THE SUPREME COURT OF THE STATE OF ALASKA

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| GARY K., | ) | |
| | ) | Supreme Court No. S-13118 |
| Appellant, | ) | |
| | ) | Superior Court No. 4FA-05-120 CN |
| v. | ) | |
| | ) | MEMORANDUM OPINION |
| STATE OF ALASKA, OFFICE OF CHILDREN'S SERVICES, | ) | AND JUDGMENT* |
| | ) | |
| Appellee. | ) | No. 1324 – December 31, 2008 |

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Randy M. Olsen, Judge.

Appearances: Jill C. Wittenbrader, Anchorage, Quinlan Steiner, Public Defender, Anchorage, for Appellant. Joanne M. Grace, Assistant Attorney General, Talis J. Colberg, Attorney General, Anchorage, for Appellee.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Winfree, Justices. [Carpeneti, Justice, not participating.]

## I. INTRODUCTION

A father who failed to establish paternity until his daughter was two years old but who expressed a desire to parent the child after paternity was established appeals the superior court's termination of his parental rights. We conclude the superior court's

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* Entered pursuant to Appellate Rule 214.

factual findings were not clearly erroneous and its legal rulings and application of the law were proper. We therefore affirm the superior court's termination of parental rights.

## II. FACTS AND PROCEEDINGS

### A. Facts

Amy is the child of Gary K. and Jan W., who met sometime in December 2004 or January 2005 and had an approximately six-month relationship.[1] Their relationship was characterized by extensive drug use; in a two-week period of the relationship during which the couple was living with Gary's mother, they used methamphetamine "almost the whole time."[2]

Around April 2005, while Gary and Jan were living together, Jan discovered she was about one month pregnant. Jan testified Gary was with her when she completed a home pregnancy test and read the results. Gary testified that at first he thought Jan was lying about the pregnancy, but that later, after they had broken up, he noticed she was showing and thought there was a possibility the child was his. Meg,

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[1] We use pseudonyms to protect the parties' privacy. Jan has three children. As of December 2006 the tribe of Nenana had custody of her first child. As of February 2008 Dwight, the father of her second child, was working with OCS toward gaining custody of that child.

[2] Both Gary and Jan have a history of drug abuse. In 2001 Gary was arrested and charged with misconduct involving controlled substances. Jan has a long history of methamphetamine and cocaine use; she was still struggling with substance abuse as of 2007. Together, they used methamphetamine multiple times a week and marijuana daily, and Gary would often drive Jan's second child to the child's father in exchange for drugs.

Gary's current fiancee,[3] testified that she knew both that Jan claimed to be pregnant and that Gary might be the father.

Despite the pregnancy, according to Jan's testimony and the superior court's findings, Gary physically abused Jan.[4] Gary testified the relationship was violent "to an extent" due to the drug use but denied any physical abuse or any role in injuring Jan. Jan testified that the couple also continued to use methamphetamine after discovering the pregnancy.

Gary and Jan ended their relationship around May 2005, when Gary resumed his relationship with Meg. At some point near the end of Gary and Jan's relationship, Meg and Gary got into a physical altercation over Gary's relationship with Jan: Meg grabbed his throat, hit him with her fists and hands, and left gouge marks on his neck from her fingernails. The fight ended when police arrived, responding to a call Meg had made from Gary's house because she was afraid Gary might hurt her due to Jan's allegations of abuse.[5] Gary also claimed in a 2007 substance abuse evaluation that he has not used methamphetamine since 2005.

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[3] Gary and Meg met in 1997 and began dating in 1998 or 1999. Meg was married; she finalized her divorce in 2005. She and Gary became engaged in November 2006 but had not yet married as of the termination trial in March and April 2008.

[4] Jan testified that she never reported the abuse because she knew there were warrants for her and because she feared Gary would hurt her even more. Corroborating testimony is discussed below.

[5] Meg was arrested and charged with assault but pleaded down to disorderly conduct and criminal trespass.

Jan gave birth to Amy, who is an Indian child,[6] on November 10, 2005.[7] At birth, Amy tested positive for amphetamines, methamphetamine, and marijuana, had a low birth weight and difficulty eating and maintaining her body temperature, and exhibited withdrawal symptoms. Consequently, she remained in the neonatal intensive care unit for over one week, and the Department of Health and Social Services took emergency custody of her on November 22, 2005. Gary was named as the putative father in the emergency petition filed in superior court and was assigned a public defender. Amy was quickly placed with her current foster parents, who are Native American.

For the first seven to eight months, Jan visited Amy, but Jan stopped showing interest in parenting Amy after learning that, due to health complications and developmental delays, Amy would never be a normal child.[8] Amy's health and developmental problems include laryngomalacia (excess tissue in the upper airway causing difficulty in breathing) and a congenital cardiac abnormality called an atrial septic defect (an opening between the walls of the two upper chambers of the heart, requiring a procedure to close the opening around age four or five). She also exhibits signs of possible hearing impairment and has had tubes put in her ears and her adenoids removed to improve hearing and reduce ear infections.

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[6] *See* 25 U.S.C. § 1903(4) (2006). Amy qualifies as an Indian child through Jan and is a member of the tribe of Nenana.

[7] Jan gave Amy Dwight's last name because Dwight was present at Amy's birth.

[8] Jan also failed to follow through with her case plan, which required her to undergo long-term outpatient and residential substance abuse treatment, as well as ongoing mental health treatment.

Amy has seen several specialists for her health and developmental problems. She started physical and occupational therapy at eight months to address delays in her motor and cognitive skills. In January 2007 Amy saw a neurologist to determine if certain behavior — turning her eyes suddenly to the left and staring, and trembling when overly excited — could be seizures. The neurologist testified that Amy's behavior could be a "benign childhood event" but observed that Amy had difficulty self-quieting and recommended further testing. A specialist in genetic defects testified that though Amy did not have an identifiable genetic syndrome, she would "probably be on the lower side of a normal IQ to having mild mental retardation." Amy has also seen a speech therapist to help with her feeding and facial expressions; her foster parents use sign language to help Amy communicate.

From November 2005 until May 2007, the Office of Children's Services (OCS) attempted to locate Gary. After Amy was born, Jan called Gary but he had changed his phone number; in January or February 2006 she called Gary or his brother to tell Gary that Amy had been born. At one point after Amy's birth, Jan ran into Gary and asked him why he had not seen Amy yet.[9] OCS first tried to find Gary by contacting relatives and acquaintances and by researching his criminal and permanent fund dividend records; OCS located Gary's mother and obtained Meg's phone number and Gary's places of employment. At one point Susan Desrosiers, the OCS case worker assigned to the case, went physically looking for him.[10] Gary was living in Fairbanks but did not

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[9] Dwight testified that he asked mutual acquaintances to tell Gary he had a daughter and to contact Dwight or Jan.

[10] Desrosiers did not testify at trial; Erin Lee, the second OCS case worker assigned to this case, testified as to this event based on notes Desrosiers had made in the case file.

respond to these efforts. Though OCS had not located Gary, Desrosiers established a case plan in May 2006, which listed the goals as reuniting Jan and Amy, and locating Gary and having him submit to a paternity test.[11]

By May 1, 2006, Gary had neither been located nor had he stepped forward, and the superior court issued an order finding Amy to be a child in need of aid under AS 47.10.011 (1), (6), and (10).[12] The order named Gary as the putative father; he was again

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[11] Because Gary had not yet been located, he was not involved in preparing the case plan and did not sign it. Dwight submitted to a paternity test as requested by OCS; he was determined not to be the father.

[12] In December 2005 the court found there was probable cause that Amy was a child in need of aid under AS 47.10.011(6) and (10) and extended custody through March 2006; in February 2006 the court extended custody through April 2006. AS 47.10.011 provides, in relevant part:

> Subject to AS 47.10.019, the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following:
>
> (1) a parent or guardian has abandoned the child as described in AS 47.10.013, and the other parent is absent or has committed conduct or created conditions that cause the child to be a child in need of aid under this chapter;
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> . . . .
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> (6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct or by conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately;
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> . . . .

(continued...)

assigned a public defender.

In December 2006, when Gary still had not been located, OCS filed a petition to terminate Jan and Gary's parental rights. In February 2007, while the petition was pending, OCS developed a second case plan. This plan changed the goal from reuniting Jan and Amy to adoption "due to lack of progress by the parents and the young age of the child." The plan again listed as goals locating Gary, having him submit to a paternity test, and having him participate in case planning if found to be the father.[13]

Near the end of May 2007 Desrosiers made contact with Gary; apparently Gary responded at this time because the police had served him with a petition to terminate his parental rights. On May 30, 2007, OCS held a case review and an appointment for a paternity test was set up for June 2007.[14] In June 2007 OCS reassigned the case to Erin Lee, whose first task was to establish paternity. In early June she called Gary and left two voice-mail messages a couple of weeks apart. Gary responded after the second voice mail but had already missed the paternity test.

For the rest of June, July, and August 2007 Lee left voice mails every other week or weekly, requesting that Gary submit to a paternity test, explaining to him how important it was that he take the test, giving him instructions on where to go, offering to

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[12](...continued)

> (10) the parent, guardian, or custodian's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk to the child.

[13] The plan also outlined tasks for Amy's foster parents, including taking her to various doctor and therapy appointments.

[14] Lee's testimony suggests Desrosiers had documented that Gary participated in this case review; Gary testified he had no recollection of this event.

help him with transportation, informing him OCS would pay for the test, and telling him he did not need an appointment to take the test.[15] OCS also sent Gary letters stating he was the putative father. By the end of August 2007, Lee was calling several times a week.

Though Gary often did not respond to Lee, she testified that they connected a few times and when they did, he would say he was going to take the test. One of these times he told Lee he had not taken the test yet because he had been moose hunting. Another time, Lee explained Amy's health and developmental problems and told him that Amy had been living with her foster parents since birth and they were interested in adopting her. Gary expressed uncertainty as to whether he would want to parent Amy or not. Meg and Gary testified that he was "scared" of the consequences of paternity being established.

Gary finally submitted to a paternity test on September 28, 2007, and his paternity was established in December 2007. He first expressed interest in parenting Amy after learning that the test revealed that he was her biological father. Meanwhile, Jan's parental rights were terminated on November 7, 2007.

On December 7, 2007, OCS met with Gary to establish an initial case plan and to discuss its concerns, which included Gary's inexperience with parenting and his lack of knowledge about Amy's numerous health and developmental problems, the safety of his housing situation, and the role Meg would play in parenting Amy. The case plan, effective February 2008, required Gary to participate in OCS's and Resource Center for Parents and Children's (RCPC) parenting and visitation services, as well as

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[15] She also repeatedly called LabCorp, which conducts the paternity tests, to see if Gary had come in yet.

to participate in substance abuse and behavioral assessments, submit to urinary analysis tests, and follow through with all recommendations.

In March and April 2008 OCS and RCPC scheduled more than thirteen supervised visits with Gary, Meg, and Amy, and one home visit without Amy to assess Gary and Meg's living situation. Of those visits, Gary canceled one due to work and missed another due to illness; in the latter case, Meg attended the visit without Gary. These visits were mostly successful: Amy did not reject Gary and Meg, she often greeted them, she called them "mommy" and "daddy" at their prompting and repeated "I love you" after Meg at least once, and she appeared to enjoy playing with them.

On the other hand, on at least one occasion Amy did not appear to recognize or respond to Gary and Meg, and on another, Amy cried when Meg reached out to take her. When visits ended Amy often ran back to her foster brother, another foster child who is close in age and with whom she has a close bond. On a few occasions, Christine Bost, a family services worker at RCPC, observed that Gary appeared to be easily frustrated by Amy and to not understand Amy's limitations. Amy's occupational therapist attended a visit in early March to teach Gary and Meg techniques to help Amy improve her motor skills; Bost observed that Gary had difficulty hearing this information and that Meg more consistently implemented the suggestions.

Bost conducted the home visit in April 2008. She described Gary and Meg's home as "warm and tidy" and in a safe neighborhood, and noted they have an extra bedroom for Amy.

Gary submitted to both a substance abuse assessment and a behavior and abuse history evaluation. In late December 2007 Christy Pichette evaluated Gary for substance abuse and concluded that he has an amphetamine dependence in full sustained remission that does not require treatment. She recommended that he attend narcotics

anonymous meetings, grief counseling for a family tragedy, and parenting classes. She also recommended Meg attend the parenting classes with him.

In January 2008 Lisa Hay, of LEAP Inc., Alternatives to Violence Programs, completed a domestic abuse history evaluation and behavior assessment of Gary. Based on her interview with Gary and her review of his criminal records, she did not recommend a violence treatment program. In her evaluation and based on Gary and Meg's representations, she stated Gary and Meg appeared to be in a stable and violence-free relationship. Hay also stated she had been unable to contact Jan to verify abuse allegations. Finally, Hay noted Gary "was not honest about his criminal history that involved drug use" and that this dishonesty made her uncertain as to whether he was being honest about current drug use; she therefore recommended a substance abuse evaluation.

However, on March 21, 2008, the third day of Gary's termination trial, Hay revised her assessment because she had received two letters purportedly written by Jan describing Gary's abuse; Lee had faxed these to Hay.[16] Hay tried to contact Jan by phone to verify these letters but was unsuccessful. Based on these letters and on corroborating information gained by talking to Lee and Nita Marks, of the Nenana Native Council,[17] Hay changed her recommendation to requiring Gary to attend a nine-month alternatives to violence program.

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[16] The record is silent on when OCS received these letters or when Lee faxed them to Hay. Gary claims Lee faxed the letters to Hay on March 11, the first day of trial. The court did not admit these letters into evidence.

[17] Hay testified that Lee told her there were allegations of abuse and that Marks told her it was common knowledge in Nenana that Gary was abusing Jan. Marks did not testify.

Meanwhile, on March 10, 2008, Karen Kallen-Brown, a family relationship consultant, completed a family relationship assessment of Amy and her foster family at OCS's request. To complete the assessment, Kallen-Brown made home visits to observe Amy and her foster family for approximately seven hours on three consecutive days, and she talked to references.[18] Based on her observations of Amy with her foster family, Kallen-Brown "strongly recommend[ed] that [Amy] be kept in her current placement to prevent irreparable harm" and concluded Amy was "securely attached" to her foster family. She testified that she believed Amy could benefit from a "secondary attachment" to Gary and that his role could be "like an uncle."

In March 2008 Bost completed an initial family assessment of Gary and Meg. She noted that both Gary and Meg are employed[19] and have steady incomes and health insurance. She also emphasized that Amy has bonded to her foster family and "has not had enough time to establish a bond and attachment to [Gary and Meg]." Bost concluded, "[w]ith [Amy] developmentally behind in most areas, disrupted attachment [caused by removing Amy from her foster family] has the possibility of putting [Amy] more developmentally behind." However, the assessment also acknowledged that "[Gary] has completed most of his case plan without any recommendations or risk factors."

### B. Termination Trial Proceedings

The termination trial was held on March 11, 12, and 21, and April 21 to 23, 2008. In both its oral findings at the trial's conclusion and in its written findings and

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[18] Kallen-Brown did not meet with or interview Gary or Amy's doctors, teachers, or therapists.

[19] Gary works full-time at a carpet warehouse; Meg has two part-time jobs, one at Teamsters and the other at Fred Meyer's.

order, dated May 14, 2008, the court found there was clear and convincing evidence that (1) Gary abandoned Amy and she is a child in need of aid under AS 47.10.011(1) and AS 47.10.013; (2) Gary had not remedied the abandonment within a reasonable time; and (3) OCS had made reasonable and active efforts under AS 47.10.086 and the Indian Child Welfare Act (ICWA),[20] respectively, through its attempts to locate Gary and to provide him with paternity testing and case plan services.

The court also found there was evidence beyond a reasonable doubt, including expert testimony, that Amy would suffer serious emotional or physical harm if Gary received custody of her. The court based this conclusion on two findings: (1) Gary is prone to violence and rage, and (2) disrupting Amy's attachment to her foster family would result in emotional and developmental harm. In finding that Gary has a violent nature, the court relied on Jan's testimony of Gary's alleged abuse, as corroborated by the testimony of Dwight, Meg, and Bost.[21] Finally, the court found by a preponderance of the evidence that terminating Gary's parental rights was in Amy's best interests.

Gary appeals each of these findings and the termination of his parental rights.

## III. STANDARD OF REVIEW

Whether the superior court's factual findings comport with ICWA and are sufficient to support termination of parental rights under the Child in Need of Aid

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[20] 25 U.S.C. §§ 1901 *et seq.* (2006).

[21] The court also made its own observations of Gary's temperament during trial, describing Gary's facial expressions during Jan's testimony as exhibiting aggression and hatred. Additionally, the court recorded that the clerk of the court called judicial security at the trial's conclusion because Gary's "demeanor change" scared her.

(CINA)[22] statutes and rules are questions of law to which we apply our independent judgment.[23]

Whether substantial evidence supports the superior court's findings that the State complied with ICWA's "active efforts" requirement and proved beyond a reasonable doubt that granting the parent custody would likely result in serious damage to the child are mixed questions of law and fact.[24] We review the legal elements de novo.[25] We "will reverse the factual findings of the superior court in a termination of parental rights case only when those findings are clearly erroneous."[26] This standard "is met only if we are left with a definite and firm conviction that a mistake has been made after review of the entire record."[27] In reviewing a superior court's determination to

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[22] AS 47.10.005 *et seq.*

[23] *Rick P. v. State, OCS*, 109 P.3d 950, 954-55 (Alaska 2005) (CINA); *L.G. v. State, Dep't of Health & Soc. Servs.*, 14 P.3d 946, 950 (Alaska 2000) (ICWA); *see also Martin N. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 79 P.3d 50, 53 (Alaska 2003) (explaining that we adopt "the rule of law that is most persuasive in light of precedent, reason, and policy" when engaging in de novo review (quoting *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)) (internal quotation marks omitted)).

[24] *E.A. v. State, Div. of Family & Youth Servs.*, 46 P.3d 986, 989 (Alaska 2002) (discussing standard of review for finding the state proved beyond a reasonable doubt that granting the parent custody will likely cause serious harm to the child); *T.F. v. State, Dep't of Health & Soc. Servs.*, 26 P.3d 1089, 1092 (Alaska 2001) (discussing "active efforts" standard of review).

[25] *E.A.*, 46 P.3d at 989; *T.F.*, 26 P.3d at 1092.

[26] *Martin N.*, 79 P.3d at 53.

[27] *Id.* (citing *V.S.B. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 45 P.3d 1198, 1203 (Alaska 2002)).

terminate parental rights, we "bear in mind at all times that terminating parental rights is a 'drastic measure.' "[28]

## IV. DISCUSSION

Courts must make several findings under the CINA rules and statutes, as well as ICWA, before terminating parental rights.[29] First, the court must find by clear and convincing evidence that (1) "the child has been subjected to conduct or conditions described in AS 47.10.011";[30] (2) the parent "has not remedied the conduct or conditions in the home that place the child at substantial risk of harm," or "has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child at substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury";[31] and (3) in the case of an Indian child,[32] that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have

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[28] *Karrie B. ex rel. Reep v. Catherine J.*, 181 P.3d 177, 184 (Alaska 2008) (quoting *Martin N.*, 79 P.3d at 53) (internal quotation marks omitted).

[29] 25 U.S.C.A. §§ 1901-1963 (2008); AS 47.10.088; CINA Rule 18; *Carl N. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 102 P.3d 932, 935 (Alaska 2004).

[30] AS 47.10.088(a)(1); CINA Rule 18(c)(1)(A).

[31] AS 47.10.088(a)(2)(A)-(B); CINA Rule 18(c)(1)(A)(i)-(ii).

[32] *See* 25 U.S.C. § 1903(4). It is undisputed that Amy is an Indian child. ICWA applies though Gary is a non-Indian. *See K.N. v. State*, 856 P.2d 468, 474 n.8 (Alaska 1993) (noting ICWA applies to proceedings terminating a non-Indian's parental rights over an Indian child).

proved unsuccessful."[33] Also in the case of an Indian child, the court must find by "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[34] Finally, the court must find "by a preponderance of the evidence that termination of parental rights is in the best interests of the child."[35]

### A. The Superior Court Did Not Err in Finding that Gary Abandoned Amy Under AS 47.10.013 and Therefore She Is a Child in Need of Aid Under AS 47.10.011(1).

Gary argues the superior court erred in finding he abandoned Amy within the meaning of AS 47.10.013 and that therefore she is a child in need of aid under AS 47.10.011(1). The State replies that substantial evidence supports the court's findings that Gary knew Amy existed and that his failure to determine paternity for two years evidenced a conscious disregard for his parental duties and resulted in the destruction or prevention of a parent-child relationship.

The superior court concluded there was "clear and convincing evidence that [Amy] is a child in need of aid under AS 47.10.011(1)." It found based on the testimony of Gary, Meg, and Jan, that "[Gary] had every reason to believe that he was probably the father," and that "[his] explanations for not taking the paternity tests sooner than he did, [were] not credible." Thus, the court found that "[Gary] abandoned [Amy] by failing to make any effort to determine whether he had fathered a child, despite having

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[33] 25 U.S.C. § 1912(d) (2006); CINA Rule 18(c)(2)(B).

[34] 25 U.S.C. § 1912(f) (2006); CINA Rule 18(c)(4).

[35] CINA Rule 18(c)(3); *see also* AS 47.10.088(c) (stating courts "shall consider the best interests of the child" in deciding whether to terminate parental rights).

been given notice on more than one occasion that [Jan] was pregnant and that she identified him as the child's father." The court also found that leaving Amy with Jan, "whom [Gary] knew to be seriously and actively using addictive dangerous drugs, . . . constitute[d] an abandonment of the child." Based on these findings, the court concluded that "[Gary's] conduct has evidenced a disregard for his parental obligations, and it has resulted in the destruction of the parent-child relationship; in fact, it prevented a parent-child relationship from ever coming into existence."

Under AS 47.10.011 a child is "in need of aid" if the court "finds by a preponderance of the evidence that . . . a parent or guardian has abandoned the child as described in AS 47.10.013, and the other parent is absent or has committed conduct or created conditions that cause the child to be a child in need of aid under this chapter."[36] Jan voluntarily relinquished her parental rights. Therefore, the prerequisite related to "the other parent" has been met.[37] The remaining issue under AS 47.10.011(1) is whether Gary abandoned Amy as described in AS 47.10.013. That statute explains:

> For purposes of this chapter, the court may find abandonment of a child if a parent or guardian has shown a conscious disregard of parental responsibilities toward the child by failing to provide reasonable support, maintain regular contact, or provide normal supervision, considering the child's age and need for care by an adult.[38]

The statute also gives specific examples of conduct considered to constitute abandonment, including instances where the parent, "without justifiable cause," leaves the child with another person without providing for the child's support or making

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[36] AS 47.10.011(1).

[37] *See Rick P. v. State, OCS*, 109 P.3d 950, 956 (Alaska 2005).

[38] AS 47.10.013(a).

meaningful communication with the child for three months, or makes only minimal efforts to support and communicate with the child.[39]

Our courts apply a two-prong test to determine if abandonment has occurred: "(1) whether the parent's conduct evidenced a disregard for his or her parental obligations, and (2) whether that disregard led to the destruction of the parent-child relationship."[40] We have stated that the child's best interests are relevant in determining whether the parent's conduct destroyed the parent-child relationship "because it is indicative of a breakdown of the parent-child relationship if the child's best interests are promoted by legal severance of the relation."[41]

We have clarified that "[a]bandonment is not determined by the parent's subjective intent, but by 'objective evidence of parental conduct.' "[42] Under our objective test, courts "inquir[e] as to whether [the parent's] behavior demonstrates a willful disregard of his or her parental responsibility."[43] We have stated that "a parent has an 'affirmative duty . . . [to show] continuing interest in the child and [to make] a

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[39] *See* AS 47.10.013(a)(1) & (a)(2); *see also* AS 47.10.13(a)(3)-(8) (listing additional instances of conduct amounting to abandonment).

[40] *G.C. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 67 P.3d 648, 651 (Alaska 2003) (quoting *E.J.S. v. State, Dep't of Health & Soc. Servs.*, 754 P.2d 749, 751 (Alaska 1988)) (internal quotation marks omitted).

[41] *In re B.J.*, 530 P.2d 747, 749 (Alaska 1975).

[42] *D.E.D. v. State*, 704 P.2d 774, 783 (Alaska 1985) (quoting *In re E.J.(T.)*, 557 P.2d 1128, 1130-31 (Alaska 1976)).

[43] *G.C.*, 67 P.3d at 652 (citing *E.J.S.*, 754 P.2d at 751).

genuine effort to maintain communication and association'; token efforts to communicate with a child will not satisfy this duty."[44]

**1. The superior court did not err in finding that Gary's conduct evidenced a conscious or willful disregard for his parental duties.**

Gary argues that he did not know Amy existed and therefore he had no affirmative duty to establish paternity. He argues the superior court thus erred in finding he willfully disregarded his parental duties. In making this argument, Gary attempts to distinguish his situation from that in *Jeff A.C., Jr. v. State*,[45] where we indicated that the father had abandoned his daughter though the father did not know she existed until she was eleven months old because, among other things, the mother testified she had told the father of the pregnancy and yet he made no effort to determine paternity, the father did not request visitation with the child until eight months after learning he had a daughter, and the father failed to manifest a desire to parent the child.[46] The State counters that substantial evidence supports the court's finding that Gary knew that Jan was pregnant and the child might be his, and that Gary's failure to step forward and establish paternity for nearly two years evidenced a willful disregard for his parental duties.

Gary's efforts to distinguish his case from *Jeff A.C., Jr.* are unavailing. As with the father in *Jeff A.C., Jr.*, whose absence from his daughter's first year of life could not be excused because the mother had told him of a possible pregnancy and yet

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[44] *Jeff A.C., Jr. v. State*, 117 P.3d 697, 704 (Alaska 2005) (alterations in original) (quoting *In re H.C.*, 956 P.2d 477, 481 (Alaska 1998)) (internal quotation marks omitted).

[45] 117 P.3d 697 (Alaska 2005).

[46] *See id.* at 705.

he still made no effort to determine paternity,[47] here, Jan testified that she and Gary lived together when she discovered the pregnancy, that Gary was with her when she completed a home pregnancy test and read the results, and that they were happy about the results. She also testified Gary's mother knew Jan was pregnant "because she was living in the same house" as Gary and Jan. And Jan testified that after she and Gary broke up, she ran into him and asked him why he had not seen Amy yet. Dwight testified he asked mutual acquaintances to tell Gary he had a daughter and to contact Dwight or Jan.

More importantly, Gary and Meg testified that they were aware the child could be his. Meg testified that Jan had told her she was pregnant and that it had occurred to Meg the child might be Gary's. Meg also testified that at some point after Gary and Jan had broken up, Jan came over to Gary's and "was showing a little, just a little bump." Gary testified he thought there was a possibility the child might be his and admitted that he did "nothing" about it. When OCS finally got in touch with Gary in May 2007, he admitted he had "heard through the grapevine that [Jan] had a baby and that it might be his." Additionally, though Meg and Gary testified they were not sure the child was Gary's because Jan would often return to Dwight, Gary admitted he had unprotected sex with Jan. Thus, as with the father in *Jeff A.C., Jr.*, there is substantial evidence to support the superior court's finding that Gary knew the child was probably his.

We are also unpersuaded by Gary's argument that, because he took the paternity test "within months" of OCS finding him and expressed a desire to parent Amy

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[47] *See id.* (acknowledging that as a general matter a person cannot abandon a child he does not know exists but concluding that under the facts of the case the father's argument was unavailing).

upon finding out he was the biological father, his conduct did not evidence a willful disregard for his parental duties

Though Gary took the paternity test four months after OCS first made direct contact with him in May 2007, his objective conduct undermines his argument that by waiting four months he acted in a timely manner. Gary failed to attend the June 2007 paternity test. Lee's testimony established that Gary only infrequently answered her numerous phone calls in the summer of 2007 though he understood the importance of taking the paternity test, and that he was not following through with getting the test done. And according to the testimony of Lee, Meg, Bost, and Gary, Gary put off taking the paternity test because he was scared of the consequences and had other priorities. Bost testified that Gary told her he was "scared, [he] didn't know what was going to happen if he was the father," and he "didn't know exactly how to tell [Meg]." Meg testified that when she would urge Gary to take the test, he would respond he was "busy at work." Lee testified that at one point he had been out of town moose hunting for ten days. Gary admitted he "was freaking out. I was very scared. I just had a promotion at my job that I was obligated to, and I had a little vacation time coming up, and I took a little vacation time." This evidence more than supports the superior court's finding that "[Gary] delayed the testing . . . despite the dogged efforts from OCS and had no good reason for doing so," and that Gary's "explanations for not taking the paternity tests sooner than he did [were] not credible."[48]

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[48] In his reply brief Gary makes a new argument, urging us to adopt a rule that parental duties do not attach until paternity is established, and therefore his conduct before paternity was determined cannot form a part of the abandonment analysis. Because Gary raised this argument for the first time in his reply brief, we consider it waived. *See Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 632 (Alaska 1995).

Additionally, Gary's failure to make any effort to determine paternity, despite knowing there were good reasons to believe that the child was his, undercuts his argument that by expressing a desire to parent Amy upon paternity being established, he did not evidence willful disregard for his parental duties. In concluding that the father in *Jeff A.C., Jr.* had abandoned his daughter, we stated that "[m]ost importantly, from when he learned of [the child] until trial — a period of over one year — there was no evidence that [the father] manifested any desire to the social worker or the foster mother to parent [the child]."[49] Here, unlike there, Gary stated he wanted custody of Amy once paternity was established and has largely complied with his case plan requirements.[50] However, in concluding the superior court did not err in finding abandonment in *Jeff A.C., Jr.*, we also emphasized the father's failure to make any effort to determine paternity during the first year of the child's life.[51] Because Gary likewise made no effort to determine paternity until Amy was nearly two years old, and because he showed no interest in parenting her until paternity was established, we conclude the record contains substantial evidence to support the superior court's finding that Gary's conduct evidenced a willful disregard for his parental duties.

**2. The superior court did not err in finding that Gary's conduct destroyed the parent-child relationship.**

Gary argues his conduct did not destroy the parent-child relationship because in the four months after paternity was established in December 2007 he "developed a close bond with Amy." To support this argument, he cites examples of

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[49] *Jeff A.C., Jr.*, 117 P.3d at 705.

[50] Hay's revised behavior assessment, in which she recommended a nine-month alternatives to violence course, was not made available until the third day of trial.

[51] *Jeff A.C., Jr.*, 117 P.3d at 705.

when he has displayed appropriate parenting skills and of when Amy has shown affection or recognition of him. Gary argues these examples establish that his conduct did not destroy a parent-child relationship with Amy. The State replies that Gary's examples "do not evidence a parent-child bond" and offers counter examples of Gary being frustrated by Amy and of Amy failing to recognize or respond affectionately to Gary and Meg. Additionally, the State argues that because of Amy's close bonds with her foster family, a best interests analysis leads to the conclusion that Gary's conduct, which resulted in his absence from her life for her first two years, destroyed the parent-child relationship.

The superior court found that Gary's conduct had destroyed the parent-child relationship. In so concluding, the court considered Amy's best interests, noting, "[Amy is in] the critical period during which disruptions in her attachment can produce permanent damage to any child." The court implicitly found that Gary's visits with Amy in March and April 2008 were insufficient to establish a parent-child relationship, stating, "[Gary's] conduct . . . prevented a parent-child relationship from ever coming into existence between [Amy] and himself."

In *O.R. v. State, Department of Health & Social Services*,[52] we held the superior court did not err in determining the parent-child bond was destroyed by the parents' failure to maintain contact with the child for the first ten months of her life where: (1) a social worker testified that she did not believe the child "has any attachment [to her parents] other than [as] someone she comes to visit," (2) the child showed "no great sign of recognition on her face" when meeting her parents, and (3) an expert witness testified that contact between the parent and child is "the number one critical

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[52] 932 P.2d 1303 (Alaska 1997).

thing that happens in the first several months of life and probably is what future relationships are dependent upon."[53]

Similarly, the expert testimony presented in Gary's termination trial established that Amy may not recognize Gary as someone other than an occasional visitor, and that Gary's conduct, resulting in his absence from the first two years of Amy's life, may have long-lasting consequences. Bost testified that she believed "[Gary and Meg] have established a relationship with [Amy], but I do not know how well — how strong a bond they have formed." With respect to Amy calling Gary "daddy," Bost testified that in her "experience in working with kids, this age is a really big age for kids to call all women mom or most women mom and most males dad, especially the ones that are placed." Additionally, Bost's observations indicate that Amy neither rejected Gary nor was more receptive to him than to her foster family, and that she exhibited significant attachment to her foster brother. On at least one occasion, Amy appeared to not recognize Gary and Meg. Bost also observed Gary to be easily frustrated by Amy's limitations.

Dr. Marni Cranor, a psychology expert, testified that often supervised visits are "not that much different than the child going to preschool, or daycare, or a babysitter." Kallen-Brown, who observed Amy with her foster family, testified at length as to the importance of forming secure attachments to primary care-givers in early childhood and as to Amy's significant attachment to her foster family.

As with the testimony in *O.R.*, the testimony of Bost, Dr. Cranor, and Kallen-Brown supports the superior court's finding that Gary's conduct destroyed a parent-child relationship. The experts' testimony suggests that because of Gary's own delay in taking the paternity test, he at best formed a relationship with Amy over a four-

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[53] *Id.* at 1309 (alterations in original).

month period in which he had supervised visits with her at OCS and RCPC, and that at worst Amy did not recognize Gary as an attachment figure. Therefore, we conclude that the superior court did not err in finding that Gary's conduct destroyed a parent-child relationship.

Because substantial evidence supports the superior court's finding that Gary had reason to know Jan's child was his, consciously delayed taking the paternity test, failed to express interest in parenting Amy until after paternity was established, and only began forming a relationship with her after she was two years old, we conclude the superior court did not clearly err in finding that Gary abandoned Amy within the meaning of AS 47.10.013 and that she therefore is a child in need of aid under AS 47.10.011(1).

### B. The Superior Court Did Not Err in Finding that Gary Failed, Within a Reasonable Time, To Remedy the Conduct or Conditions in the Home that Placed Amy at Substantial Risk of Physical or Mental Injury.

Gary argues that even if the court did not err in finding that he abandoned Amy, the court did err in finding there was clear and convincing evidence that he had not remedied, within a reasonable time, the conduct or conditions that placed her at substantial risk. He contends he met this requirement because he stated his desire to parent Amy after paternity was established, fulfilled his case plan requirements, began to develop a relationship with Amy within four months of establishing paternity, and has a nice home in a good neighborhood. The State responds that more is required of Gary "to remedy two years of abandonment" and that his "change of heart came too late for Amy." The State also argues that disrupting Amy's attachment to her foster parents could result in lifelong damage and granting Gary custody would place Amy at risk of Gary's violent nature.

In finding there was clear and convincing evidence that Gary had not met this requirement, the court stated that "[a]t this time, he could not remedy the lack of a parent-child relationship with [Amy] and his other issues in an amount of time that is reasonable for this young child." The court made various findings that supported its conclusion, including: Gary abused Jan, he "lacks patience and control over his aggressive impulses," there has been violence in Gary and Meg's relationship and they misrepresented this, and Gary's testimony regarding his drug use was not credible. Additionally, the court considered Amy's best interests, acknowledging her special needs and stating her health and developmental delays put her in a "particularly vulnerable position."

Before a court may terminate parental rights, it must find by clear and convincing evidence that the parent "(A) has not remedied the conduct or conditions in the home that place the child at substantial risk of harm; or (B) has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child at substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury."[54] In making this determination, "the court may consider any fact relating to the best interests of the child."[55] One such interest is the likelihood of returning the child to the parent within a reasonable time based on the child's age or needs.[56]

"Our cases indicate that a parent's willingness to resume parental duties does not 'remedy' abandonment if this change of heart comes too late for the parent to

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[54] AS 47.10.088(a)(2)(A)-(B).

[55] AS 47.10.088(b).

[56] AS 47.10.088(b)(1); *see also* AS 47.10.088(b)(2)-(b)(5) (listing additional facts).

bond with the child during the critical early phase of the child's life."[57] We have held that "where a young child has lived without the parent for a significant period of time, that in and of itself may be sufficient evidence to establish that reunification would put the child at 'substantial risk of . . . mental injury' within the meaning" of AS 47.10.088(a)(2)(B).[58]

In *M.W. v. State, Department of Health & Social Services*,[59] we held that a father had failed, within a reasonable time, to remedy abandonment where the father failed to contact the state for nearly one year after the child's birth and made no effort to establish a parental relationship with the child until over one year after her birth.[60] While there the father's paternity was not at issue, the reasoning in that case applies here because Gary knew that Jan had a baby who could be his and that OCS was trying to find him.

As with the father in *M.W.*, Gary failed to make contact with OCS until May 2007, when Amy was eighteen months old, and then failed to follow through with getting the paternity test until September 2007, when she was just shy of two years old. Also like the father in *M.W.*, Gary waited until Amy was over two years old before

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[57] *Rick P. v. State, OCS*, 109 P.3d 950, 958 (Alaska 2005) (citing *M.W. v. State, Dep't of Health & Soc. Servs.*, 20 P.3d 1141 (Alaska 2001)) (acknowledging expert testimony indicating it is "important for a child to bond with its parent in the 'early months' of its life," and legislative findings emphasizing "the importance of expediting the placement process for children under six years of age" (quoting *M.W.*, 20 P.3d at 1145) (internal quotation marks omitted)).

[58] *Id.* (stating that a "parent's attempt to resolve abandonment by reappearing does not remedy the conduct unless the attempt occurs within a reasonable amount of time" (quoting *M.W.*, 20 P.3d at 1145) (internal quotation marks omitted)).

[59] 20 P.3d 1141 (Alaska 2001).

[60] *Id.* at 1145.

stating any interest in parenting her. Thus, the superior court could reasonably find that Gary waited too long to remedy his abandonment.

Additionally, the record contains sufficient evidence to support the superior court's finding that Gary has aggression control problems that need to be addressed and given Amy's age, attachment to her foster family, and special needs, she could not wait for him to address these issues. Jan testified that Gary abused her during their relationship; Dwight testified that when he picked Jan up from Gary's she had bruises, that she told him Gary abused her, and that Gary had threatened him; Amy's foster mother testified that when she dropped Amy off with Gary for a visit, he intimidated her; Meg testified that Jan had told her Gary abused Jan and that this caused Meg to call the police for protection; Gary testified that he thought Meg's violence toward him was "justified"; and Gary admitted his relationship with Jan was violent "to an extent" due to drug use. Hay testified she would now recommend that Gary attend a nine-month alternatives to violence course because of Jan's allegations and Hay's conversations with Marks, which indicated it was common knowledge in Nenana that Gary abused Jan. Though the court stated it was not sure that a nine-month course would be necessary, it found that Gary could not remedy his aggression control issues within a reasonable time for Amy given her special needs, age, and attachment to her foster family.

Although the record also contains evidence supporting Gary's claims that he has made strides toward improving his quality of life and parenting skills,[61] we

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[61] Bost testified that Gary exhibited some good parenting behaviors in visits and that RCPC could teach further skills. Bost's family assessment of Gary and Meg noted that Gary has "been visiting weekly" since meeting Amy in December 2007, that Gary reports "he will do whatever he has to in order to gain custody of [Amy]," and that they live in a well-furnished home in a good neighborhood and are both employed. Meg and Gary testified they have not had any further incidences of violence and that because (continued...)

conclude the superior court did not clearly err in finding Gary failed to remedy, within a reasonable time, his abandonment of Amy.[62] Substantial evidence supports the court's finding that Gary's change of heart came too late: Gary was not a part of Amy's life for her first two years as a result of his own choices, and he only stated a desire to parent her after paternity was established, at which point she was twenty-five months old. There is sufficient evidence of Gary's unresolved aggression problems to support the superior court's finding that Gary could not remedy his lack of a parent-child relationship within a reasonable time for Amy given her age and special needs — he would at least need to be reevaluated for domestic abuse history and might need to attend treatment for up to nine months.[63]

### C. The Superior Court Did Not Err in Finding the State Made Active Efforts To Provide Remedial and Rehabilitative Services To Prevent the Breakup of the Indian Family and These Were Unsuccessful.

Gary contends the superior court erred in finding that OCS met its active efforts burden under ICWA because OCS failed to provide collateral information about

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[61](...continued)
of Meg, Gary has not used drugs in around two years.

[62] Gary raises a new argument in his reply brief, claiming that "if there was any failure to remedy [his abandonment], the record clearly shows that it was OCS's failure to provide active efforts, not any lack of effort on Gary's part." This argument lacks merit for the reasons stated in the text following this note. Further, because Gary did not raise this argument in his opening brief, we consider it waived. *See Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 632 (Alaska 1995).

[63] *See* AS 47.10.088(b)(1); *see also Carl N. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 102 P.3d 932, 936 (Alaska 2004) (concluding that where expert testimony indicated it would be at least two years before the father could be reunited with the child and where evidence in the record indicated the child needed to achieve stability and permanence, "the superior court could reasonably find, as it did, that [the father's] recent efforts were 'too little, too late' ").

his alleged abuse of Jan in a timely manner and "to undertake an active reunification plan." The State disputes both of these points, arguing Gary's own failure to step forward and assume responsibility for parenting Amy caused the "short window" of opportunity to complete a case plan, and his own failure to be honest with Hay led to her unsuccessful behavioral assessment.

In its oral findings, the court found OCS had proven by clear and convincing evidence that it had met its active efforts requirement. It found that "OCS was dogged in their efforts to try to locate [Gary]," and that his response was "very slow" and he "missed appointments and missed appointments." The court stated, "during all of that time, I believe that he knew he had a child out there that he had left . . . abandoned." In its written findings and order, the court further found:

> The department has provided [Gary] with a substance abuse assessment and a behavioral assessment, and with parenting education and visitation in addition to the paternity testing that established [Gary's] biological paternity of [Amy]. Prior to that, the department exerted more than active efforts in attempting to locate [Gary] . . . . [and Gary] sabotaged the behavioral assessment by providing Ms. Hay with false and deceptive descriptions of his history with [Jan], preventing her from making the recommendation that was appropriate for him in this case.

Under ICWA, before terminating parental rights the court must find by clear and convincing evidence "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[64] We have held that " 'no pat formula'

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[64] 25 U.S.C. § 1912(d) (2006); CINA Rule 18(c)(2)(B).

exists for distinguishing between active and passive efforts."[65] However, we have recognized certain distinctions: passive efforts include drawing up a case plan and leaving the client to develop his own resources to satisfy it; whereas active efforts include "tak[ing] the client through the steps of the plan," for example, by helping the client develop the "parenting skills necessary to retain custody of [the] child."[66] Establishing paternity where it had been in doubt triggers the State's "active efforts" duty.[67] The parent's willingness to cooperate in carrying out a case plan is relevant to determining if the State met its "active efforts" burden.[68]

The record contains substantial evidence supporting the superior court's finding that OCS made active efforts to provide Gary with remedial and rehabilitative services regarding domestic abuse and that Gary's misrepresentations prevented Hay from making an appropriate recommendation. To meet its active efforts burden, OCS needed not only to require Gary to undergo a domestic abuse history assessment, but also to provide the services for him to do so. Hay testified that she interviewed Gary, talked to Meg on the phone, looked up criminal histories and civil complaints for both, had Gary complete two behavior inventories (one on acts done to him and one on his own actions), and met with him for one and one-half hours. She stated in her assessment that

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[65] *A.A. v. State, Dep't of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999) (quoting *A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997)).

[66] *Id.* (citing CRAIG J. DORSEY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL 157-58 (1984)).

[67] *T.F. v. State, Dep't of Health & Soc. Servs.*, 26 P.3d 1089, 1094-95 (Alaska 2001) (stating until paternity was established, the state had no active efforts duty); *see also* 25 U.S.C. § 1903(9) (excluding "the unwed father where paternity has not been acknowledged or established" from the definition of "parent").

[68] *A.A.*, 982 P.2d at 262.

Gary admitted there had been one fight with Jan, and that she had tried to find Jan to verify this but was unsuccessful. Hay also testified that she did not rely solely on the letters purportedly written by Jan in revising Gary's behavioral assessment and recommendation; instead, she relied on her conversations with Lee, who told her there were allegations of abuse, and with Marks, who informed her it was common knowledge in Nenana that Gary abused Jan.

Additionally, Hay testified that Gary had "denied any violence or abuse" in his relationships with Jan. She also testified that Gary was "inconsistent on his paperwork" regarding his criminal history and that this made it "hard to believe that [he was] being consistent with everything else."

Though OCS's failure to give Gary the letters earlier, assuming it could have done so, is not commendable, based on this testimony the superior court could reasonably find that OCS made active efforts to provide Gary with remedial services for domestic abuse.[69] The superior court could also reasonably find based on this testimony that Gary misrepresented his domestic abuse history to Hay, thereby preventing her from making an appropriate recommendation and causing the remedial services to be unsuccessful.

Gary also complains that OCS failed to make active efforts because it did not provide a case plan with Kallen-Brown's recommendations for a slow transition and overnight visits, and it gave him only a "short window" of time to complete his plan. He asserts he complied with "every other aspect of his case plan." Our prior opinions demonstrate that where a parent causes OCS to delay in providing services, such as by

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[69] *Cf. Winston J. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 134 P.3d 343, 347 (Alaska 2006) (clarifying in the context of the state's less demanding duty to provide reasonable efforts under AS 47.10.086 that "the law does not require perfect efforts").

refusing to take a paternity test, OCS is not responsible for the resulting shortened window of time the parent has to complete the services.[70] The record contains evidence supporting Gary's claim that he largely complied with his case plan;[71] however, there is substantial evidence to support the superior court's finding that Gary's own delay in establishing paternity and showing interest in parenting Amy has placed her in a "particularly vulnerable position," and that given her age and special needs, OCS needed more time to provide Gary with the services he needed to be ready to care for Amy. As previously discussed, the record contains substantial evidence that Gary knew Jan had a child that might be his, that OCS was looking for him and he needed to take a paternity test, and that he missed a paternity test appointment and delayed taking the test. OCS did not have a duty to provide active efforts until paternity was established, and once it was established, OCS immediately developed a case plan for Gary. To the extent that OCS gave him a short window of opportunity to complete the case plan, it was short because of Gary's decision to wait two years to establish paternity, as well as because of Amy's age and special needs.

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[70] *See G.C. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 67 P.3d 648, 654 n.23 (Alaska 2003) (concluding DFYS had limited time in which to meet its reasonable efforts requirement under AS 47.10.086 because the child had "been in foster care for a significant period of time" and "[b]ecause allowing additional time for DFYS to provide [the father] with reunification services would not have been in [the child's] best interests"); *T.F. v. State, Dep't of Health & Soc. Servs.*, 26 P.3d 1089, 1094 (Alaska 2001) (declining to delay the termination of parental rights so a father would have more time to demonstrate fitness where he had caused the delay in paternity testing).

[71] He attended most of the scheduled visits with Amy and completed a substance abuse assessment, a domestic abuse history evaluation and behavioral assessment, and a family assessment.

We therefore conclude the superior court did not clearly err in finding that OCS met its active efforts duty.

### D. The Superior Court Did Not Err in Finding Beyond a Reasonable Doubt that Granting Gary Custody Would Likely Result in Serious Emotional or Physical Damage to Amy.

Gary argues the superior court erred in finding there was evidence beyond a reasonable doubt that granting him custody would likely result in serious damage to Amy. He argues the "record contains scant evidence" to support the superior court's finding that Gary lacks patience and has a proclivity for violence. Gary also contends the testimony indicated that Amy is "a resilient child," and that the various experts "could not predict or quantify if she would suffer harm if moved to Gary's home." The State replies by arguing there was sufficient evidence to support the superior court's findings that Gary has a violent nature and that removing Amy from her foster family would cause severe damage to her.

The superior court found there was evidence beyond a reasonable doubt, including expert testimony, that granting Gary custody would likely result in serious emotional or physical damage to Amy. The court based this conclusion on two findings: (1) Gary lacks patience and is inclined to use violence, and (2) Amy would suffer serious emotional damage if removed from her foster parents, with whom she has lived since she was an infant. Regarding Gary's nature, the court stated from the bench it believed "there was violence in [Gary and Jan's] relationship" based on Jan's testimony, as confirmed by that of Hay and Meg.

ICWA and CINA Rule 18 require the court to find beyond a reasonable doubt, including by expert testimony, that the parent's custody of the child would likely

result in serious emotional or physical damage to the child.[72] The court must "focus on the risk of future harm . . . rather than on the infliction of past injury."[73] Proof of the likelihood of such future harm "must include qualified expert testimony based upon the particular facts and issues of the case."[74] However, ICWA "does not require that the experts' testimony provide the sole basis for the court's conclusion."[75] We have held that a child's close ties to foster parents may "properly be considered as relevant evidence bearing on the issue of likely emotional harm."[76] But "mere evidence that a willing

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[72] 25 U.S.C. § 1912(f) (2006); CINA Rule 18(c)(4).

[73] *L.G. v. State, Dep't of Health & Soc. Servs.*, 14 P.3d 946, 950 (Alaska 2000) (quoting *E.M. v. State, Dep't of Health & Soc. Servs.*, 959 P.2d 766, 771 (Alaska 1998)) (internal quotation mark omitted). "Proof that a parent's continued custody of [his child] is likely to cause [her] serious harm requires both proof that the parent's conduct is likely to harm the [child], and proof that it is unlikely that the parent will change [his] conduct." *Id.* (citing *In re Termination of Parental Rights of T.O.*, 759 P.2d 1308, 1310-11 (Alaska 1988)).

[74] *E.A. v. State, Div. of Family & Youth Servs.*, 46 P.3d 986, 991 (Alaska 2002) (citing 25 U.S.C. § 1912(f); *C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1218 (Alaska 2001)) (holding expert testimony meets this standard though the expert had no contact with the parent where the expert had "substantial contact" with the child and where the expert's testimony is specific to the child's behavior and needs); *see also L.G.*, 14 P.3d at 950 (explaining the court may find the parent's conduct is likely to harm the child and it is unlikely the parent will change his conduct "through the testimony of a single expert witness, by aggregating the testimony of expert witnesses, or by aggregating the testimony of expert and lay witnesses" (internal footnotes omitted)).

[75] *E.A.*, 46 P.3d at 992.

[76] *A.M. v. State*, 891 P.2d 815, 826 (Alaska 1995), *overruled on other grounds by In re S.A.*, 912 P.2d 1235, 1239 (Alaska 1996), *superseded on other grounds by statute*, ch. 99, §§ 1(b)(2)(B), SLA 1998; *see also State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs. v. M.L.L.*, 61 P.3d 438, 442 (Alaska 2002) (declining to (continued...)

custodian other than the parent would do a better job than the parent does not in itself suffice to support a finding of likely emotional harm."[77]

In *State, Department of Health & Social Services, Division of Family & Youth Services v. M.L.L.*, we concluded insufficient evidence existed to find likely damage beyond a reasonable doubt where: (1) the parent had been sober for over three years, (2) the parent had maintained a stable and violence-free relationship, (3) the parent had maintained a clean home, and (4) the expert testimony "left room for doubt as to whether [the mother] and her new husband would be able to safely care for the children."[78] In that case, a mental health expert testified that persons with the mother's diagnosis were treatable and her diagnosis did not necessarily rule her out as a parent; another expert testified that while the mother lacked many basic parenting skills, the expert's ultimate recommendation was to increase visits between the children and the mother.[79] There, we concluded that though "this testimony did not constitute an

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[76](...continued)
decide whether ICWA requires courts to consider the child's bonds with her foster parents in deciding if granting the parent custody will likely result in serious damage "[b]ecause the superior court considered the potential harm that the children would suffer from the severing of their bonds with their foster mother").

[77] *A.M.*, 891 P.2d at 826.

[78] *See M.L.L.*, 61 P.3d at 443-44; *see also J.J. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 38 P.3d 7, 9-11 (Alaska 2002) (reversing the superior court's finding beyond a reasonable doubt that placement with the mother would likely result in serious damage to the children where the evidence showed the mother had complied with her case plan, had found a safe living environment and entered a sober and supportive relationship, had remained sober for nearly one year before trial, the expert on which the state relied had not met with or interviewed the mother or the children, and the children were not in a permanent placement).

[79] *M.L.L.*, 61 P.3d at 444-45.

endorsement of granting custody [to the parent], it also was not a recommendation that her parental rights be terminated."[80]

Similarly, here, the record contains evidence that Gary (1) had not used methamphetamine in around two years as of December 2007; (2) has maintained a violence-free relationship with Meg since 2005, has a clean and safe home, and is employed; and (3) has largely complied with the case plan OCS had established for him before Hay's revised behavior assessment.

Additionally, the expert testimony leaves some doubt as to the effect on Amy of removing her from her foster parents. Keri Herning, Amy's occupational therapist, testified that when she first started seeing Amy at eight months, Amy "had pretty significant delays in her fine motor abilities, and also in her oral motor abilities," but that Amy has "been consistently making gains." But on cross-examination, Herning testified that a supportive care-giver could learn the techniques needed to help the child and that she could not be certain that bringing in a new care-giver would halt Amy's progress. Dr. Mark Hannibal, who evaluated Amy for genetic defects, testified that because of Amy's developmental and health delays, the most important elements for optimizing her ability to continue making gains are "consistent care and consistent evaluations."

Dr. Cranor testified that a child with difficulty self-quieting and being comforted, like Amy, is "going to be much more vulnerable and is going to require a higher level of care in terms of trying to make any change if a change is going to be made. And I would expect that it will be much more difficult for this child to adjust to any kind of change." But on cross-examination she admitted she had not met Amy and there are ways to lessen the trauma of transition.

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[80] *Id.* at 445.

Finally, Kallen-Brown testified that after observing Amy with her foster family in their home, she concluded that removing Amy from this home would be "likely to have permanent and lasting consequences" and that therefore, "it would be [her] professional opinion to recommend against it." She testified that ideally a transition would occur over a long period of time, with a gradual increase to overnight visits, and that under such conditions it is possible Amy could form "some sort of healthy attachment" to Gary. On cross-examination, however, Kallen-Brown admitted she had not observed Amy with Gary, and that she could not "guarantee" that granting Gary custody would result in "adverse effects [on Amy] for the rest of her life."

None of these experts recommended terminating parental rights,[81] nor did any testify to a certainty that Amy would stop making gains or suffer serious emotional harm if placed in Gary's custody. However, we conclude the record contains sufficient evidence to support the superior court's finding that Gary has unresolved aggression control and violence issues, and substantial evidence to support the court's finding that Amy's attachment to her foster family, age, and special needs render her particularly vulnerable. The court heard extensive testimony alleging Gary abused Jan and indicating Gary has a violent, aggressive nature.[82] In particular, Jan testified that during the relationship and while knowing she was pregnant, Gary punched, kicked, and hit her in the face and abdomen; threatened to kill her; called her a "stupid native"; and pushed her down, causing her to shatter her elbow.

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[81] An expert's recommendation that parental rights be terminated is "something that [we have] found instructive." *Id.* at 445 (citing *J.J. v. State, Dep't of Family & Youth Servs.*, 50 P.3d 395, 402 (Alaska 2002)).

[82] *See supra* Part IV.B.

Gary argues that Jan's credibility is questionable and points out that the superior court as much as stated this. Though the court acknowledged that Jan "is no one to base a decision on solely," it also stated that she "has some credibility when supported by outside facts and observations." Such outside facts and observations included Meg's testimony that Jan had told her Gary abused Jan and this caused Meg to fear that Gary might do the same to her.[83] Additionally, the court heard Hay — having been qualified as an expert on abuse in relationships — testify, in response to Gary's statement that Meg's violence toward him was justified, that a "belief that there is . . . some sort of justification for violence against somebody else, particularly in a relationship," would "cause [her] great concern." This testimony forms sufficient evidence to support the superior court's finding that Jan's testimony was credible when taken in light of all the testimony, and that Gary has aggression control issues that would need resolution before Amy could safely be placed with him.

Further, the expert testimony discussed above and the assessments in the record by Kallen-Brown and Bost provide substantial evidence to support the court's finding that "[Amy] would be harmed emotionally and developmentally in the near future and throughout her life if her present secure and bonded relationships were disrupted."

Given the weight of the expert testimony, Amy's age, special needs, and attachment to her foster family, and Gary's absence from her life and his unresolved aggression control problems, the superior court did not clearly err in finding that OCS had proven beyond a reasonable doubt that granting Gary custody would likely result in serious damage to Amy.

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[83] *See supra* Part IV.B. The court also found Jan's testimony was confirmed by that of others, including Amy's foster mother and Bost, as well as by Gary's behavior in the courtroom.

### E. The Superior Court Did Not Err in Finding that Terminating Gary's Parental Rights Is in Amy's Best Interests.

Finally, Gary argues there was insufficient evidence to support the superior court's finding that terminating his parental rights is in Amy's best interests. The State replies that the evidence the court heard about the nurturing home in which Amy has lived since birth, Amy's special needs, her foster parents' dedication to helping her make gains, and her close bond to her foster parents and foster brother was sufficient to support its conclusion.

Before a court may terminate parental rights, it must find by a preponderance of the evidence that termination is in the child's best interests.[84] We have stated that terminating parental rights is in the child's best interests where, among other things, there is evidence in the record showing the child needs stability and cannot afford to wait for the parent to be ready to serve as the parent.[85] A parent's determination to change and become fit to parent is a relevant factor to consider.[86] However, "[i]n a termination trial, the best interests of the child, not those of the parents, are paramount."[87]

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[84] CINA Rule 18(c)(3); *see also* AS 47.10.088(c).

[85] *Carl N. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 102 P.3d 932, 937 (Alaska 2004) (citing *J.H. v. State, Dep't of Health & Soc. Servs.*, 30 P.3d 79, 87 (Alaska 2001)).

[86] *See Karrie B. ex rel. Reep v. Catherine J.*, 181 P.3d 177, 186 (Alaska 2008) (stating the mother's "ability to stay sober and her determination to remain sober were relevant factors to consider as part of the children's best interests under AS 47.10.088(c)").

[87] *M.W. v. State, Dep't of Health & Soc. Servs.*, 20 P.3d 1141, 1147 (Alaska 2001) (citing *A.B. v. State, Dep't of Health & Soc. Servs.*, 7 P.3d 946, 954 (Alaska 2000)) (internal quotation marks omitted).

The record contains evidence indicating that Amy has enjoyed her visits with Gary, that Gary has expressed desire to change and become fit to parent, and that Gary has exhibited some positive parenting skills. However, the record is replete with evidence of Amy's special needs, her close bonds with her foster family, and the likelihood that removing her from them will cause her to undergo emotional and developmental harm. For instance, as previously discussed, Kallen-Brown described Amy as being "securely attached to [her foster parents]," as "demonstrat[ing] a significant secondary attachment to her adult foster sibling," and as "show[ing] sibling attachments to her foster brother." She also described at length the success with which Amy's foster parents have implemented various techniques to help Amy improve her gross, fine, and oral motor skills. Based on her observations, she "strongly recommend[ed] that [Amy] be kept in her current placement to prevent irreparable harm," and that Gary work on establishing "a role as a secondary attachment figure" through "frequent daytime visits of several hours." Also, Herning testified that Amy has "been consistently making gains" and that this requires diligent effort on the part of her care-givers, her foster parents.

Bost concluded in her family assessment of Gary and Meg that "[w]ith [Amy] developmentally behind in most areas, disrupted attachment has the possibility of putting [Amy] more developmentally behind." As previously mentioned, she noted that Gary was easily frustrated by Amy's limitations, and that "[Amy] has also shown some resistence to [Gary and Meg] if she does not see them but once in a week's time. Twice after going a whole week without interactions [Amy] has hit [Gary] for no apparent reason." She rated Gary and Meg's "Readiness for Reunification" with Amy as a "Moderate Problem due to the possibility of disrupted attachment and [Amy's] well-being." She emphasized that Amy has been in the same placement since infancy and has

strong attachments to her foster family, and that Gary and Meg "have many different areas they need to learn about in order to have [Amy] in their care, i.e. [Amy's] health issues and her developmental disabilities."

Based on this record and testimony, the superior court did not clearly err in finding that Amy has "cognitive and language and developmental delays" that "render her less able than an average child her age to cope with the forces affecting her life, and to comprehend and overcome the disruption in placement that would ensue if [Gary] were to obtain custody of her." Further, because the record contains sufficient evidence suggesting that Amy's limitations appear to frustrate Gary and that he has unresolved aggression problems, the superior court did not clearly err in finding that Amy's limitations "are highly likely to trigger [Gary's] frustration and anger, with damaging results." Amy's special needs and age, and the fact that Gary would need to undergo further parenting and aggression control training, provide sufficient evidence to support the court's finding that Amy needs stability and cannot afford to wait any longer for Gary to serve as the parent. Given these circumstances and the likelihood that disrupting Amy's bond with her foster parents could have serious consequences, we conclude the superior court did not clearly err in finding that terminating Gary's parental rights is in Amy's best interests.

## V. CONCLUSION

For the above reasons, we AFFIRM the superior court's termination of Gary's parental rights.