

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
DIVISION OF SENIOR AND DISABILITIES SERVICES

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Sectional Analysis

CSSB 86 (JUD), “An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date.”

Section 1 inserts “vulnerable adult” in place of “elder or disabled adult” in AS 08.29.200(b) concerning reporting of harm required by licensed professional counselors. This change will make the statute consistent with similar definitional changes made by the bill. The term “vulnerable adult” more accurately defines and describes the citizens subject to protection.

Section 2 inserts “vulnerable adult” in place of “elder or disabled adult” in AS 08.63.200(b) concerning reporting of harm required by marriage and family therapists. This change will make the statute consistent with similar definitional changes made by the bill. The term “vulnerable adult” more accurately defines and describes the citizens subject to protection.

Section 3 makes the knowing violation or attempted violation of a financial protective order (introduced in section 10 of this legislation to protect vulnerable adults and elders) a crime.

Section 4 amends AS 11.56.740(c), which defines “protective orders,” by including financial protective orders issued under AS 13.26.207-13.26.209 to that definition. This change brings financial protective orders within the class of protective orders subject to sanction under the criminal code.

Section 5

amends AS 12.55.155(c) by adding a new paragraph (35) which makes the fact that a defendant knowingly directed criminal conduct at a person 65 years of age or older an aggravating factor at sentencing.

Section 6

amends AS 13.26.165(1) by substantively adding several new paragraphs and changes or additions in definitions to enhance protection of vulnerable persons in conservatorship proceedings as follows:

- amends AS 13.26.165 by deleting the words “make another” and inserting the words “issue another” regarding the authority of the court to issue a protection order for a protected person in conservatorship proceedings;
- creates new paragraph (A) to authorize the court to issue orders protecting a minor with money or property that needs protection or who otherwise needs protection and substitutes the word “that” for the word “which” in the authorizing language;
- creates a new paragraph (B) specifying that the authority of the court to issue protective orders extends to minors with business affairs that may be in jeopardy and substitutes the word “that” for the word “which” in the authorizing language;
- creates a new paragraph (C) ensuring that protection extends to any need to protect a minor’s funds or obtain funds for a minor and deletes the unnecessary use of the word “that” twice in the authorizing language;
- amends AS 13.26.165(2)(A) by adding the word “fraud” to the illustrative list of reasons why a person may be found to be unable to effectively manage their own affairs and therefore may be in need of a conservator.

Section 7

amends AS 13.16.180(a) by adding “a person’s attorney or other legal representative.” to the list of persons who may petition for a conservatorship and further adds “or caregiver, the Department of Health and Social Services” to that list. This change is necessary to broaden the list of specific persons authorized to petition for a conservatorship in aid of a vulnerable adult and specifically to ensure that the Department of Health and Social Services is authorized to do so when necessary.

Section 8

amends AS 13.26.180 by adding a new sub-section (c) to specifically authorize petitioners to request orders for temporary conservatorships upon showing that the person's money or property will be wasted or dissipated during the pendency of normal conservatorship proceedings. This change is necessary to ensure that the courts have express statutory authority to entertain and grant temporary conservatorships in urgent cases involving financial exploitation.

Section 9

amends AS 13.26.185 to provide that that section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.207 or a temporary protective order filed under AS 13.26.208

Section 10

adds four new sections:

- New section AS 13.26.206 authorizes temporary conservatorships to provide immediate protection from imminent waste or dissipation of the person's money or property while the normal conservatorship proceedings are underway. The court is required to impose only the least restrictive orders necessary to protect the money or property from waste or dissipation. The temporary conservatorship expires as a matter of law when the full conservatorship is ordered or when the petition for conservatorship is dismissed.
- New section AS 13.26.207 authorizes a person to apply for an ex parte protection order against financial exploitation without the need for a lawyer, very similar to the authority and procedure presently authorized for domestic violence, sexual assault and stalking protection orders. The new section authorizes a third-party to file a petition on behalf of another where, for example, the vulnerable adult is incapacitated and unable to file for her or himself. The new section requires that notice of the proceedings be provided to the vulnerable adult and for service of any order issued to third-parties, such as financial institutions, at the nearest place of business, or by registering the order with the Department of Public Safety. The new section also requires the Alaska Court System to create appropriate forms for use by the public in filing for such orders and exempts such applications from court filing fees.
- New section AS 13.26.208 specifies that a party may apply and the court may convert a protective order to a temporary order effective for up to six months upon proper application, notice and hearing. That section further provides that if the court finds by a preponderance of

the evidence that the respondent has committed fraud against the victim that the court may convert the ex parte protective order to temporary protective order effective for up to six months.

- New section AS 13.26.209 specifies legal authority and procedures for applying to the court to modify an ex parte protective order issued under AS 13.26.207 or a protective order issued under AS 13.26.185 or a temporary protective order issued under AS 13.26.208.

Section 11 defines “fraud” and adds it to the list of terms defined in AS 13.26.324. The definition used is taken from that currently in statute at AS 44.21.415.

Section 12 excludes the crime of violating a protective order from the list of crimes subject to warrantless arrest in AS 18.65.530(a).

Section 13 adds financial protective orders to registry of protective orders maintained by Public Safety in AS 18.65.540(a).

Section 14 adds financial protective orders to AS 18.65.540(b), which requires peace officers to take reasonable steps to ensure that a protective order is entered into the registry within 24 hours after receipt.

Section 15 changes “theft and related offenses” to “offenses against property” in AS 44.21.415(g)(1)(B), which is part of the definition of “fraud” in the statutes governing the Office of Elder Fraud.

Section 16 adds undue influence to the list of reportable harms to a vulnerable adult. Employees of nursing homes, residential care or health care facilities and the staff of educational institutions are added to the list of mandated reporters in AS 47.24.010(a).

Section 17 requires a reporter to include the contact info of the vulnerable adult in AS 47.24.010(b).

Section 18 adds undue influence to the statute making a mandatory reporter who knowingly fails to report guilty of a class B misdemeanor (AS 47.24.010(c)).

Section 19 adds undue influence to the list of reportable harms and amends AS 47.24.010(d) to permit anyone to make a report of harm, including a mandatory reporter in the reporter's nonoccupational capacity.

Section 20 adds undue influence to the list of harms and amends AS 47.24.010(e) to require a public safety officer to report to APS within 24 hours of receiving a report of harm involving imminent risk of serious physical harm.

Section 21 adds undue influence and abandonment to the list of harms in AS 47.24.010(f), which states that a mandatory reporter's report of harm to the long-term care ombudsman or the department regarding an adult in an out-of-home care facility satisfies that reporter's duty to report under AS 47.24.010(a).

Section 22 adds two new subsections to AS 47.24.010: first, a mandatory reporter is not relieved of duty to report by reporting to supervisor. Second, if someone makes a reckless false report, that person is liable for actual damages suffered by the subject of the report.

Section 23 adds undue influence to AS 47.24.013(a), which requires the department to transfer a report of harm to the long-term care ombudsman if it involves a vulnerable adult aged 60 or older who has been allegedly harmed by a staff member or volunteer of an out-of-home care facility where the adult resides.

Section 24 adds undue influence to AS 47.24.013(b), which requires the department to investigate a report of harm involving a vulnerable adult who is younger than 60 years of age when the harm is alleged to have been committed by a staff member or volunteer of an out-of-home facility where the adult resides.

Section 25 changes the reference to "department" to "office of the department that handles adult protective services" in AS 47.24.013(c), which states what the long-term care ombudsman and the department must do when they receive a report of harm.

Section 26 adds undue influence to AS 47.24.013(d), which requires the long-term care ombudsman to give a report of harm and the result of the ombudsman's investigation to the department's central information and

referral service when the report of harm involves an adult who resides in an out-of-home care facility.

Section 27

adds undue influence to the statute that requires the department to start an investigation once it receives a report of harm that is not transferred from the long-term care ombudsman's office (AS 47.13.015(a)).

Section 28

adds undue influence to AS 47.24.015(c), which describes situations when the department must or must not terminate an investigation following a report of harm. Section 27 also changes the cross reference for the definition of fraud from AS 44.21.415 to AS 13.26.324.

Section 29

adds six new subsections to AS 47.24.015, which governs APS's investigatory power:

- (h) gives the department subpoena power to support its investigative authority, including the power to conduct interviews and examine any health care or financial records related to a vulnerable adult.
- (i) prohibits individuals from interfering with APS's investigation.
- (j) gives APS access to relevant records maintained by another division in DHSS.
- (k) allows APS to audio- or videotape an interview with a vulnerable adult if the adult has capacity and consents.
- (l) requires APS to train investigators of reports of harm.
- (m) defines "financial records."

Section 30

updates AS 47.24.016(a) regarding surrogate decision makers by adding new fiduciaries who may serve in that capacity – specifically, conservator, trustee, and surrogate for health care decisions under AS 13.52. It also deletes the requirement that in order for a spouse to be a surrogate decision maker, the spouse and vulnerable adult may not be living in separate domiciles. Section 29 also adds legal separation as a factor that would prohibit a spouse from being a surrogate decision maker for that spouse's vulnerable adult spouse.

Section 31 adds undue influence to the statute that sets out the exceptions to when a person listed in AS 47.24.016(a) may serve as a surrogate decision maker (AS 47.24.016(b)).

Section 32 adds a surrogate decision maker serving under AS 13.52.030 to AS 47.24.016(d), which describes when the department must cease providing protective service based on the consent of the surrogate decision maker.

Section 33 adds conservator, trustee, and surrogate for health care decisions under AS 13.52.030 as individuals who may consent to the provision of protective services to a vulnerable adult and adds undue influence to the list of potential reports of harm.

Section 34 allows the department under AS 47.24.019(c) to petition the superior court for an injunction restraining any person from interfering with the provision of protective services to a vulnerable adult.

Section 35 amends AS 47.24.050 to add “undue influence” to the types of harm contained in confidential reports. Trustee and conservator are added to the list of individuals who may consent to release a confidential report and they are also added to the list of individuals who may not receive copies of a report if they are the alleged perpetrator. “Undue influence” is also added to the list of harms that are contained in reports of verified harms that occur in an institution that cares for vulnerable adults or that were the result of actions or inactions of a public home care provider.

Section 36 clarifies that a person is not considered to be unduly influenced if they choose to consent to treatment by spiritual means only under AS 47.24.130.

Section 37 redefines “abuse” in AS 47.24.900(2) to include the knowing infliction of emotional distress or fear, including coercion and intimidation.

Section 38 redefines “caregiver” in AS 47.24.900(3) to include someone who provides some or all responsibility for the care of a vulnerable adult either voluntarily, by contract, by court order or as an employee of a business that provides care in an adult’s home.

Section 39 defines “informed decision” as a decision made free from undue influence within the definition of “decision making capacity” in AS 47.24.900(4).

Section 40 redefines “exploitation” in AS 47.24.900(7) to include acts by a person in a position of trust with a vulnerable adult who obtains profit or advantage through undue influence, deception, fraud, intimidation or breach of fiduciary duty.

Section 41 redefines neglect in AS 47.24.900(9) to include the knowing or reckless failure by a caregiver to provide access to services or to carry out a treatment plan necessary to the health of a recipient. “Essential care or services include food, clothing, shelter, medical care and supervision.

Section 42 expands the definition of protective services in AS 47.24.900(11) to include services that obtain basic health care needs, financial assistance services, and protection from abuse, obtaining basic food, shelter and clothing, among others. Undue influence is added to the list of types of harm that may result in the provision of these services.

Section 43 amends the definition of “unable to consent” in AS 47.24.900(15) by adding the concept of “undue influence” and that the inability to consent includes a person’s inability to perceive a loss of income or assets, eviction, and physical or mental harm.

Section 44 amends the definition of a vulnerable adult in AS 47.24.900(16) by more clearly defining what constitutes a physical or mental impairment.

Section 45 amends AS 47.24.900 by adding new paragraphs which contain definitions for the following terms:

- Deception
- Fiduciary duty
- Financial institution
- Person who stands in a position of trust or confidence
- Undue influence

Section 46

amends the uncodified law, Rule 12(h), Alaska Rules of Criminal Procedure. The court, when considering a motion for continuance of a trial date, shall consider the victim's circumstances and the effect of a continuance on the victim, particularly a victim of advanced age or extreme youth. The court's findings will be placed on the record.

Section 47

amends the uncodified law, Rule 45(a), Alaska Rules of Criminal Procedure. The courts, when considering a trial date, shall consider the victim's circumstances, particularly a victim of advanced age or extreme youth, in setting the trial date.

Section 48

amends the uncodified law by making five indirect court rule amendments enacted by Section 10 of the bill:

- amending Rule 17, Alaska Rules of Probate Procedure, to allow ex parte orders to be issued to protect persons subject to protective proceedings from financial exploitation.
- amending Rule 9, Alaska Rules of Administration, by not requiring filing fees for an ex parte protective order.
- amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.
- amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on an application for a temporary protective order on 10 days notice.
- amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on a request for modification of a protective order on 20 days notice and for modification of an ex parte protective order on 3 days notice.

Section 49 amends the uncodified law by indicating that Sections 3-5, 46, and 47 of the bill apply to offenses committed on or after the effective date.

Section 50 amends the uncodified law by adding revisor's instructions to change the catch lines of AS 47.24.010 and AS 47.24.013.

Section 51 amends the uncodified law by adding a new section which indicates that the enactment of portions of Section 10 of the bill, having to do with ex parte orders, are contingent upon a two-thirds vote of each house on Section 48 of the bill, referencing court rule amendments.

Section 52 provides for an effective date of September 1, 2011 for sections 16 and 20 of the bill, the two sections that address mandatory reporters and the obligation of peace officers to report to the department within 24 hours.

Section 53 provides for an effective date of July 1, 2011.