney's well-being. n107 Samuel, as expected, argued that Sandra had a different motivation — retaliation. n108 Specifically, he argued 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]." n109 After Samuel filed suit, Sandra filed a motion to dismiss, [*973] which the court treated as a summary judgment motion. n110 The district court granted Sandra's motion, and Samuel appealed. n111

In ruling on the aforementioned dispute, the Sixth Circuit accepted and then expanded the reach of the doctrine of vicarious consent as set forth in *Thompson*: n112

> After [a] review of relevant case law, we . . . agree with the district court's adoption of the [vicarious consent] doctrine, provided that a clear emphasis is put on the need for the "consenting" parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. Accordingly, we adopt the standard set forth by the district court in *Thompson* and hold that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. Such vicarious consent will be exempt from liability under Title III, pursuant to the consent exception contained in *18 U.S.C. § 2511*(2)(d). n113

As stated above, in holding as it does, the Sixth Circuit expands the reach of the vicarious consent doctrine beyond that set forth in *Thompson*. n114 Specifically, the *Pollock* court held that the doctrine applies not only to young children, but also to children much older than those involved in *Thompson*. n115 The children caught in the muddle of *Thompson* were three and five — a fact to which the *Thompson* court attached great significance. n116 In *Pollock*, however, the child whose telephone conversations were secretly recorded was fourteen years of age. n117

In expanding the application of the doctrine of vicarious consent to include older children, the court seemingly does away with the *Thompson* court's staunch reliance on the fact that the children at issue in that case "were children who lacked both the capacity to [legally] consent and the ability to give actual consent." n118 In so doing, it relied on its own district court's decision: "We are not inclined to view [the child's] own [*974] ability to actually consent as mutually exclusive with her mother's ability to consent on her behalf." n119 Furthermore, with respect to the issue of age: "It would be problematic . . . for the Court to attempt to limit the application of the doctrine to children of a certain age, as not all children develop emotionally and intellectually on the same timetable, and we decline to do so." n120 In short,

Pollock expanded the doctrine's applicability to a greater number of people by refusing to limit it to cases involving very young children. n121

Though its holding expands the number of children to which the doctrine applies, the court does issue a warning to would-be wiretappers, writing that "we stress that . . . this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: I was doing it in his/her best interest'" n122 Instead, the court stresses, recognition and acceptance of the vicarious consent doctrine requires "that a clear emphasis [be] put on the need for the consenting' parent to demonstrate a good faith, objectively reasonable basis for believing that such consent was necessary for the welfare of the child." n123

In addition to their acceptance of the vicarious consent doctrine, the *Thompson*, *Silas*, and *Pollock* decisions all share a significant factual similarity — they all involve one parent who recorded conversations between a child and the other parent. More specifically, none of the three decisions addresses the issue of a parent who records a child's telephone conversations with a third party who is not a family member. It was not until the criminal courts began to accept the vicarious consent doctrine that recordings involving non-family members began to appear as part of the case law governing the doctrine.

[*975] *b. The Doctrine of Vicarious Consent in the Criminal Context*

A small number of reported cases have carried the doctrine of vicarious consent from the civil to the criminal arena, allowing for the use of recorded telephone conversations in the prosecution of an adult criminally charged, in one way or another, with victimizing a child. n124 The typical scenario in these cases involves parental taping of a conversation between a child and a non-family member who is later discovered to be sexually abusing the child, and a subsequent legal challenge to the use of those recordings in the prosecution of the abuser. n125

The case of *Commonwealth v. Barboza* n126 provides a good example of the way in which courts have applied the doctrine of vicarious consent in the context of these criminal prosecutions. *Barboza*, a criminal prosecution, involved allegations that George Barboza had sexually molested a young boy named Tom, the son of one of Barboza's employees. n127 Initially Barboza and Tom's family had little contact, but in 1993 Tom's family moved to the town where Barboza lived. n128 At that point, the families "began meeting frequently, and on some weekends, Tom would stay overnight with [Barboza] at his home." n129 Tom also spent time with Barboza at Barboza's second home in Florida during February of 1995. n130

Tom's relationship with Barboza continued to develop, and in 1996 Tom's parents "began to feel uneasy about their son's close relationship" with Barboza. n131 Specifically, during 1996, Tom's family visited Barboza in Florida. n132 During that visit Tom "had little interaction with his parents," furthermore, Tom "stayed in one hotel room with [Barboza], while his parents and their other son stayed in a second room." n133 As the court's opinion illustrates, the relationship continued to develop after the vacation:

> [Tom's parents] were further disconcerted when Tom announced that it was his intention after he graduated from high school to live [*976] with [Barboza] in Florida. After the family returned from Florida in December, 1996, [Barboza] called Tom on a regular basis. The parents noticed that when Tom spoke with [Barboza] on the telephone, he would be unusually quiet, and sometimes even denied afterwards that he had spoken to [Barboza]. n134

Determining that things had gone far enough, Tom's parents decided to investigate Barboza's relationship with their son. n135 To this end, "Tom's father ordered a tape recorder that he had seen advertised in a magazine in order to record secretly telephone conversations at his house." n136 Tom's parents never told their sons that the tape recorder had been installed, and thereafter "four telephone calls between Tom and [Barboza] were recorded." n137 In each of these conversations, the court wrote, Barboza "declared that he loved Tom, and in at least the last three conversations, there [were] references to masturbation." n138 Additionally, in the second of the recorded telephone calls Barboza mentioned "making love" with Tom. n139

Upon discovering that Barboza was having sexual contact with his son, Tom's father turned the recordings over to law enforcement and criminal charges were filed against Barboza. n140 During the course of Barboza's trial, and following a partial denial of a motion to suppress the recordings, the prosecution was permitted to play two of the recordings to the jury, which ultimately convicted Barboza of four counts of rape of a child under sixteen and two counts of indecent assault and battery on a child under fourteen. n141 In ruling on the suppression issue, the judge stated that "there's no question

. . . that the [parents'] primary concern was their son and that everything they did was not to assist law enforcement . . . but to try to figure out what was going on and what's right for their son and for their family." n142 Because it found that the recordings were made out of a concern for family rather than a desire to assist law enforcement, the court concluded that two of the four recordings — both made prior to law enforcement being informed of the situation — were [*977] admissible at trial. n143 The other two recordings, made after police were contacted, though not at their request, were suppressed because "under the circumstances, silence by the police made the parents unwitting agents of the police for the purposes of continuing to record telephone calls from [Barboza]." n144 On appeal, Barboza argued that the trial court should have suppressed the two tape recordings the jury had heard, as well as other evidence that he alleged was obtained after the recordings were made and provided to law enforcement. n145 The Massachusetts Appeals Court divided its discussion of Barboza's claim into two distinct parts. The first was an analysis of the suppression issues under the Massachusetts state wiretap statute, n146 and the second was a similar analysis under the federal wiretap law. n147

The court began its analysis under the Massachusetts statute by appropriately pointing out that Massachusetts is a two-party consent state, meaning that "the Massachusetts wiretap statute . . . requires both parties to consent to the recording of telephone calls for the recording to be legal." n148 As such, when Tom's father recorded Barboza's conversations with Tom, which was done without Barboza's knowledge or consent, it was clearly illegal under Massachusetts law. n149 This fact notwithstanding, the appellate court determined that the trial court was correct in denying Barboza's motion to suppress under the Massachusetts statute because it was private conduct, not government conduct, that produced the recordings that helped secure Barboza's rape and other convictions. n150 Quoting the Massachusetts Supreme Judicial Court, the *Barboza* court noted that "exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights," n151 and determined that "we see no reason why the [exclusionary] rule should protect [Barboza] from the consequences of the unlawful interception b[y] private citizen, a father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation." n152

[*978] Of more pertinence to this article is the *Barboza* court's analysis of the suppression issue under the federal wiretap statute. n153 With respect to the application of federal law and the one-party consent exception contained in Title III, the court, with very little discussion, concluded that "a recording by parents of their own minor son talking on the telephone in their own home, motivated by concerns that he was being sexually exploited by an adult, does not violate Title III." n154 In deciding the issue as it does, the court briefly referenced the Sixth Circuit's decision in *Pollock* as well as a handful of other cases that have approved the doctrine of vicarious consent, and then relied on their authority to refute Barboza's arguments. n155 Significantly, the court also went beyond the scope [*979] of *Pollock* and *Thompson* and noted that "we do not read the Federal cases as limiting the parents' rights to intercept calls to those from family members," meaning the court appears open to the idea that parents can also record a child's telephone conversations with non-family members under the doctrine of vicarious consent without running afoul of the prohibitions of Title III. n156

[*980] *c. Rejecting the Doctrine of Vicarious Consent*

Not all courts that have addressed the issue of parental taping of a child's phone conversations have adopted the doctrine of vicarious consent. A small number of courts have rejected the doctrine altogether and held that parental recording of a child's phone conversations does not fall within the consent exception to Title III or its state law equivalents.

The first court to raise and then reject the doctrine of vicarious consent was the Michigan Court of Appeals in the case of *Williams v. Williams*. n157 The *Williams* case, similar to *Thompson v. Dulaney*, involved an appeal of a Michigan state trial court's ruling on a motion for summary judgment in a tort action filed by one former spouse against another. n158 Specifically, Brenda Williams filed suit against her former husband, Brent Williams, when she discovered that he had secretly recorded some telephone conversations that she had engaged in with their son, Jason Williams, while Jason was living with Brent. n159 Brenda Williams' three-count lawsuit alleged violations of the federal wiretapping act and Michigan's eavesdropping statute, and also included a claim based on the common law tort of invasion of privacy. n160 Both parties filed motions for summary judgment in connection with the case. n161

In ruling on the motions for summary judgment, the trial court ruled in favor of Brent Williams, holding that there was no genuine issue of material fact and that Brent had a right to consent to the recording of the phone calls on behalf of his son. n162 In short, the trial court applied the doctrine of vicarious consent. Brenda Williams appealed the lower [*981] court's decision and the Michigan Court of Appeals reversed. n163 In reversing the trial court, the appellate court addressed both the federal wiretap statute and Michigan's eavesdropping statute. n164 In so doing, the court framed the issue as follows:

> The sole issue presented by plaintiff on appeal is an issue of first impression for this Court: whether a custodial parent of a minor child may consent on behalf of the child to the interception of conversations between the child and another party and thereby avoid liability under the Michigan eavesdropping statute and the federal wiretapping act. n165

The court further framed the issue in terms of statutory interpretation, writing that "we must decide whether these references to consent may be construed so broadly as to include the type of vicarious consent exception advocated by defendants." n166

As stated above, the Court of Appeals reversed the trial court, and in so doing, rejected the vicarious consent doctrine. n167 With respect to the applicability of the vicarious consent doctrine to the federal wiretapping statute, the court rejected the doctrine because, contrary to the Utah District Court's decision in *Thompson*, the Michigan court chose to adopt a narrow reading of the consent exception. n168 The court held as follows:

> However, the federal wiretapping act is silent with regard to the types of consent that Congress contemplated. The exception to the federal statute simply provides for consent by "one of the parties to the communication." This language gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape record telephone conversations between the child and a third party. Were it the intent of Congress to create a safe harbor from liability for custodial parents recording the conversations of their children, it, too, could have easily done so. Instead, the federal wiretapping act states that any exceptions to its prohibitions are "specifically provided in this chapter." This Court will not speculate with regard to the probable intent of Congress beyond the words expressed in the statute. n169

[*982] The court then employed a similarly narrow reading of the state statute, rejecting the vicarious consent doctrine because the state legislature had not specifically adopted it. n170 In rejecting the doctrine, the court also addressed decisions such as *Thompson* that accepted the doctrine, holding that despite the benefits that it was able to provide, any acceptance of vicarious consent would be left to the state legislature. n171

The appellate court's rejection of the vicarious consent doctrine did not end the appeals of the trial court's decision to adopt the doctrine. Specifically, the Michigan Court of Appeals' decision in *Williams* was appealed to the Michigan Supreme Court. n172 The Michigan Supreme Court did not decide the issue, but remanded the case back to the Michigan Court of Appeals for reconsideration in light of *Pollock*, which the Sixth Circuit decided after the Michigan appellate court initially rejected the principle of vicarious consent. n173 On remand, the court reluctantly held that, depending on the facts of the case, the vicarious consent doctrine potentially applied to the federal statute and the claim based on Title III. n174 The court then remanded the case back to the trial court to make a factual determination of whether vicarious consent excused Brent Williams' actions. n175 With respect to the state law claim, however, the court held strong to its prior decision and rejected the claim of vicarious consent:

> [*983] This court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute. We remain convinced by the statutory analysis in our prior opinion that if the Legislature had intended [to allow a parent to vicariously consent on behalf of a minor child to the recording of telephone conversations between the minor and a third party] then it could have included such an exception in [the law]. n176

Thus the court held that the vicarious consent doctrine did not apply in Michigan's state courts. n177

The most recent rejection of the vicarious consent doctrine came from the Washington Supreme Court in its 2004 decision in *State v. Christensen*. n178 In *Christensen*, the court addressed the admissibility of evidence obtained by defendant Christensen's minor girlfriend's mother during a surreptitious interception of a phone call between Christensen and his girlfriend. n179

The *Christensen* case began when San Juan County Sheriff Bill Cumming suspected Oliver Christensen of the robbery of an elderly woman. n180 Because Sheriff Cumming "believed that evidence of the robbery might be found in the house of Christensen's then-girlfriend, Lacey Dixon," he contacted Lacey's mother, referred to by the court as Mrs. Dixon, "and obtained her consent to search her home for evidence of the crime." n181 While no evidence was found in the home, Sheriff Cumming nonetheless asked Mrs. Dixon to "keep a lookout for any evidence of the crime that might surface." n182 Mrs. Dixon did just that, and when Christensen later called for her daughter, she "handed the cordless