



## Alaska State Legislature

### Representative Anna Fairclough – House District 17

#### House Bill 190

"An Act privatizing the Alaska children's trust as a separate endowment fund; providing for an administrator for the assets of the former trust; establishing conditions for a grant of the balance of the former Alaska children's trust; designating certain receipts as available for grants to the trust's successor; and providing for an effective date."

House Bill 190 would re-create the Alaska Children's Trust (ACT) as a 501(c)(3) non-profit entity, managed by a board of directors, including the Commissioners of the Departments of Health and Social Services and Education and Early Development, four (4) additional members appointed by the Governor, and three (3) members appointed by the Commissioners and the Governor's appointees. The nine (9) member board would have many of the same duties and obligations required by current statute.

It would preserve the present revenue sources of license plates and birth and marriage certificates for a grant to a named recipient to hold in trust for child abuse and neglect prevention activities and programs.

HB 190 would transfer the balance of the Alaska Children's Trust to a named recipient organized for charitable purposes to hold in trust as a permanent endowment fund for child abuse and neglect prevention programs. The ACT board has entered into an agreement with the Alaska Community Foundation to serve as this trustee, while the ACT board (re-created as a non-profit entity) would direct the Foundation on grant-making.

In summary, HB 190 would allow the legislature to use the estimated balance of the account maintained by the Commissioner of Revenue to make a named recipient grant to the Alaska Community Foundation to be governed by the non-profit ACT board, the majority of whom will be appointed by the Governor. With the Alaska Community Foundation as trustee, the ACT board will have greater flexibility to create a more stable, streamlined and simplified administrative structure that would greatly enhance the Trust's ability to pursue its mission efficiently and effectively.

The Trustees of the Alaska Children's Trust, with the support of the Friends of the Alaska Children's Trust, have recommended to the Governor and the Alaska Legislature that the Alaska Children's Trust be privatized.

I urge your support on this piece of legislation.



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### Sectional Analysis

#### Section 1. Amends AS 18.50.225(d)

Allows the legislature to annually appropriate funds generated from birth certificates suitable for display to the endowment fund held by the charitable named recipient grantee.

#### Section 2. Amends AS 18.50.272(e)

Allows the legislature to annually appropriate funds generated from heirloom marriage certificates suitable for display to the endowment fund held by the charitable named recipient grantee.

#### Section 3. Amends AS 28.10.181(t)

Renames the Alaska Children's Trust license plates to call them Alaska children's endowment fund plates.

#### Section 4. Amends AS 28.10.421(d)(14)

Allows legislature to appropriate the fee for the children's fund special license plates to the endowment fund held by the charitable named recipient grantee.

#### Section 5. Amends AS 37.05.146(c)(20)

Allows the birth certificates suitable for display, the heirloom marriage certificates and special request children's fund license plates to be accounted for separately, and appropriations from these program receipts are not made from the unrestricted general fund.

**Section 6.** Amends AS 37.14 by adding a new section 37.14.205

Allows the legislature to transfer the balance of the Alaska Children's Trust to a charitable named recipient grantee to be held as a permanent endowment fund for child abuse and neglect prevention activities and programs.

The transfer of assets is subject to the terms of an agreement between the Department of Commerce, Community and Economic Development and the named recipient grantee.

The grantee shall provide the interest on the endowment fund to the corporate grant administrator for the purpose of prevention of child abuse and neglect.

Should the grantee ceases to exist or become unable to fulfill the purposes of the grant agreement, the balance of the grant is to revert to the state to be used for child abuse and neglect prevention programs.

**Section 7.** Amends AS 37.14 by adding a new section 37.14.215

Creates a corporate grant administrator independent from the named grant recipient.

The grant administrator solicits and evaluates grant proposals from organizations working to prevent child abuse and neglect, and awards grants from the interest on the endowment fund obtained from the named recipient grantee.

The board of the grant administrator is made up of nine members, six of which are appointed by the governor.

The grant administrator is also responsible for soliciting contributions, gifts and bequests to the endowment fund.

**Section 8.** Clean up language

Repeals current Alaska Children's Trust statutes.

**Section 9.** Amends the Uncodified law of the State of Alaska

Explains that this Act is contingent on the appropriation of the Alaska Children's Trust funds to a named recipient grantee.

**Section 10.** Effective date clause

Explains that the effective date of the act is the date of appropriation of the funds to the named recipient grantee.

**HOUSE BILL NO. 190**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES FAIRCLOUGH, Hawker, Holmes, Wilson

Introduced: 3/16/09

Referred: Health and Social Services, Finance

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act privatizing the Alaska children's trust as a separate endowment fund;  
2 providing for an administrator for the assets of the former trust; establishing conditions  
3 for a grant of the balance of the former Alaska children's trust; designating certain  
4 receipts as available for grants to the trust's successor; and providing for an effective  
5 date."

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

7 \* **Section 1.** AS 18.50.225(d) is amended to read:

8 (d) The legislature may use the annual estimated balance of the account  
9 maintained by the commissioner of administration under AS 37.05.142 to make an  
10 appropriation for a grant to a named recipient under AS 37.05.316 to hold in an  
11 endowment fund for child abuse and neglect prevention activities and programs  
12 [TO THE ALASKA CHILDREN'S TRUST ESTABLISHED UNDER AS 37.14.200].

13 \* **Sec. 2.** AS 18.50.272(e) is amended to read:

(e) The legislature may use the annual estimated balance of the account maintained by the commissioner of administration under AS 37.05.142 for the fees paid for heirloom certificates of marriage under (b) of this section to make an appropriation **for a grant to a named recipient under AS 37.05.316 to hold in an endowment fund for child abuse and neglect prevention activities and programs** [TO THE ALASKA CHILDREN'S TRUST ESTABLISHED UNDER AS 37.14.200].

\* **Sec. 3.** AS 28.10.181(t) is amended to read:

(t) Special request [ALASKA] children's **endowment fund** [TRUST] plates. Upon application by the owner of a motor vehicle, the department may design and issue registration plates representing the [ALASKA] children's **endowment fund** [TRUST UNDER AS 37.14.200]. The department may disapprove the issuance of registration plates under this subsection when the requested plates are a duplication of an existing registration.

\* **Sec. 4.** AS 28.10.421(d)(14) is amended to read:

(14) special request [ALASKA] children's **endowment fund** [TRUST] plates ..... \$100 plus the fee required for that vehicle under (b), (c), (h), or (i) of this section; the fee required by this paragraph shall be collected only on the first issuance and the replacement of special request plates; the commissioner of administration shall separately account for the fees received under this paragraph that the department deposits in the general fund; notwithstanding (g) of this section, the annual estimated balance in the account that is in excess of the cost of issuing special request plates may be appropriated by the legislature **as a grant to a named recipient under AS 37.05.316 to hold in an endowment fund for child abuse and neglect prevention activities and programs** [INTO THE PRINCIPAL OF THE ALASKA CHILDREN'S TRUST UNDER AS 37.14.200];

\* **Sec. 5.** AS 37.05.146(c)(20) is repealed and reenacted to read:

(20) receipts for birth certificates suitable for display (AS 18.50.225), heirloom certificates of marriage (AS 18.50.272), and special request children's endowment fund plates (AS 28.10.421(d)(14));

\* **Sec. 6.** AS 37.14 is amended by adding a new section to read:

1                   **Sec. 37.14.205. Management of endowment fund for prevention of child**  
2                   **abuse and neglect.** (a) Under an appropriation for the purpose, the commissioner of  
3                   revenue shall transfer the balance of the former Alaska children's trust, including any  
4                   reserves and income, to a recipient organized for charitable purposes. The recipient  
5                   shall hold and manage the amount transferred by the commissioner of revenue as a  
6                   permanent endowment fund for child abuse and neglect prevention activities and  
7                   programs, subject to the terms of a grant agreement under (b) of this section in which  
8                   the recipient is the grantee.

9                   (b) The transfer of assets of the former Alaska children's trust under this  
10                  section is subject to execution of an agreement between the Department of Commerce,  
11                  Community, and Economic Development and a grantee that establishes grant  
12                  conditions that, in addition to usual and customary provisions, include the following:

13                         (1) the grantee shall execute a grant agreement to specify the  
14                         conditions and use of the grant funds under this subsection;

15                         (2) amounts of the former Alaska children's trust shall be held in and  
16                         managed as a permanent endowment fund that is qualified as a component fund of the  
17                         grantee under 26 C.F.R. 1.170A-9(f)(11) (Federal Income Tax Regulations), as  
18                         amended;

19                         (3) the principal of the endowment fund may not be expended;  
20                         however, not more than \$150,000 may be expended during each fiscal year from the  
21                         principal for grant administration expenses of the corporate grant administrator;

22                         (4) the grantee shall maintain a reserve to finance grants and grant  
23                         administration operations at a consistent level from year to year; an initial reserve  
24                         account shall be established on transfer of the assets of the former Alaska children's  
25                         trust to the named recipient grantee at four times the amount paid in grants under  
26                         former AS 37.14.230(2) for the fiscal year preceding the year in which the transfer is  
27                         completed;

28                         (5) the grantee may provide for the distribution of amounts from the  
29                         interest on the endowment fund to the corporate grant administrator for the charitable  
30                         purpose of preventing child abuse and neglect; and

31                         (6) the grantee shall annually report the investment performance of the

1 endowment to the commissioner of revenue and the board of directors of the corporate  
2 grant administrator in AS 37.14.215.

3 (c) If the grantee ceases to exist or is unable to fulfill the purposes of the grant  
4 agreement, as determined by the board of directors of the corporate grant administrator  
5 or the commissioner of revenue, the balance of the grant reverts to the state treasury.

6 (d) The legislature may appropriate money that has reverted to the state  
7 treasury under (c) of this section for the prevention of child abuse and neglect.

8 \* **Sec. 7.** AS 37.14 is amended by adding a new section to read:

9 **Sec. 37.14.215. Corporate grant administrator.** (a) Authority for  
10 administration of grants received to aid in the prevention of child abuse and neglect  
11 from the endowment fund established under AS 37.14.205 and from the income of the  
12 fund is vested in a corporate grant administrator. The corporate grant administrator is  
13 independent from the charitable grantee identified in AS 37.14.205. The corporate  
14 grant administrator shall be organized as a nonprofit corporation under AS 10.20. The  
15 corporate name of the corporate grant administrator may include the words, "the  
16 children's endowment trust."

17 (b) The board of directors of the corporate grant administrator described in (a)  
18 of this section consists of nine members, as follows:

19 (1) the commissioner of health and social services or the  
20 commissioner's designee;

21 (2) the commissioner of education and early development or the  
22 commissioner's designee;

23 (3) four members appointed by the governor; and

24 (4) three additional members selected by the members identified in (1)  
25 - (3) of this subsection.

26 (c) The board of directors of the corporate grant administrator shall

27 (1) hold regular and special meetings as the board of directors  
28 considers necessary and may hold meetings by teleconference;

29 (2) award grants from the endowment fund under AS 37.14.205 to  
30 community-based programs and projects that the board finds will aid in the prevention  
31 of child abuse and neglect;



(3) monitor the community-based programs and projects to which grants are awarded for compliance with the goals of the endowment fund;

(4) before providing a grant to a program or project, approve written findings about the program or project that include a consideration of the means of measuring the effectiveness of the program or project;

(5) apply for, and use amounts received from the endowment fund described in AS 37.14.205 to obtain private and federal grants for the prevention of child abuse and neglect;

(6) solicit contributions, gifts, and bequests to the endowment fund described in AS 37.14.205;

(7) keep audio tape recordings of each meeting of the board of directors to be made available on request; and

(8) submit to the governor and make available to the legislature by February 1 each year a report describing

(A) the child abuse and neglect prevention services that were provided by the programs and projects to which the board of directors awarded grants; and

(B) the annual level of contributions, income, and expenses of the endowment fund.

\* **Sec. 8.** AS 37.14.200, 37.14.210, 37.14.220, 37.14.225, 37.14.230, 37.14.240, 37.14.250, 37.14.260, and 37.14.270 are repealed.

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

CONTINGENT EFFECT. This Act is contingent on passage by the Twenty-Sixth Alaska State Legislature and enactment into law of a bill appropriating an amount equal to the unencumbered balance of the former Alaska children's trust, established under AS 37.14.200, as a grant to a named recipient under AS 37.05.316, as described in AS 37.14.205, added by sec. 6 of this Act, for community-based programs and projects in the state that aid in the prevention of child abuse and neglect.

\* **Sec. 10.** If, under sec. 9 of this Act, this Act takes effect, it takes effect on the effective date of the appropriation described in sec. 9 of this Act.

**AMENDMENT**

OFFERED IN THE HOUSE

TO: HB 190

Page 2, Line 8, 10 & 15

Delete “**children endowment fund**”

Insert “**ALASKA’S CHILDREN TRUST**”

# LEGAL SERVICES

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

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

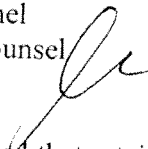
State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

March 30, 2009

**SUBJECT:** Alaska Children's Trust Reference After Repeal of the Trust  
(Amendment E.1 to HB 190 (Work Order No. 26-LS0502\E.1))

**TO:** Representative Anna Fairclough  
Attn: Crystal Koeneman

**FROM:** Jean M. Mischel  
Legislative Counsel 

I have made the changes you requested that retain the references to the Alaska Children's Trust in the provisions for special request license plates and fees. As previously discussed, referencing a repealed trust, particularly for purposes of fee collection, creates an unenforceable provision in codified law. While the nonprofit grantee may intend to use the former trust's name, such references must exist and be defined in codified law. In the meantime, if the amendment and the bill pass, the fees will be paid and collected under a false impression that the trust continues to exist as a state fund.

JMM:lmb  
09-016.lmb

Enclosure

**A M E N D M E N T**

OFFERED IN THE HOUSE

TO: HB 190

1 Page 2, line 8:

2 Delete "[ALASKA] children's **endowment fund** [TRUST]"

3 Insert "Alaska children's trust"

4

5 Page 2, lines 10 - 11:

6 Delete "[ALASKA] children's **endowment fund** [TRUST]"

7 Insert "Alaska children's trust ["

8

9 Page 2, line 15:

10 Delete "[ALASKA] children's **endowment fund** [TRUST]"

11 Insert "Alaska children's trust"

12

13 Page 2, line 30:

14 Delete "endowment fund"

15 Insert "trust"

# LEGAL SERVICES

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

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Mail Stop 3101

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

### MEMORANDUM

February 9, 2009

**SUBJECT:** Draft bill for an Act to substitute private management of the Alaska Children's Trust for the state's governmentally-administered endowment trust fund  
(Work Order No. 26-LS0502\A)

**TO:** Representative Anna Fairclough

**FROM:** Jack Chenoweth  
Assistant Revisor

This memo accompanies the draft of a bill proposing to substitute private management of the Alaska Children's Trust for the state's governmentally-administered endowment trust fund. The draft draws upon text that your office submitted with the work order request.<sup>1</sup>

#### **DRAFTING CONSIDERATIONS:**

The text of the material submitted did not suggest a bill title, so we prepared one based on the apparent content of the proposal.

In the accompanying draft, the material in bill sections 1 - 5 draws on substantially similar amendments set out in the material submitted with the work order. These are conforming changes made so as to alter references to the current trust where they appear in certain of sources authorized for appropriation into the fund: AS 18.50.255(d) [certain birth certificate receipts], AS 18.50.272(e) [certain heirloom certificates of marriage], and AS 28.10.181 [special request license plates].<sup>2</sup> Bill section 8 repeals the various sections

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<sup>1</sup> Under AS 37.14.200 - 37.14.270, proposed to be repealed in the bill, the Alaska Children's Trust Fund was established as a separate endowment trust of the state, consisting of legislative appropriations and private contributions. In addition, proceeds from specialized birth and marriage certificates, as well as license plate sales, are deposited into the general fund for the purpose of contributing to the trust fund or for any other public purpose.

<sup>2</sup> Each of these provisions adds reference to "a grant to a named recipient under AS 37.05.316." That section, functionally the state appropriation process's equivalent of a federal "earmark" -- the term was defined by recent federal legislation as "a provision or report language included primarily at the request of a Member [of Congress] . . . providing, authorizing, or recommending a specific amount of discretionary budget

that comprise the current Alaska Children's Trust, AS 37.14.200 - 37.14.270 inclusive. Again, the repeal provisions follow direction provided in the suggested text.

The critical substantive provisions of the bill appear in proposed AS 37.14.205, added by bill section 6, and AS 37.14.215, added by bill section 7. I have drawn from the language that was supplied, reversing the suggested subject matter order (reference to the corporate grant administrator in the draft follows the provisions for the trust management mechanism, rather than preceding it).

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authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process." -- authorizes the legislature to identify by operation of law grantees that are not public entities:

(a) When an amount is appropriated or allocated to a department as a grant under this section for a named recipient that is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act for which the appropriation or allocation is made. A grant agreement must be executed within 60 days after the effective date of the appropriation or allocation unless the department determines that an award of the grant would not be in the public interest.

Significantly, while AS 37.05.316 establishes a mechanism by which the legislature may identify the recipient of what the section surely contemplates to be a single or one-time-only grant, in the draft accompanying this memo, amendments proposed to AS 18.50.225(d) [certain birth certificate receipts], to AS 18.50.272(e) [certain heirloom certificates of marriage], and to AS 28.10.421(d)(14) [special request license plates] operate so that these sources continue to be available to support annual grants to the named recipient. In other words, these may be considered permanent sources for the support of the revised trust fund subject to the likelihood of annual legislative appropriation.

Reliance on the artifice that the transfer will be handled as a grant is open to challenge. The legislation's proponents may regard the transfer as a grant -- because the transfers would occur annually, they are probably better viewed in context as an unlimited or open ended series of grants -- but, in fact, the form of the product that is transferred is a trust corpus or permanent endowment. No court would mistake the legislature's attempts to disguise the transfer of a trust corpus by calling it something that it is not in order to take advantage of the "grant to a named beneficiary" statute, AS 37.05.316.

These two sections identify two different entities.

The first, taken from AS 37.14.229 in the material provided and proposed to be codified in AS 37.14.205 in the accompanying draft, identifies a prospective trust manager, referred to in the material transmitted with the work order as the "charitable trustee" [page 4, line 7]. In the language of the material supplied, the "charitable trustee" has the status of a grantee, responsible for management of the transferred trust assets, transferred in the form of a grant. Subsection (b) of this section sets important sidebars on use of the grant of the transferred trust assets through use of an agreement,<sup>3</sup> while subsection (c) -- as I have opted to redraft it -- directs a reversion to the state of "the balance of the grant" in the event the charitable trustee breaches the agreement. I have more to say about this entity and its operations below.

The other -- derived from AS 37.14.227 in the material provided and reworked as AS 37.14.215 in the accompanying draft -- is identified as the corporate grant administrator, comprising a board composed of state commissioners serving ex officio, other appointees of the governor, and persons collectively appointed by these other board members. As to the corporate grant administrator set out in AS 37.14.215, there are some omissions that deserve your attention before a new draft is prepared for introduction:

-- the terms of the seven board members serving other than ex officio are not specified or set;

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<sup>3</sup> Notably, the sidebar or standards provisions proposed do not carry forward specific direction concerning the manner of trust administration. As a public trust, AS 37.14.210(4) directs the commissioner of revenue to "invest and reinvest the assets of the trust as provided in this section and as provided for the investment of funds under AS 37.14.170." Under the latter provision, that public official is charged to "invest the money in the fund on the basis of probable total rate of return to promote the long-term generation of income," and, as well, that

In managing the trust fund, the commissioner shall

- (1) consider the status of the fund's capital and the income generated on both a current and a probable future basis;
- (2) determine the appropriate investment objectives;
- (3) establish investment policies to achieve the objectives;

and

- (4) act only in regard to the financial interests of the fund's beneficiaries.

By contrast, the draft bill omits specific standards and does not propose any alternative standards; it directs that the private manager -- the charitable trustee -- shall hold the transferred former trust assets in and manage them "as a permanent endowment trust fund." See proposed AS 37.14.205(b)(2).

-- there is no provision for organization, for convening and holding meetings (chair; support services), or for coverage or reimbursement for travel or per diem;

-- since this appears to be or to function as, at least in my judgment, an executive branch board or commission, the selection of the three members not serving ex officio or at the behest or pleasure of the governor is constitutionally questionable as a violation of the governor's appointing authority spelled out in article III of the state constitution.

**POTENTIALLY SIGNIFICANT CONSTITUTIONAL CONSIDERATIONS:**

This draft constitutes a reworking of an idea from the 25th Legislature, introduced as SB 206, "An Act repealing the Alaska children's trust; and providing for an effective date." In that bill, as in this draft, the legislation proposed to transfer management of the trust assets of the former Alaska Children's Trust to a specific named recipient. Section 3 of SB 206 provided:

CONTINGENT EFFECT. This Act is contingent on passage by the Second Regular Session of the Twenty-Fifth Alaska State Legislature and enactment into law of a bill appropriating an amount equal to the unencumbered balance of the funds described in sec. 2 of this Act as a grant to The Alaska Community Foundation, a nonprofit organization, for community activities and programs.

In short, the proposal offered during the 25th Legislature would have eliminated the Alaska Children's Trust as a public trust and provided for transfer of its money assets to a specified nonprofit organization. It was not at all clear whether the designated recipient would have been required to maintain and manage the transferred money assets in accordance with trust principles.

At the time, we were concerned that the legislature's ability to "privatize" management of a "former" public fund might encounter significant obstacles under state constitutional provisions applicable to the prohibition against dedicated funds<sup>4</sup>; the requirement of spending the money only for a public purpose<sup>5</sup>; and the risk of an equal protection

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<sup>4</sup> The prohibition appears in article IX, sec. 7:

**Dedicated Funds.** The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

<sup>5</sup> The so-called public purpose clause is set out in article IX, sec. 6:



violation by directing public funds to a private entity or pursuit.<sup>6</sup> Moreover, the corpus of the Alaska children's trust, then, as now, included both money derived from public revenue sources and private contributions.<sup>7</sup> Given that mix, in the event of a challenge brought to the proposal, it was not clear to us how a court would view the transfer of the responsibility for the trust's management from public oversight to a private entity.

We have considered those concerns as they might arise in the context of the accompanying draft.

*Does the transfer of responsibility for trust management implicate a dedicated funds violation?* While the possibility that the Alaska children's trust fund as originally constituted might be found invalid as a dedicated fund,<sup>8</sup> the transfer of trust management responsibility into private hands probably does not significantly change that likelihood.

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**Public Purpose.** No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

<sup>6</sup> State equal protection considerations derive from a clause of article I, sec. 1:

**Inherent Rights.** This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; *that all persons are equal and entitled to equal rights, opportunities, and protection under the law;* and that all persons have corresponding obligations to the people and to the State.

<sup>7</sup> See AS 37.14.200(b):

(b) The principal of the [Alaska children's] trust consists of  
(1) legislative appropriations to the trust; and  
(2) *gifts, bequests, and contributions of cash or other assets from a person.*

<sup>8</sup> See, Inf. Op. Atty. Gen'l (April 12, 1988):

... [T]he section on "fund utilization" ... provides that capital gains from investment of the fund become part of the principal. That provision raises a question of validity under art. IX, sec. 7, of the Alaska Constitution, which prohibits dedicated funds. As mentioned in 1982 A. G. Opinion No. 13 (J66-785-81 and J66-649-80; Nov. 30), at page 17, we will defend such a provision in court, but the issue is not free from doubt. Related to this issue is proposed AS 37.14.240(b)'s attempt to limit[ ] appropriations of fund income to certain purposes. An attempt to so limit a future legislature is invalid.

*Does the transfer to private management implicate the public purpose clause?* Again, probably not. Article IX, sec. 6 of the state constitution allows the legislature to appropriate funds for any public purpose. The Alaska Supreme Court has held that "where the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, this court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact." *DeArmond v. Alaska State Development Corp.*, 376 P.2d 717, 721 (Alaska 1962) citing *In re Opinion of the Justices*, 177 A.2d 205 (Del. 1962). The test of whether a public purpose is being served does not depend on the entity that will operate the use, but upon the character of the use to which the property will be put.<sup>9</sup> The attorney general's office appears to be of the view that the public purpose clause permits use of public money "to pay state debts, support current services, or protect state assets," further subject to the caution that

... expenditure of [an] appropriation generally ... has to be done in accordance with an underlying statutory authority for [an agency] to provide the services which the [grantee or contractor] will provide or to otherwise assist the [grantee or contractor] for a public benefit. A mere authorization to provide for the public welfare will not suffice.

Inf. Op. Att'y Gen'l., September 22, 1980. If private management of the trust assets will assist the state in providing a public benefit, then the assignment of management responsibility to a private entity subject to appropriate standards and sidebars should survive a public purpose-based challenge.<sup>10</sup>

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<sup>9</sup> See *Weber v. Kenai Peninsula Borough*, 990 P.2d 611, 614 (Alaska 1999), citing *Milheim v. Moffat Tunnel Improvement District*, 67 L.Ed. 1994 (1923), and *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963).

<sup>10</sup> Looking to other jurisdictions, the courts of South Carolina have developed a fairly comprehensive jurisprudence on whether contractual arrangements that yield a perceived private benefit are constitutionally suspect, and have concluded that, in general, they are not. Summarized, the courts have reached the conclusion:

[T]he public character of an agency's purpose is not diminished or altered by the nature of the transaction used to accomplish it. Were that the case, no leasing transaction could ever be used to accomplish a legitimate public goal. Private benefit to the lessee is always present. Where the purpose is clearly public in nature, we have consistently held this "incidental" private benefit does not convert the public purpose to a private purpose.

*South Carolina Public Service Authority v. Summers*, 282 S.C. 148, 152-153 (S.C. 1984). I think this is a fair statement of the view held by the courts of this state on this issue.

*Would the management transfer of the trust corpus raise a question under the equal protection principle?* Legislative designation of a named recipient grantee under AS 37.05.316, while surely providing the designee an unfair advantage to the exclusion of any other private party that might have wished to have bid for the management agreement, is an arrangement presumably to be entered into for reasons of administrative efficiency. In and of itself, the designation does not implicate any suspect classification, nor does it present any obstacle to interstate migration, deny to anyone the necessities of life, penalize a person for having migrated to Alaska, or interfere with any other fundamental right that would require examination of the proposal under the standards of strict scrutiny. The compelling state interest test does not apply; the courts should apply a more deferential test, one that would consider whether the legislation bears a 'fair and substantial relationship' to legitimate purposes." *State v. Lewis*, 559 P.2d 630, 642 (Alaska 1977). The equal protection clause should not impose an obstacle.

*Does the bill impermissibly violate the principle against nondelegation of a power exercisable by one branch of the government to another?* In identifying a "named recipient under AS 37.05.316," the legislature may be substituting its authority for that of executive branch officials, who traditionally have had responsibility for selection of successful vendors and oversight of contract management in programs that significantly affect the public.

Let me explain.

The doctrine of nondelegation is at least implicit in constitutions that provide for or impose a separation of powers.<sup>11</sup> Delegation questions most often arise when legislative or law-making powers are assigned to executive branch agencies or officials. However, the doctrine operates universally and may apply as well to questions of improper delegations of legislative powers to judicial officials, improper delegations of judicial powers to legislative or executive officials, improper delegations of executive powers to legislative or judicial officials, improper delegations of legislative or judicial powers to subordinates within their branches, improper delegations of legislative, judicial, or executive powers to private parties, or improper delegations of private powers to public officials.

In this instance, the question appears to me to be one involving the delegation of an executive function to the legislature. To be sure, AS 37.05.316 is part of the statutory process applicable to appropriations, part of the state's Fiscal Procedures Act, AS 37.05.

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<sup>11</sup> The Alaska Supreme Court has determined that the doctrine of the separation of powers is implicit in the Alaska constitution. *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947 (Alaska 1975); *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).

There can be no doubt that the making of appropriations, including the designation of a party or entity to receive and expend the appropriation, is properly a matter for the legislature. But, except as to appropriations specifically made to the legislative and judicial branches, the executive, subject to applicable law, determines the specifics of how the direction given by the legislature is to be executed or implemented -- in other words, how the amount that is made in the appropriation is to be expended.

The management and investment of surplus state revenue is fundamentally a responsibility of the executive branch of government, assigned by law to the appropriate commissioner, board, or commission to make relevant decisions. Often, the party charged with responsibility for management and investment will enter into contracts with third parties to discharge those responsibilities. In this draft, the legislature anticipates substituting its judgment by identifying, in law, through the mechanism of the "grant to a named recipient under AS 37.05.316," the third party who would make those investment decisions. The legislature may, as part of its law-making function, conclude that certain services that are routinely the responsibility of the executive branch should be privatized and may also determine how the management of money appropriated for a purpose that is clearly an executive function ("child abuse and neglect treatment and prevention activities and programs," clearly an executive obligation under article VII, secs. 4 and 5, directing that the state "provide for the promotion and protection of public health" and "provide for public welfare") is to be managed -- for example, internally by a state agency or externally by contract with a private management service. While the legislature may generally prescribe the manner of money or fund management, the legislature may not at the same time also identify the entity that is to do that without at least raising the argument that it has intruded on a power reserved to the executive branch.<sup>12</sup>

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<sup>12</sup> In addition, because the draft relies on AS 37.05.316, giving direction for an appropriation, an appropriation made subject to that section is subject to the confinement clause, the second sentence of art. II, sec. 13 of the Alaska Constitution (emphasis added):

**Form of Bills.** Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. *Bills for appropriations shall be confined to appropriations.* The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

With respect to a measure subject to the confinement clause, the court has determined:

The superior court wrote that to satisfy the confinement clause, the qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. *It must not administer the program of expenditures.* It must not enact law or amend existing law. It must not extend beyond the life of the

Two federal decisions lend support for my concern.

*Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (U.S. 1986), presented the question of Congressional control of matters committed to the executive branch, and more specifically whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.. Under the Act, popularly known as the Gramm-Rudman-Hollings Act, Congress authorized the Comptroller General, an officer of the legislative branch, based upon economic forecasts proposed by the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO), to specify the spending reductions necessary to keep the budget deficit within the limits set by Congress. The Act provided that the Comptroller General was to use independent judgment in making the determination, showing "due regard" for the OMB-CBO forecasts. The Act directed the President then to issue a sequestration order "provid[ing] for reductions in [a] manner . . . consistent with [the Comptroller General's] report in all respects."

The United States Supreme Court rejected Congress's attempt through its agent to implement or execute the law and determined that there was a violation. Within "execution of the laws," it included the Comptroller General's administrative duties under the Act because those duties involved determining "precisely what budgetary calculations are required." The majority made it clear that "once Congress makes its choice in enacting legislation, its participation [and those of its agents] ends. Congress can thereafter control the execution of its enactments only indirectly -- by passing new legislation."

Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as [*Immigration and Naturalization Service v.*] *Chadha* [, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (U.S. 1982) (striking down a one house "legislative veto" provision by which each house of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make)] makes clear, once Congress makes its choice

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appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

We find the authority the superior court . . . persuasive, and we approve the . . . formulation as a non-exclusive test for deciding whether an appropriation violates the confinement clause.

*Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) (emphasis added).

in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation. *Chadha*, 462 U.S., at 958. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

*Bowsher v. Synar*, 478 U.S. 714, 733-734 (U.S. 1986).

*Lear Siegler, Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1111 (9th Cir. Cal. 1988), rev'd on other grounds, 893 F.2d 205 (9th Cir. 1989) (en banc), involved a claim by a bid contractor after it had made an unsuccessful bid for a contract with the defendant, the Secretary of the Navy. The Navy exercised its discretion and waived a penalty provision of the Buy American Act; the plaintiff then filed a bid protest with the Government Accounting Office. Although the bid award was stayed during the protest under the Competition in Contracting Act of 1984 (CICA), the Navy disregarded the stay. Plaintiff filed an action to compel the Navy to comply with the provisions of the Act requiring the stay and sought review of the bid award. The United States Senate, United States House of Representatives, and Government Accounting Office intervened, seeking injunctive and declaratory relief to uphold the constitutionality of CICA. The district court upheld the constitutionality of CICA.

On appeal, the court affirmed, holding that the Act's stay provisions were constitutional. The court reached the conclusion on the basis of this formulation:

The appropriate formal test must instead be derived from reading the principles of *Chadha* and *Bowsher* in light of the facts of those cases. Such a reading suggests improper congressional action to be the exercise of ultimate authority over an executive official, or a final disposition of the rights of persons outside the legislative branch. Put another way, the critical issue is whether Congress or its agent seeks to control (not merely to "affect") the execution of its enactments without respect to the Article I legislative process. See *Bowsher*, 106 S. Ct. at 3192. If Congress "in effect has retained control," its action and the statutory provision on which it is based is unconstitutional.

*Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, at 1108 (9th Cir. 1988). In the case of the draft, it is clear that the legislature, by making a choice of fund manager, seeks to control, not just to "affect," the manner of execution of the remainder of the proposed enactment.

JBC.ljw:plm  
09-072.ljw

Enclosure

# LEGAL SERVICES

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

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### MEMORANDUM

February 9, 2009

**SUBJECT:** Legislative Delegation of Spending Authority to a Quasi-public Corporation (Work Order No. 26-LS0502\A)

**TO:** Representative Anna Fairclough

**FROM:** Jean M. Mischel  
Legislative Counsel

In addition to the considerations raised in a memorandum from Jack Chenoweth that accompanies the above referenced work draft, the draft raises the question of whether the attempt to privatize an existing state trust fund and to appropriate state money for use by a private non-profit entity under a named recipient grant while retaining a "corporate administrator" that is comprised of public officials is an improper delegation of legislative authority. Art. II, sec. 1 of the state constitution vests the legislative power, including the appropriation power, in the legislature, and art. IX, sec. 13 of the state constitution requires an appropriation before money can be withdrawn from the state treasury and an authorization for any obligation for the payment of money. In this draft, a public asset (the Children's Trust Fund) is to be transferred out of the state treasury and given to a private entity with little direction on how and when the money is to be withdrawn and spent.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation that could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original).

In the context of legislative delegation of its powers to a state agency, the Alaska Supreme Court has set some ground rules. In Alaska Public Interest Research Group v. State of Alaska, 167 P.3d 27 (Alaska 2007), the court held that delegation of power to an administrative agency is more likely to be found constitutional if the grant of power

minimizes agency discretion. In Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001), the court limited item vetoes by the governor to those that included a specified sum of money for a defined purpose, holding that the governor's power over the state budget was limited to the power to reduce or strike sums of money. The court summarized the distinction between the executive function and the legislative powers over state assets in this way: "[t]he governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature." Id. at 368.

In my opinion, allowing private trustees to spend money recovered from the Children's Trust without express authorization for each expenditure may violate art. II, sec. 1, art. VII, secs. 4 and 5, or art. IX, sec. 13, of the state constitution. This conclusion is based on the following considerations.

First, the Alaska cases in this area are based on the premise that control over state assets and finances is vested in the legislature and only the legislature. The court was unwilling to "bend" that principle, even in the face of the fiscal emergency in the Fairbanks North Star Borough case. It has also refused, in the McAlpine case, to limit the appropriation power to cover only money.

Second, the possibility that other parts of the state budget would be affected by spending the money may well apply here. If trust fund money is to be spent on certain child protection programs, that fact may affect other programs of the state Department of Health and Social Services. If trust fund money is spent on programs that use state employees, that may also affect the state budget. The constitution -- art. VII, secs. 4 and 5 -- requires the legislature to provide for the public health and welfare, but this bill would delegate a portion of that duty to a private entity. Finally, if the trustees are themselves public employees acting as a "corporate administrator," that may also affect the long-term fiscal obligations of the state.

Some of the cases outside of Alaska holding that money is not subject to appropriation have been based on the fact that the money was being held by the state in trust for another political entity authorized to spend it. E.g. Navajo Tribe v. Arizona Dept. of Admin., 528 P.2d 623 (Ariz. 1974) (Tribe and cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974) (University). On the other hand, in cases in which money was held not to be subject to appropriation, the money was coming to the state as a gift or grant from either the federal government or a third party not as here from the state treasury.

For all of the reasons discussed above, it may be that the state constitution requires legislative appropriation before the trust money can be spent. The bill draft provides no guidelines on how and when it is to be spent by the named recipient grantee.

The use of a "corporate administrator" to advise on the expenditure of the trust funds held by a private entity, it seems to me, does not settle the issue. It is unclear from this draft whether the administrator is subject to state laws that govern public bodies such as the



Representative Anna Fairclough  
February 9, 2009  
Page 3

open meetings and public records laws or whether the administrator enjoys state immunity for its actions.

If I may be of further assistance, please advise.

JMM:ljw:plm  
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Enclosure

To: Rep. Fairclough

Re: The Children's Trust Bill

Date: February 23, 2009

The week before last, you shared with us the draft bill that you received from legal services, and two memos outlining some concerns about the bill. We believe that the constitutional and technical concerns outlined in the two memos are not significant, and can be addressed. We do, however, believe that the bill draft needs to be altered in several ways that will, among other things, help ensure that the bill is in line with IRS rules. Those proposed edits are attached as "2-9-09Work Draft Revision FINAL 2-23-09", and we would request that the work draft dated 2/9/09 be amended to include these proposed changes.

As for the drafters' concerns, both memos are based on theoretical constitutional issues that have not been directly decided by the Alaska Supreme Court (this is, of course, the job of legislative counsel – to warn clients about any possible issue that may affect the validity of the bill).

The memo by Jack Chenoweth raises a series of potential constitutional issues, and largely concludes that the constitutional problems are likely inconsequential. Chenoweth considers and rejects the ideas that the transfer of funds is a violation of dedicated funds, that the transfer implicates the public purpose clause, or that the bill raises equal protection issues. Chenoweth is concerned about a possible impermissible delegation of powers, and also asks several largely technical questions unrelated to the delegation issue. For clarity, we call the memo by Mr. Chenoweth "Memo #1". The memo by Ms. Jean Mischel, called here "Memo #2", raises a different problem with the delegation of powers issue: essentially that the legislature must retain control over state assets. We consider each of these issues below.

Does the bill impermissibly direct the delegation of a nondelegable power from one branch of the government to another?

Memo #1 argues that it appears that the legislature is delegating the executive's power to invest and administer state funds. Our intent is very

different. We consider the legislature to represent the settlor and trustee of the Alaska Children's Trust (ACT) and as settlor and trustee it has the ability to select a new custodian. Under established trust law a trustee is permitted to invade an existing trust and appoint assets to another trust. AS 13.36.157. According to AS 13.36.157(d) the appointed trust must hold the assets of the invaded trust under "substantially identical terms." The Department of Revenue (DOR) was designated to act on behalf of the state by statute, and now, by statute, the legislature would be setting up a process to establish a private trustee and "trust" in the form of a permanent endowment fund. If the governor does not agree with the transfer to a private nonprofit, she can veto the bill and strike the designated grant appropriation.

The bill sets up a process to grant, or give away, the ACT on the condition that it continue to be used for existing purposes and administered in way that is consistent with public purposes. The bill gives substantial power to DOR in making the grant agreement with the grantee and then gives substantial oversight power over the grantee's endowment fund administration to avoid a nondelegation doctrine problem. The fact that the governor's appointees control a majority of the grant administration entity is also a factor that rebuts any delegation problem.

Do we need to specify the terms of board members?

No, we presume that the articles of incorporation of the non-profit corporate grant administrator would set these terms, as is usual for articles of incorporation.

Do we need trust administration standards?

These could be added to the bill, but the plan is to let the Alaska Community Foundation apply its own fiduciary standards, subject to review by DOR. If we apply the standards cited by Mr. Chenoweth (which are in existing law), then ACT possibly could not adopt a POMV concept, which allows spending a percentage of market value. As the goal is to get more money flowing into worthy child abuse prevention programs, while at the same time preserving the endowment fund, we want to maintain the greatest level of flexibility.

Can the board itself appoint additional members?

We believe that the board can appoint additional members. The impetus of this question arises from the fact that Memo #1 considers the non-profit to be functionally a state agency. This was not intended. Our intent is to create a private charity that will attract private donors who are willing to give to private causes. To achieve this environment it was intended that the grant administrator would be a private nonprofit corporation that would be carrying out a public purpose. We do not believe that there can be any infringement on the governor's executive power of appointment if the board is private.

Does the bill violate the confinement rule?

Memo #1 raises the issue that appropriation bills must be confined to appropriations. Unlike in Congress, the legislature cannot log roll substantive legislation into appropriation bills. Memo #1 argues that the designation of the grantee in the accompanying appropriation bill, (which we have not yet submitted) adds something to the bill beyond mere appropriation matter. He believes that the bill could be interpreted to be executing the law by directing the management of state money. This issue has never been decided by the Alaska Supreme Court, although when Justice Carpeneti was on the Superior Court, he decided that the designation of a grantee was nothing more than specifying the purpose for an appropriation and that the executive was free to go through the notification and solicitation process to determine if the named recipient would in fact become the grantee. This issue has not been decided by the Alaska Supreme Court and therefore, the statutes authorizing designated grants remain valid and enforceable.

Additionally, we chose the designated grant approach so that the legislature would have a hand in suggesting the grantee.

Does the bill impermissibly allow the legislature to delegate control over a state asset?

Memo #2 raises a different concern about delegation. It argues that the legislature cannot transfer the trust out of the state treasury "with little direction on how and when the money is to be withdrawn and spent." We do not agree with the premise of this argument: that the state constitution may require additional, specific legislative appropriations before the trust money can be spent.

First, the requirements of the ACT board in the bill are carefully modeled on existing law, and specify how and when the board is to make grants. Second, each year the legislature currently appropriates money from the trust to be used at the discretion of the existing ACT board – the only change in the bill is that the appropriation is for the trust *res* and thereafter the legislature would have nothing available to appropriate, other than the license revenues that annually become available – and that is, of course, purely discretionary. Finally, it is important to note the safeguards built into the bill, including the duties to maintain the funds as a permanent endowment fund, the duty to report on investment performance, the duty of the ACT board to annually report to the legislature the prevention services that were funded and the annual level of contribution, income and expenses of the fund, and – significantly – the section that allows the endowment fund to revert back to the state should the grantee cease to exist or is unable to fulfill the purposes of the grant agreement between the grantee and the Department of Commerce, Community, and Economic Development. For these reasons, we do not believe that the legislature appropriating the trust causes an impermissible delegation of legislative power.



March 26, 2009

Representative Anna Fairclough  
Alaska State Legislature  
State Capitol, Room 421  
Juneau, AK 99801-1182

Dear Representative Fairclough:

Please accept this letter as an indication of the ACT board's support of **HB 190, CHILDREN'S TRUST GRANT FOR ENDOWMENT**. As Trustees for the Alaska Children's Trust (ACT), it is our belief that transitioning management of the ACT fund into an endowment model capitalizes on the best practices in the endowment world, and will result in greater performance and growth of the ACT fund over time. Additionally, privatization of the ACT will allow for ethical fundraising and for private sector funds to be used for dedicated purposes.

There are two small changes that we would like to request in HB 190 as follows:

In Sec.3. AS 28.10.181(t) and Sec. 4. AS 28.20431(d)(14), the Trustees would like to retain the name, **Alaska Children's Trust** plates;

In Sec. 7.37.14.215: The Trustees would like to retain the name, the **Alaska Children's Trust**.

We have been known as the Alaska Children's Trust since 1988 and keeping our name would allow us to maintain our established identity across the state as the only entity solely dedicated to the prevention of child abuse and neglect.

We truly appreciate your support of our ongoing efforts to eliminate child abuse and neglect in the State of Alaska. Please feel free to contact the ACT's executive director, Panu Lucier if you have any questions about the Alaska Children's Trust. She can be reached at 907-248-7676.

Sincerely,

*Kaye M. Saxon*  
Kaye Saxon, Chair

ALASKA CHILDREN'S TRUST  
BOARD OF TRUSTEES  
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✧Larry LeDoux,  
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✧Michael Lesmann  
✧Judy Patrick  
✧Marg Volz

EXECUTIVE DIRECTOR  
✧Panu Lucier

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